

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)

Fields marked with * are mandatory.

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

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU Citizen
- Non-EU Citizen
- NGO
- Public Authority

Other

* First name

Victoria

* Surname

de Posson

* Email (this won't be published)

vdeposson@ccianet.org

* Organisation name

Computer & Communications Industry Association (CCIA Europe)

* Transparency register number

15987896534-82

* Country of origin

United States of America

* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- Anonymous** - Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name, transparency register number) will not be published.
- Public** - Your personal details (organization name, transparency register number, or first name, and surname in case of contribution as individual, as well as country of origin will be published with your contribution.

I agree with the [personal data protection provision](#)

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.

The same regulatory approach could not be applied to both linear and video-on-demand (VOD) services, due to their distinguishing features. By way of example, a calculation of the share of European works according to the total broadcast time of such content would not be an appropriate measure in the context of VOD services.

In contrast to linear broadcast services, the catalogues of VOD services are not constrained by a limited number of hours – and so, in theory, can include an unlimited amount of content. A calculation of the 30% quota based on hours or minutes (i.e. the total playback time of European works as compared to non-European content) would not prompt VOD services to invest in high-quality European content. Instead, such services could simply choose to decrease the amount of non-European content in their catalogues or buy in bulk European content merely according to its duration and low price.

Therefore, we recommend a calculation of the share of European works in the catalogues of VOD services based on the number of available titles, where one movie (regardless of duration) and one TV show (regardless of the number of episodes) would count for one title.

With the focus on investment in new European productions, such an approach would ensure that 30% of the individual works included in VOD services' catalogues are European. This approach would encourage VOD services to invest in a more diverse range of high-quality European content, and would (in turn) encourage the production of new European titles to fulfil this demand. This approach would also more accurately reflect the choice customers make in relation to all titles available on a VOD service (i.e. users will select on the basis of a 'box' or listing per title, regardless of duration and number of episodes). The proposed approach would also ensure that TV shows with a significant number of episodes would not be given a disproportionate weight when calculating the share of European works in the overall catalogue.

From a practical point of view, it will be easier to track and verify (and report) on the number of titles, as opposed to hours/duration.

We would also recommend that the share of European works in respect of a single VOD service be calculated across all the different distribution methods of a single provider (e.g. SVOD, TVOD and AVOD).

This method of calculation would:

- (i) Ensure that each title is treated equally (and not, for example, counted more than once for the same service);
- (ii) Ensure that there is no discrimination based on content type;
- (iii) Limit the risks of fragmenting the Digital Single Market; and
- (iv) Encourage services to experiment across distribution channels.

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.

If the share of European works is calculated for each Member State, we believe that the calculation of low turnover should equally be calculated in each Member State.

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 would suggest doing it on a quarterly basis. It would be proportionate to the expectations of catalogue changes.

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.

The annual turnover of a service should be measured based on the turnover in the relevant Member State, not global turnover.

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.

We wouldn't define the 'low audience' threshold based on the number of "paid subscribers". In order to determine the audience share of VOD providers, we would recommend to take into account:

- SVOD: the number of paying active subscribers during the preceding 30-day period. 'Active' should be defined as any subscriber who has watched more than 70% of a single film or TV episode during that period.
- TVOD: the number of customers that have made a purchase (i.e. to own or to rent) from the TVOD catalogue during the preceding 30-day period.
- AVOD: the number of active customers during the preceding 30-day period. 'Active' should be defined as any customer who has watched more than 70% of a single film or TV episode during that period.

We would suggest calculating the audience and the turnover in each individual Member State in which the VOD provider's service is available (i.e. on a Member State-by-Member State basis, only taking into account the VOD provider's audience or turnover in each Member State).

For providers that offer services in addition to VOD within the same subscription service, only the turnover properly attributable to the provision of the VOD service should be determinative.

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.

n/a

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.

The introduction of different thresholds across the EU would cause a high level of fragmented obligations that constitute a financial and administrative burden for VOD providers that want to offer their service in more than one EU Member State. Lower thresholds would act as a barrier for new market entrants and could even motivate VOD providers to retract their service. In addition, the AVMSD requires any financial obligation imposed to not disproportionately hamper the provision of audiovisual media services within the EU.

When assessing the applicability of levies to AVOD, we consider turnover thresholds to be more relevant than audience thresholds, as revenue is a better indicator of a Media Service Provider's ability to meet complex compliance obligations and/or pay levies. This is particularly the case as media service providers may have very different business models. Generally a higher proportion of AVOD channels are SMEs rather than SVOD channels. For instance: Company A, an OTT Film-Subscription Service based in Spain charges a subscription fee of 10 Euros per month, and has 100,000 subscribers throughout the EU. It earns EUR 1m per month. Company B, an online advertiser-funded current affairs channel also based in Spain, has one million unique monthly viewers to its website, earning it EUR 100,000 per month throughout the EU in advertising revenue.

Moreover, the low turnover exemption is relevant to the determination whether or not a service is "targeting audiences" in a particular Member State (in accordance with Article 13.2). The annual turnover of a service should therefore be measured against its turnover in the relevant Member State, not global turnover. Otherwise, a service based in the EU, with a small presence in the relevant Member State, but a large global presence - for instance a creator making Spanish-language content with a large following in South America - could be liable for making a financial contribution, or paying financial levies in every Member State. This could be entirely disproportionate to their impact on European users. The equivalent, in broadcasting terms, would be a French broadcaster being subject to regulation in Belgium due to de minimis spillover transmission into Belgium.

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:

Video-sharing platforms have become an engine for growth of the entrepreneur economy, with thousands of European creators making a living out of producing (in the EU) fresh, entertaining and informative content. They are next-generation media businesses who are contributing to local economies and creating jobs. The vast majority make their content available globally, including to all Member States. Under AVMSD some of these creators may be deemed Media Service Providers. In order to allow these creators to operate with certainty, we recommend:

A. Clear guidance so media service providers understand what 'targeting' means.

In line with the ERGA Analysis & Discussion Paper "to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive", from August 2018, (section 3.1.1) and given that two aims of AVMSD are to harmonise rules and to promote the European media industry, we suggest that the Commission provide clarity as to what steps would result in a media service provider 'targeting' a Member State. In particular, confirmation that a Media Service Provider established in country A, producing content in the national language of country A, and making their content available throughout the EU, should not be seen as 'targeting' all Member States.

The alternative would result in a situation where Media Service Providers are required to seek legal advice on each Member State's implementation of the levies requirements, and interpretation of 'targeting', and then seek a country-by-country compliance solution. For instance: A public-service broadcaster based in e.g. France/Belgium/Switzerland/ or Luxembourg has a French-language on-demand AVOD channel, with their content available throughout the EU, which earns advertising revenue. We recommend that this broadcaster is subject to their national levies only, unless they specifically target other Member States through localised content or marketing campaigns.

We note that Recital 38 lists the following three factors as potential indicators of 'targeting': (1) advertisement or other promotions specifically aiming at customers in its territory; (2) the main language of the service; (3) the existence of content or commercial communications aiming specifically at the audience in the Member State of reception. We recommend:

- (i) Additional guidance is given on the above list (including whether there are any additional material indicators of targeting such as existence of distinct/separate catalogues); and
- (ii) A single-stop shop mechanism for a media service provider to ascertain whether it does/doesn't target additional Member States, so it is not required to respond to enquiries from 28 different Member State regulators with different views on what constitutes 'targeting'.

As a final note, we recommend a clarification that production activity in a Member State does not equate to targeting. We are concerned that failing to clarify this would actually discourage a media service provider from investing in productions in a given Member State due to concerns about triggering levies there. It would create an incentive for a Media Service Provider to fulfil its 30% European works quota only in its country of origin (or at least in as few Member States as possible).

B. Clear guidance so media service providers can assess where their revenue is earned.

In terms of where revenue is earned, Media Service Providers operating on video-sharing platforms may be able to see total revenue against their channel, as well as a breakdown of audience by region. They may not be able to see the location of the advertiser. We strongly recommend that this is considered when providing guidance on where revenue is earned.

You can upload a document here:

The maximum file size is 1 MB

Contact

CNECT-I1@ec.europa.eu