

Targeted consultation on the method of calculation of the share of European works and the exemptions for low audience and low turnover (Art. 13(7) Directive (EU) 2010/13)

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Introduction

As part of the rules on the promotion of European works set out in the Audiovisual Media Services Directive ('the AVMSD'), the Commission is required to provide, after consulting the Contact Committee, 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' for the purposes of exemptions to the obligations concerning the promotion of European works.

The Commission has consulted the Contact Committee on possible approaches on several occasions. It also organised a dedicated public hearing with stakeholders, to which Contact Committee representatives were invited.

The present consultation aims to complement the process by gathering stakeholders' input on specific technical issues.

About you

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I. Calculation of the share of European works

1. Method of calculation

The calculation of the share of European works may be based on the duration of the works or on the number of titles (i.e. individual items) present in a video-on-demand (VOD) catalogue.

When calculating the share by duration, the provider would secure that European works account for at least 30% of the total playing time (in minutes) of all the works in the VOD catalogue. When calculating the share

by titles, the provider would ensure that European works account for at least 30% of the total number of titles present in a VOD catalogue.

If the calculation is based on titles, a question arises as to what constitutes a title. This is relatively easy to answer for feature and TV films: each of them would constitute a title in a catalogue. However, it 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 seasons. In such cases, a question arises as to whether one title should correspond to the whole series, one season or individual episodes.

These different ways to count TV series could imply giving similar weight to different audiovisual productions or different weight to comparable productions. For example, calculating by episodes could imply equating one episode of short duration or one episode of a low budget format with one long / high budget feature film/documentary. Calculating by seasons could imply giving higher weight to one long / high budget feature film/documentary than one episode of a high-end TV series with similar duration and production costs (as the entire season would be counted once). In such cases, a solution could be to allow national regulatory authorities to give a higher weighting to relevant works (e.g. a feature film could count as three titles and correspond to three episodes of a TV series), for example based on a provider's substantiated request.

What would be the market and practical implications of calculating the share of European works by (a) duration (minutes), (b) titles/seasons or (c) titles/episodes, with and without a weighting system?

Please provide reasons and evidence/data for your answers.

We are in favour of calculating the share of European works by duration (minutes), which is also used for linear/broadcasting services (i.e. "majority proportion of their transmission time" as provided by Art. 16(1) AVMSD). Such an approach would seem fairer and simply more objective than a calculation based on titles /seasons or titles/episodes. Calculating the duration seems practically feasible as information on duration is usually available as metadata accompanying films, seasons or episodes.

The alternative calculation method based on titles can become a more difficult exercise, in particular when different kinds of European works are weighted by national regulatory authorities (NRAs). Differences in the types of programmes would have to be accounted for: EBU Members, for instance, produce a large number of daily and weekly programmes (current affairs programmes, children's programmes, documentaries, etc...). NRAs would thus have to establish objective criteria which would have to be applied uniformly and in a transparent manner. Above all, this method implies additional administrative burdens for service providers. Due to the complexities such a calculation method would bring with it, we are in favour of a calculation based on duration.

2. Relevant catalogue or 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.

One approach would be to calculate the 30% share of European works for each of the national catalogues offered by multi-country VOD providers. Another approach would be to look at the average of the

respective shares of European works in all the catalogues offered by the VOD provider in all the Member States concerned.

What would be the market and practical implications of calculating the share of European works for, respectively, each national catalogue and as an average of the respective shares in all the catalogues offered within the EU?

Please provide reasons and evidence/data for your answers.

As the Commission rightly observes, catalogues may differ in their composition of European and non-European works from one country to another and depending on different business models (e.g. basic and premium subscriptions). We consider that catalogues are the equivalent to broadcaster's channels and therefore support a calculation based on each individual (national) catalogue. This would be the most objective and neutral assessment, undistorted by calculations based on averages.

3. Time / period of calculation

The actual share of European works in VOD catalogues can vary on a day-to-day basis. For example, when a VOD includes a new non-European TV series into its catalogue, this could have an effect of temporarily decreasing the share of European works until further European works are subsequently included. This raises the question when the verification of compliance should be carried out. Providers may be required to ensure compliance at every point in time or on average over a pre-determined period (e.g. one year).

What would be the market and practical implications of verifying the share of European works, respectively, at any point in time and on average over a pre-determined period of time?

Please provide reasons and evidence/data for your answers.

We believe that the 30% share should be met and verified over a specific reference period, e.g. one year. This would account for short-term changes in a catalogue's composition, while ensuring the overall objective. We note that the European Commission as well as many national regulatory authorities verify compliance with broadcasters' "quota obligations" on a yearly basis (see, for example, the Commission's application reports in relation to Art. 13, 16, 17 AVMSD).

While verifying compliance and ensuring effective enforcement of Art. 13 AVMSD are important, it is equally important that reporting obligations do not become a disproportionate burden on service providers. We would be against service providers having to do several reports at different times over a specific period, because the composition and size of some of the EBU's Members' on-demand catalogues may vary during a single day. This is due to the fact that broadcasts are automatically included in the catch-up service after their transmission on TV. We would therefore prefer reports that cover a pre-determined reference period (e.g. one year) but are made at a specific point in time, which may be set by the national regulatory authority and which may vary from one verification period to the next.

II. Definition of low turnover and low audience

According to the AVMSD, 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" (see *Recital 40 of the Directive 2018/1808/EU*).

1. Low turnover

An established policy making approach 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 them being covered is demonstrated. According to the Recommendation concerning the definition of micro, small and medium sized enterprises (see *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*), micro enterprise are 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.

What would be the market and practical implications of defining ‘low turnover’ on the basis of the concept of micro enterprises as set out in the Commission Recommendation?

Please provide reasons and evidence/data for your answers.

2. Low audience

a. On demand services

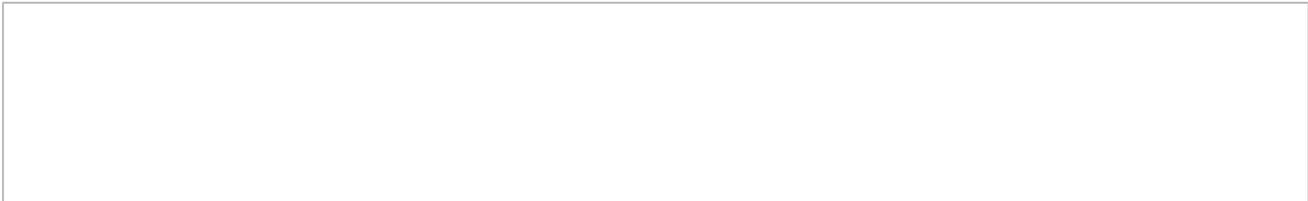
The concept of audience for on demand (VOD) services is not an established one, and no standardised industry measurements or consistent / independently verified data are available across Member States.

One approach to defining audience for VOD would be to associate it 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 particular, the reach could be determined by looking at the number of active users of a particular service, i.e. the number of paying subscribers for Subscription Video on Demand (SVOD), the number of unique customers/unique accounts used for acquisition for Transactional Video on Demand (TVOD) and the number of unique visitors for Advertising Video on Demand (AVOD). The number of active users would then be compared to the potential user population for that particular service, represented by the number of households having the capacity to access VOD services in the Member State concerned (i.e. the number of households with fixed or mobile broadband connection).

Alternatively, the audience of a service could be determined in terms of its “VOD user market share”, by comparing the number of users (active subscribers/account holders) of a provider with the total number of users of (similar) VOD services in the Member State concerned.

What would be the market and practical implications of defining the audience of a particular VOD service in terms of, respectively, ‘reach’ and ‘market share’? What thresholds would indicate low reach and low market share?

Please provide reasons and evidence/data for your answer.



b. Broadcasting

For broadcasting services, audience is an established concept, and audience measurement services exist in several Member States. The definition of low audience could therefore be based on the ‘daily audience share’ calculated for the reference year - a widely accepted indicator that is used in the context of the AVMSD (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*).

In terms of the presence of non-domestic providers, the broadcasting market is different from the VOD market. While for VOD, national markets are largely dominated by non-domestic providers, the top broadcasting players are usually TV groups that attain the entire or large parts of their audience share in their domestic markets. The EU audiovisual market is characterised by a limited number of TV channels that capture a large part of the audience, while 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 (see *The internationalisation of TV audience markets in Europe, European Audiovisual Observatory, Strasbourg, 2019, p. 16*).

What thresholds would indicate low ‘daily audience share’ for broadcasting services? What approach would be appropriate in the case of pay-TV channels and providers of multiple channels?

Please provide reasons and evidence/data for your answers.

3. Possible adjustments for financial contributions

The AVMSD refers to two types of financial contribution obligations for the production of European works - direct investments in audiovisual content and contributions to national funds (levies) - and recognises that Member States may extend their respective national obligations to cross-border providers targeting audiences in their territories.

These obligations have different impacts on cross-border providers. The direct investment (e.g. production, co-production, acquisition of rights in works) could imply 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.

The question may arise whether Member States are entitled to apply, in duly justified cases and in line with

their cultural policy objectives, including the objective to ensure the sustainability of national film funds, lower turnover / audience thresholds for exemptions from cross border levies.

What would be the market and practical implications of lower turnover / audience thresholds for exemptions from cross border levies? What thresholds would be appropriate?

Please provide reasons and evidence/data for your answers.

Thank you for your contribution to this questionnaire. In case you want to share further ideas on these topics, you can share them here, or upload a document below.

Final comments:

The revised AVMSD's objective to reinforce Art. 13 AVMSD by introducing a specific share requirement is a step towards levelling the rules applicable to linear and non-linear service providers. Broadcasters, and in particular public service media have had a presentable track record in promoting European works and thereby Europe's rich cultural heritage and diversity.

The achievements made in the revised AVMSD should not be undermined by a lenient interpretation of the share requirement but should, as far as possible, be aligned to or take inspiration from existing practices in relation to television broadcasting. This is why we advocate for a calculation method based on the duration of European works and for each individual (national) catalogue.

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