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VOD, platforms and OTT: which promotion obligations for European works?

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VOD, platforms and OTT: which promotion obligations for European works?

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Foreword

The European audiovisual market has been facing huge transformations during the past years. Whereas the European cinema market has been facing a period of stagnation and the physical video market a rapid decline, new players and business models have seen the light and are now re-shaping the overall picture: both paid and advertising-financed on-demand services have consolidated their position, and over-the-top players and online platforms are offering their services in various forms. As a result, viewers can now benefit from both well-established traditional broadcasters and on-demand players, and viewing habits have of course also changed significantly.

These market changes are also reflected in the regulatory framework, which poses a very preliminary issue of setting the right definitions and identifying the related obligations, including those concerning the promotion of European works under the various headlines of production, programming and visibility as enshrined in Articles 13, 16 and 17 of the Audiovisual Media Services Directive (AVMSD).

So far audiovisual media services have been regulated differently depending on whether they are linear or non-linear, while services that do not fall under the editorial responsibility of their providers, such as video-sharing platforms, have remained outside the full scope of the obligations set by the AVMSD. On-going reforms in various fields are challenging the qualifying features of these concepts, so the question is whether these subjects will remain substantially excluded. As reference for the underlying issues an earlier issue of *IRIS Plus* of 2016 devoted to “On-demand services and the material scope of the AVMSD”¹ is still relevant.

But even once the nature of the service itself has been defined, it might be necessary to have a closer look at the programming in order to assess the targeted audience. Services provided in a given member state may indeed be regulated differently, depending on the country of origin of the programme. The question is whether additional rules may be adopted in the targeted member state.

As is well known, the main rationale for the regulation of audiovisual media services at EU level has been the internal market, with the country-of-origin principle at its core. According to this principle, audiovisual media service providers have to abide only by the rules of the one member state with jurisdiction over them, but can nonetheless operate in all member states. At the same time, this principle does not prevent member states from establishing higher standards at national level.

However, a receiving member state with stricter rules than those laid down by the AVMSD cannot restrict the reception of services from another member state on the basis of those stricter rules. Whereas exceptions apply in specific circumstances, in principle service providers may choose

¹ Cabrera Blázquez F.J., Cappello M., Fontaine G., Valais S., On-demand services and the material scope of the AVMSD, *IRIS Plus*, European Audiovisual Observatory, Strasbourg, 2016, <http://www.obs.coe.int/documents/205595/8351541/IRIS+Plus+2016-1+On-demand+services+and+the+material+scope+of+the+AVMSD.pdf>.



the jurisdiction that, from a regulatory standpoint, best fits their purposes. In order to avoid this “jurisdiction shopping” when it comes to the rules aiming at promoting European works, the on-going reform of the AVMSD proposes to allow the targeted member state to impose financial obligations on providers of on-demand services, established in other member states, against the turnover generated in the imposing country. Nevertheless, services established outside the EU but targeting its member states are not included by the proposal.

In this landscape, the present issue of *IRIS Plus* starts with an outlook of the latest market developments, before exploring the regulatory context, and sets out international and European obligations as well as national frameworks. The report then continues considering self- and co-regulatory tools and case-law, and provides an outline of the main aspects of the current reform of the AVMSD in this field. For the national overviews, national correspondents of our network have been involved in the checking of the information provided. Our acknowledgments therefore go to Eva Lievens, Christophoros Christophorou, Jan Fučík, Gianna Iacino, Andres Joesaar, Enric Enrich, Anette Alén-Savikko, Amélie Blocman, Lorna Woods, Alexandros Economou, Polyák Gábor, Ronan Ó Fathaigh, Ernesto Apa, Kevin Aquilina, Jurgita Iešmantaitė, Ieva Andersone, Mariana Lameiras, Eugen Cojocariu, and Erik Ullberg.

Some questions inevitably remain unanswered as is unavoidable during an on-going revision process. For example the issue concerning the vagueness of the obligations concerning on-demand services in the current wording of the AVMSD, which has caused great disparity among member states and to a certain degree of forum-shopping: will this be solved by the Commission’s proposal?

It is not to the charge of this report to provide even a tentative answer to such a question. The report rather aims at providing a gateway to relevant information on these issues that constitute the legal background against which the obligations on on-demand service providers for the promotion of European works should be considered.

Strasbourg, December 2016

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

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1. Setting the scene

1.1. The structure of the audiovisual market in Europe

The European and worldwide audiovisual markets are currently undergoing structural changes which redefine the roles of incumbent players, modify the established governance structures and, eventually, could redistribute the cards between traditional national players and new market entrants. Which forces are behind these winds of change? The digitization of information (and thus audiovisual content) and the distribution of digitized content over the Internet (also called “over-the-top” or simply OTT²) are leading to the digitalization of our societies and of the audiovisual sector. Of course, the Internet and digitization alone did not have these profound impacts on audiovisual markets, but rather changed the supply of and demand for audiovisual services.

On the supply side, incumbent players such as broadcasting companies and telecom operators are challenged by new entrants from the tech world in the European audiovisual sector and by new forms of entertainment rendered possible by the Internet, which leads to an increased competition for revenues, subscribers and viewers. In a field in which technological innovation is crucial and which needs investments in research and development in order to be able to compete with new entrants, these shifts are leading to an upheaval in the traditional audiovisual value chain and established market structures.

On the demand side, audiences are exposed to an abundance of entertainment options (films, television shows, social media, video games, e-sports amongst many others) and many devices and screens on which audiovisual content can be consumed; these combined factors are inducing audience fragmentation across services and screens, increasing the difficulties for traditional players to reach audiences as they have in an analogue world.

Before considering the players and business models in these new settings in the audiovisual markets, it is helpful to establish an overview of the actual European audiovisual market and its structure to understand the forces at play.

1.1.1. General overview

Three major sub-markets comprise the European audiovisual market as measured by the European Audiovisual Observatory, each with different business models and therefore dynamics at play:

² See Chapter 1 Section 2 of this publication for further information.



- the audiovisual services market (composed of 5 categories: public, commercial and pay-TV services, on-demand pay services³ and advertising-funded radio services);
- the cinema market (cinema gross box-office);
- the physical video market (DVD and Blu-ray retail and rental).

Table 1 - The audiovisual market in the EU 2010-2014, in EUR million

	2010	2011	2012	2013	2014	2014/13	CAGR 2014/2010	Sources
Audiovisual services	87 559	89 291	89 744	90 577	94 123	3,9%	1,8%	
Public funding ⁽¹⁾	25 733	25 666	25 572	25 260	25 571	1,2%	-0,2%	OBS
Advertising TV	29 196	29 340	28 054	28 036	29 416	4,9%	0,2%	Warc, IP Keyfacts
Advertising Radio	4 813	4 798	4 741	4 676	4 828	3,2%	0,1%	Warc
Pay-TV revenues ⁽²⁾	26 898	28 449	29 970	30 623	31 807	3,9%	4,3%	IHS
On-demand pay-revenues ⁽³⁾	919	1 038	1 406	1 981	2 501	26,2%	28,4%	IHS/OBS
Cinema gross box-office	6 377	6 446	6 571	6 276	6 324	0,8%	-0,2%	OBS
Physical video (incl. taxes)	8 032	7 422	6 810	6 054	5 343	-11,7%	-9,7%	
Retail ⁽⁴⁾	6975	6479	5977	5372	4796	-10,7%	-8,9%	IHS
Rental ⁽⁴⁾	1057	943	833	682	547	-19,8%	-15,2%	IHS
TOTAL	101 968	103 159	103 125	102 907	105 790	2,8%	0,9%	
Growth		1,2%	0,0%	-0,2%	2,8%			

Source: Yearbook 2015, European Audiovisual Observatory on IHS, Warc, IP Keyfacts data

The European audiovisual market,⁴ as a whole, generated EUR 105.7 billion in 2014, with a yearly growth rate of 2.8%. However, each of the 3 sub-markets is confronted to different dynamics with profound impacts on revenues generated, the outlook on future performances, and thus consequences on the financing and promotion of European works.

1.1.1.1. The audiovisual services market

The most important sub-market is the audiovisual services market, which represents 89% of revenues of the European audiovisual markets, with EUR 94.1 billion generated in 2014, up by 3.9% compared to 2013. The European Audiovisual Observatory categorised the audiovisual service market into five categories:

- The pay-TV market: limited growth;
- The advertising-financed TV market: stagnation
- The public funding for audiovisual services market: stagnation;
- The pay on-demand audiovisual services market: rapid growth;
- The advertising-financed radio market: not part of this analysis.

³ Advertising revenues of free on-demand services such as catch-up TV services are, to an extent, included in TV advertising revenues.

⁴ See European Audiovisual Observatory, *Yearbook 2015 – The audiovisual market in Europe*, available here : <http://yearbook.obs.coe.int> (subscription required)



1.1.1.1.1. Limited growth of the pay-TV market

The most significant market measured in terms of revenues of the audiovisual service market is the pay-TV market, with EUR 31.8 billion (or 34% of audiovisual services revenues in 2014) and a yearly growth rate of 3.9%. In the EU, 139 million consumers were subscribing to pay-TV in 2014. Pay-TV operators⁵ are a major financing source for content, television and film, with regard to European works. Since the advent of pay-TV with cable and satellite distribution⁶ and later IPTV, revenues and subscribers to pay-TV are on the rise.

Their business model is based on selling premium content and television channels (the so-called “bundle”) against a subscription. European players on the pay-TV market have until now resisted the competitive pressure exerted on their revenues by new entrants, such as Netflix and other Subscription Video-On-Demand players (SVOD) which propose a similar content offering (except for live sport) at a lower price. European players have launched their own SVOD services but are feeling the need to change and to adapt to the new competitive environment.

The main strategies adopted by pay-TV providers are the lowering of their subscription prices and the offering of so-called “skinny bundles” (fewer pay-TV channels for a lower subscription price),⁷ the creation of distribution partnerships with leading SVOD services,⁸ and launching their own SVOD services.⁹ Also, pay-TV operators are increasingly diversifying their business, acquiring Multi-Channel Networks on YouTube,¹⁰ or investing in technology,¹¹ for example, in order to hedge their business risks.

For now, the European pay-TV sector appears to resist the competition from the new entrants, but as new SVOD entrants also compete for subscribers and exclusive premium content (e.g. television series, films, and sport rights), the foreseeable future will bring higher competition and increased pressure on their traditional business model, be it for the acquisition of exclusive premium content or subscribers.¹²

1.1.1.1.2. Stagnation of the advertising-financed television market

The second main component of the audiovisual service market is advertising/commercial television.¹³ Players in this market segment¹⁴ rely on revenues generated from advertising inventory sold to advertisers and marketers against their audience; therefore their aim is to maximise their

⁵ E.g. Sky Europe, Liberty Global, Altice or the French Vivendi owned Canal+ group.

⁶ In the early 80's in Europe, thus liberating audiovisual players from the finite capacities of frequencies.

⁷ E.g. Canal+'s CanalSat, see at: <http://www.lesechos.fr/tech-medias/hightech/0211332532118-free-offre-canal-sat-pour-deux-euros-2030553.php>. See also the example of Sky's Now TV, at: <https://corporate.sky.com/media-centre/news-page/2016/now-tv-launches-uk-first-contract-free-tv-broadband-and-calls-package-bundle>.

⁸ As demonstrated by Liberty Global and Netflix in Europe, see at: <https://www.bloomberg.com/news/articles/2016-09-14/liberty-global-to-add-netflix-to-cable-boxes-in-30-countries>.

⁹ E.g. the Swedish Modern Times Group's Viaplay or Altice's SFR Zive in France, see: <http://www.digitalveurope.net/58162/viaplay-unconcerned-by-netflix-threat/>.

¹⁰ <http://variety.com/2014/biz/global/canal-plus-acquires-leading-youtube-channels-network-studio-bagel-1201124490/>.

¹¹ <https://www.theguardian.com/technology/2016/jul/15/sky-q-review-broadcast-satellite-pay-tv>.

¹² Digital TV Research forecasts that although the number of subscribers to Western European pay-TV will climb, revenues will still stagnate until 2021. See <http://advanced-television.com/2016/09/22/4-companies-control-half-of-western-europes-pay-tv-subs/>.

¹³ It is also to a lesser extent advertising-financed radio, which is the fourth category in terms of revenues on the audiovisual services market in Europe with EUR 4.8 billion in 2014, but is not covered by this report.

¹⁴ E.g. German groups, such as ProSiebenSat.1 Media AG and RTL Deutschland Mediengruppe, the Italian R.T.I., the British ITV Broadcasting Limited or the French TF1 SA.



audience in order to be able to fetch higher prices for their advertising inventory, a typical two-sided market.¹⁵

These players are also essential elements of content production in the context of European works and their promotion. Revenues of advertising television reached EUR 29.4 billion in 2014 (or 31% of revenues of the audiovisual service market) with a yearly growth rate of 4.9%. However, revenues have just reached their 2010 level¹⁶ and commercial television in Europe and elsewhere is facing severe competition for advertising budgets by Internet advertising. As advertisers and brands are trying to reach younger audiences, who typically watch a lot less linear television,¹⁷ and are highly fragmented across different online services and devices (social media, video sharing platforms, photo sharing platforms, linear and non-linear television, smartphones, tablets, connected TVs and media players etc), advertising budgets are increasingly spent on advertising in the online environment. In 2015, some figures indicate that more advertising revenues are generated online than on television in Europe.¹⁸ The possibilities offered by online advertising and data on consumers, such as advertising-targeting, cross-device targeting, or localised advertising, is appealing to advertisers.

As the consumption of audiovisual content shifts from mass-media (TV) to individualized forms of entertainment, such as on-demand (YouTube, Facebook, Snapchat, e-sports etc), reaching broader audiences is increasingly difficult for traditional broadcasters. As younger generations become adults and as such paying consumers (therefore of great interest to advertisers), their audiovisual content consumption patterns do no longer fit the linear commercial broadcasting model. As advertising is a two-sided market, the consequences the decline of commercial television's audiences (and their aging) are lower advertising revenues and, eventually, fewer resources for the production and acquisition of content.

1.1.1.1.3. Stagnation of the public funding for audiovisual services market

The last major category of the audiovisual service market in Europe is public television, financed through public funding.¹⁹ Public television has, since its inception, three major goals: to entertain, to inform and to educate. Therefore, public television is not only evaluated on financial results, as is the case for pay-TV and commercial television which are owned by private shareholders, but also on their added value to build an informed society and on their ability to strengthen the cultural sectors of their countries.

However, in order to remain relevant, public television has to establish an audience. Gaining the interest of younger generations and acquiring the capacities to reach these fragmented audience where they are, online, is therefore a prominent challenge for public television in Europe and

¹⁵ Two-sided markets, also called two-sided networks, are economic platforms having two distinct user groups that provide each other with network benefits. The organization that creates value primarily by enabling direct interactions between two (or more) distinct types of affiliated customers is called a multi-sided platform (MSP), see: https://en.wikipedia.org/wiki/Two-sided_market.

¹⁶ The compound annual growth rate of 0.2% over the last 5 years shows that this market segment is stagnant.

¹⁷ See Fontaine, G. and Grece, C, "Note 1 – Measurement of Fragmented Audiovisual Audiences", a report of the European Audiovisual Observatory commissioned by the European Commission, European Audiovisual Observatory, Strasbourg, November 2015, <http://www.obs.coe.int/documents/205595/264625/DG+CNECT+-+Note+1-2015+-+Measurement+of+fragmented+audiovisual+audiences.pdf/4222c549-9133-4f6e-bdbb-e3bdb0d7272b>.

¹⁸ According to IAB Europe, EUR 36.2 billion for online advertising against EUR 33.3 billion for TV advertising; see details at: <http://www.iabeurope.eu/research-thought-leadership/press-release-european-online-advertising-surpasses-tv-to-record-annual-spend-of-e36-2bn/>.

¹⁹ Licence fees, grants and taxes are the three major sources of public financing for public television. Another source in most cases is advertising to complement the public budget.



elsewhere. The challenges are thus equivalent to those faced by commercial television and, to a lower extent, pay-TV: reaching and building a younger audience in a time where younger generations prefer to seek information and news on social media²⁰ or to use video-sharing platforms such as YouTube or social networks.

Public funding of audiovisual services has stagnated across Europe in the past five years, with revenues in 2014 (EUR 25.6 billion) falling below those of 2010 (EUR 25.7 billion), and a negative compound annual growth rate (CAGR) of -0.2% over the past five years. This stagnation of resources combined with falling rates of viewers for public television puts an increasing pressure on its ability to finance European content. Public funding of audiovisual services represented 27% of revenues of the European audiovisual services market in 2014.

1.1.1.1.4. Rapid growth of the pay on-demand audiovisual services market

Finally, the fourth category in terms of revenues generated on the audiovisual services market in Europe is pay on-demand audiovisual services.²¹ On-demand revenues are still the smallest category of the European audiovisual services market, but are also growing the fastest. Generating just under EUR 1 billion in 2010, revenues have already reached EUR 2.5 billion in 2015 with a CAGR of 28.4% over the five year period, and will continue to rise in the near future, in Europe and worldwide. The main growth area for pay on-demand audiovisual services are SVOD services which have found their audience in Western Europe and are starting to gain traction. SVOD revenues passed from just EUR 36.9 million in 2011 to EUR 1.7 billion in 2015; a CAGR of 161% over the 5 year period.

Global SVOD revenues are set to double from USD 14.6 billion in 2016 to USD 34.6 billion in 2021, according to Juniper Research.²² In Western Europe alone, SVOD services will grow by EUR 1 billion in 2016 to EUR 3 billion, and reach EUR 5.2 billion in 2020, as stated by IHS Markit.²³ Pay on-demand audiovisual services will augment their weight in the European audiovisual services market and enhance their role as a source of entertainment, and therefore content, for customers and subscribers. Furthermore, pay on-demand audiovisual services are in competition with players of the traditional audiovisual sector on many fronts: subscribers and acquisition of exclusive content for pay-TV and SVOD services; audiences' viewing time for commercial and public television as increasingly the audience spends time watching on-demand to suit their own schedule; cinema exhibitors as younger generations tend to go less frequently to cinemas and are more inclined to watch content on-demand;²⁴ and the revenues of physical retail and rental of films and television shows, video clubs, or physical stores, as consumers prefer either to buy their films and television shows on digital on-demand services or subscribe to a SVOD service in order to be able to access it.²⁵ On-demand audiovisual services are therefore set to become a main element of the audiovisual market worldwide in the upcoming years and thus to play a major role in the promotion, production and circulation of European works.

²⁰ <http://www.bbc.com/news/uk-36528256>.

²¹ Transactional on-demand services allowing for the purchase or rental of audiovisual content, such as iTunes and subscription on-demand services such as Netflix.

²² <http://www.digitaltveurope.net/601222/svod-revenues-set-to-double-by-2021/>.

²³ <http://tbivision.com/news/2016/09/west-europe-svod-spend-reach-e3bn-ihs/648242/>.

²⁴ <http://www.larp.fr/dossiers/wp-content/uploads/2012/07/l-%C3%A9volution-du-public-des-salles-de-cin%C3%A9ma.pdf>.

²⁵ This is a general trend for younger generations, which prefer access to ownership for services and products, manifested by the rise of the so-called sharing economy, see at: <http://uk.businessinsider.com/the-allure-of-no-ownership-for-millennials-is-moving-beyond-housing-and-cars-2015-5?r=US&IR=T>.



1.1.1.2. The stagnation of the European cinema market

The second sub-market of the European audiovisual market is the cinema market, measured in terms of admissions and revenues (box-office). Cinema revenues have stagnated in the past five years, with a CAGR of -0.2% for the five year period and a gross box-office of EUR 6.3 billion in 2014 (or 6% of total revenues of the audiovisual market).

Cinema admissions represent a major source of revenues for film producers and studios. However, in EU cinemas, European films had a market share of just 26.1% of admissions in 2015 (a five year low), while US films represented 71.3% of admissions to EU cinemas.²⁶ Combined with the fact that younger generations represent a diminishing share of admissions,²⁷ and that several players are calling for a review of the windowing system which reserves a time period solely for the theatrical exploitation of films in theatres, the competitive advantage of cinemas, cinema exhibitors and film producers is also increasingly under pressure due to the ongoing changes in the audiovisual market. These calls for change are made by traditional players, such as the French pay-TV group Canal+,²⁸ which calls for a reduction of the first pay-TV window from 10 months to 6 months for theatrical feature films in France, while new entrants, such as Netflix, call for simultaneous releases on VOD and in theatres.²⁹

As cinemas remain a main distribution source for the promotion of European films,³⁰ the stagnation of the cinema market could put pressure on yet another source of financing for European works in the future.

1.1.1.3. The rapid decline of the European physical video market

The third sub-market of the European audiovisual market is the physical home entertainment; the retail and rental of audiovisual content on DVDs and Blu-ray. This market has rapidly declined, passing from EUR 8 billion in 2010 to EUR 5.3 billion in 2014, with a negative CAGR of 9.7% in the five year period.

As younger generations prefer access over ownership,³¹ as films are rented online instead of in a videostore (the main source of rental revenues), this sub-market is rapidly declining. Home entertainment has become mainly digital, consumed via on-demand services which offer instant and easy access to premium content. But, as home entertainment is also a major source of revenue for

²⁶ "Box office hit record high in the European Union in 2015", press release European Audiovisual Observatory, Strasbourg, 4 May 2016, <http://www.obs.coe.int/documents/205595/3477362/MIF2016-CinemaMarketTrends-EN.pdf/88c2aecf-525f-48fc-a805-0d8ed243bc1e>.

²⁷ Pierron, C., Jeanneau, C., Danard, B., "L'évolution du public des salles de cinéma 1993 – 2012", Les études du CNC, septembre 2013, <http://www.cnc.fr/web/fr/etudes/-/ressources/4049679>.

²⁸ <http://www.zdnet.fr/actualites/chronologie-des-medias-canal-veut-passer-a-6-mois-39842130.htm>.

²⁹ The so-called "day-and-date film releases", with Netflix's chief content officer stating "*What defines a movie being a movie used to be it being on a theater. I think that's a dying generational definition.*" For further details, see at: http://www.wsj.com/articles/netflix-ipic-entertainment-agree-to-screen-original-movies-in-theaters-online-simultaneously-1475636402?mod=WSJ_TechWSJD_NeedToKnow and at: The Wall Street Journal, *Netflix, iPic Entertainment Agree to Screen Original Movies in Theaters, Online Simultaneously*, 4th October 2016 available here: http://www.wsj.com/articles/netflix-ipic-entertainment-agree-to-screen-original-movies-in-theaters-online-simultaneously-1475636402?mod=WSJ_TechWSJD_NeedToKnow.

³⁰ European films represented 64% of the 16 829 film titles on release in 26 EU cinema markets in the period 2005 to 2014 and US film titles 16%. For further details, see Grece, C., "How do films circulate on VOD services and in cinemas in the European Union? – A comparative analysis", European Audiovisual Observatory, Strasbourg, May 2016, <http://www.obs.coe.int/documents/205595/264625/Circulation+of+films+in+cinemas+and+on+VOD+in+the+EU+-+EN.pdf/8eae4b-b979-4a12-8667-c241a35c8cbc>.

³¹ One of the main drivers behind DVD and Blu-ray sales was the wish of consumers of establishing their own media library.



film producers and studios³² (in addition to theatrical and television syndication revenues) and the loss in revenues of physical retails and rentals is not fully compensated by VOD revenues,³³ this evolution also poses problems to producers and right holders as yet another source of financing is diminishing and is not yet fully compensated by equivalent revenues in the online world. This trend could have several impacts on the future production of audiovisual content, as one of the pillars of the value chain for films and television series is rapidly diminishing in importance.

The changes brought by the digitization of content and information, and the use of the Internet for their distribution is currently changing established business models and structures, putting competitive pressures on almost all of the players and markets comprising the European audiovisual market. New entrants, competing for the same resources (subscriber revenues, advertising budgets, retail and rental revenues, and attention of viewers), are modifying traditional markets and forcing incumbent players to adapt to new market rules. VoD services, digital audiovisual services and online entertainment platforms (Facebook, Snapchat, Twitch etc) are set to play an increasingly important role in the way European citizen access and consume audiovisual content, and inform and entertain themselves. Who are these main players in the online audiovisual service world, and do they come from traditional business sectors, or are they new participants in these markets?

1.1.2. Main players and new business models

The section above has shown that the audiovisual sector as a whole is currently undergoing a deep reaching transformation, with cards being redistributed and established positions being redefined. As the digital online entertainment landscape comprises a multitude of bigger and smaller players, a comprehensive overview of all players involved in each European country would be beyond the scope of this publication. For this reason, the following selection of main players are should be considered only indicative as several others could have been integrated.

The chosen approach is to list players at both worldwide and European level, based on their business model and their source of revenues; paid video on-demand services (subscription revenue and transactional video on demand services), advertising-financed audiovisual services and platforms.

1.1.2.1. Paid video on-demand services – Business models, strategies and main players

1.1.2.1.1. Subscription revenues – SVOD services

Subscription revenue – SVOD services are services such as Netflix, which sell access to a catalogue of films, television content and documentaries against a monthly subscription fee. These services are competing with traditional pay-TV services for subscribers and revenues, and also with the physical home entertainment market as consumer preferences shift from ownership to access to audiovisual content. SVOD services are also to some extent competing with TVOD services for consumer

³² <http://variety.com/2016/digital/news/home-entertainment-spending-2015-studios-1201673329/>.

³³ The loss of EUR 2.6 billion in the physical home entertainment market from 2010 to 2014 was slightly compensated by gains of EUR 1.5 billion in the on-demand pay revenues market.



revenues, as TVOD services have more recently released films by being higher up in the windowing system.

Another threat posed by SVOD services to commercial and public television is that they are removing viewing time; the more time subscribers spend watching content on SVOD services, the less time they have to watch linear television. SVOD services, with their innovative business model (and pricing) could therefore be the major threat for traditional television businesses be it pay, commercial or public, although this is not yet the case in Europe.

The business model is, in essence, based on the granting of access to a catalogue of films and television content against a flat monthly sum, usually under EUR 10 (often compared to an “all you can eat buffet” formula). Therefore, the aim of services adopting this business model is to increase the subscriber base while reducing subscriber churn. Reducing subscriber churn requires relevant and attractive content for subscribers, granting easy access to content relevant for the user through the use of recommendation algorithms, user-friendly interfaces, and good quality viewing experiences. Substantial investments in technology, infrastructure, and R&D are undoubtedly necessary in order to achieve these objectives.

Competitive advantages for this business model are access to exclusive premium content for differentiation purposes,³⁴ and scale in order to amortise costs (so-called economies of scale); content acquisition and production costs; investments into technology such as recommendation algorithms; intuitive user interfaces for a better user experience; and portability on other screens and devices. The latter is due to the fact that consumption patterns show an increasingly mobile-first generation, with 51% of video consumed on mobile devices. However, this is limited to mainly short form.³⁵

Increasingly, global players, such as Netflix and Amazon, are investing in original content (such as television series, films, documentaries, stand-up comedy, and animation) in order to provide exclusive content only available on their platforms to their subscribers, thereby establishing a competitive advantage.³⁶ The acquisition rush of premium content by SVOD players has driven prices for premium content licences up,³⁷ increased the production of premium television series³⁸ (called “Peak TV” or the “Golden Age of Television”³⁹) and complicated the relationship between services like Netflix and traditional content providers such as studios and cable networks. On one hand, cable networks depend on the revenues they get for licencing their content to Netflix,⁴⁰ and on the other hand, they fear that in the future they will become too dependent on such licensing deals and that Netflix finally will enjoy a near-monopoly position in entertainment.⁴¹ Already, Netflix

³⁴ For example HBO’s *Game of Thrones*, blockbusters such as *Star Wars* or children’s animation such as the films of Disney and Pixar; rights to premium sports are not yet an integral part of SVOD services but could become a battle field in the future as pay-TV services evolve.

³⁵ <http://www.streamingmedia.com/Articles/News/Online-Video-News/Mobile-Devices-Now-Make-Up-51-of-Video-Views-Ooyala-Index-113653.aspx>.

³⁶ For example Netflix produced 126 original content titles in 2016, up from only 4 in 2012 while Amazon is increasing its budget for original content.

³⁷ <http://www.hollywoodreporter.com/features/netflix-backlash-why-hollywood-fears-928428>.

³⁸ <http://www.vulture.com/2016/05/peak-tv-business-c-v-r.html>.

³⁹ [https://en.wikipedia.org/wiki/Golden_Age_of_Television_\(2000s%E2%80%93present\)](https://en.wikipedia.org/wiki/Golden_Age_of_Television_(2000s%E2%80%93present)).

⁴⁰ Netflix spent around USD 6 billion in 2016 on content.

⁴¹ See for example FX Networks chief Landgraf statement: “I think it would be bad for storytellers in general if one company was able to seize a 40, 50, 60 percent share in storytelling”, at: <http://www.hollywoodreporter.com/features/netflix-backlash-why-hollywood-fears-928428>.



and other pan-European players are acquiring exclusive licenses for the countries they operate in, with the aim to differentiate their service from others.⁴²

However, with the emergence of global players and national SVOD services launched by audiovisual companies with a strong incumbent position and a generalist focus (premium films and television series), another genre of SVOD services emerges: niche SVOD services and direct-to-consumer SVOD services launched by content right holders. These niche SVOD services do not compete on the exclusive acquisition market for premium content, but rather try to offer niche content (such as comedy,⁴³ horror films,⁴⁴ documentaries,⁴⁵ archives,⁴⁶ reality television,⁴⁷ content from specific regions such as Africa⁴⁸ or India⁴⁹ etc.) aimed at specific audiences. These niche SVOD services could well be the start of a new bundle, but this time for SVOD services as consumers are increasingly subscribing to several SVOD services.⁵⁰ This new bundling of SVOD services is creating a new type of household, SVOD-only homes, which no longer subscribe to traditional pay-TV services, a behaviour adopted mainly by younger generations.

On an international level, main players include:

- Netflix (with 81.5 million subscribers in over 190 countries worldwide in the first quarter of 2016, present throughout Europe), which acted as a trailblazer in most countries to popularise SVOD services;
- Amazon's Prime Instant Video is, as of December 2016, available in every EU country and in 200 countries and territories worldwide.⁵¹ Amazon uses Prime Instant Video as an addition to its Prime one day delivery service, with additional music, gaming, and e-book services included in the subscription;
- HBO (owned by TimeWarner) has the HBO Now service in the US but a strong presence of its linear channels in Europe and a stand-alone SVOD in the Nordic countries;
- Hulu (owned by Comcast's NBC Universal, 21st Century Fox and The Walt Disney Company), only active in the US as of 2016 but with strong shareholders in the audiovisual sector;
- Showmax,⁵² launched in Africa by the South African Naspers group (presence in 36 African countries);
- iFlix, the leading Asian SVOD service with a presence in 6 Asian countries and further expansion planned (pay-TV operator Sky invested in iFlix).

⁴² <http://www.broadcastingcable.com/news/currency/global-licensing-causing-challenges-netflix/146223>.

⁴³ <http://variety.com/2015/digital/news/nbcu-seeso-comedy-subscription-vod-launch-1201618701/>.

⁴⁴ <http://www.digitaltveurope.net/395011/amc-and-dramafever-test-horror-svod-site-shudder/>.

⁴⁵ <http://www.documentarytelevision.com/distribution/discovery-founder-john-hendricks-launches-svod-factual-service-curiositystream-meet-curiosity-president-elizabeth-hendricks-north-at-mipdoc/>.

⁴⁶ <http://www.ina.fr/premium>.

⁴⁷ <http://variety.com/2016/digital/global/nbcuniversal-reality-streaming-service-hayu-uk-ireland-australia-1201703166/>.

⁴⁸ <https://www.afrostream.tv/>.

⁴⁹ <http://erosnow.com/welcome>.

⁵⁰ See research by AmpereAnalysis, at: <http://www.digitaltveurope.net/597112/svod-consumers-turning-away-from-pay-tv/>.

⁵¹ <http://www.wsj.com/articles/amazon-expands-reach-of-global-streaming-1481725492>.

⁵² <http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/tobyshapshak/2016/05/13/netflix-competitor-showmax-launches-into-36-african-countries/&refURL=&referrer=%20-%206108b7783df9>.



On a pan-European level (with presence in more than 2 countries), some of the main players among generalist SVOD services include:

- Modern Times Group's Viaplay in the Nordic countries and the Baltics;
- Bonnier's and TV4 Group C More⁵³ for the Nordic region;
- Vivendi with CanalPlay in France and until the end of 2016 Watchever in Germany;⁵⁴
- Sky Group's Sky Now TV⁵⁵ and Sky Online/Ticket in the United Kingdom, Germany, Italy and Austria;
- Altice's (Numéricable and SFR in France, Portugal Telecom with presence in Belgium, Luxembourg, Switzerland, Israel, USA and the Dominican Republic);⁵⁶
- ProSiebenSat.1 Media SE's Maxdome⁵⁷ in Germany and Austria, with a dual SVOD and TVOD offer.

On a domestic level, several countries have national SVOD players, either launched or acquired by national broadcasters⁵⁸ or telecom operators,⁵⁹ and either operated by independent players.⁶⁰ Also, Internet service providers, such as cable and IPTV operators, often have their own SVOD services on offer on their cable box. The situation varies from country to country, but the general tendency is that often one or two national generalist SVOD services other than Netflix operate in a given country, with additional niche SVOD services being available in the country.

The market for SVOD services is still developing and a definitive assessment cannot yet be made (although it seems that Netflix's competition already drove out major national SVOD services in Canada⁶¹ and Australia⁶²).

Concerning European works, SVOD services aim to offer content wanted by their subscribers. National (and on a lesser level, European) content therefore remains important as many European consumers value national content with which they can easily identify. In its study on the origin of films in VOD and SVOD catalogues,⁶³ the European Audiovisual Observatory has found that on average the 16 SVOD services analysed have a 32% share of European films in their catalogues (with US films representing a share of 60% and other international films 8%).

SVOD services acquire and produce content that their subscribers find engaging, as it is the best method to reduce 'subscriber churn'. As long as European audiences express their desire for

⁵³ <http://www.bonnier.com/news-press/News/2015/March/TV4-and-C-More-Join-Forces-Digitally/>.

⁵⁴ Vivendi's goal of creating a Southern European Netflix were suspended, see at: http://www.liberation.fr/futurs/2016/09/05/canal-bollore-suspend-son-projet-d-un-netflix-europeen_1484121?xtor=rss-450.

⁵⁵ <http://www.nowtv.com/home/new>.

⁵⁶ Zive SVOD is rumoured to be launching in countries other than France, see at: <http://www.digitaltveurope.net/480282/altice-to-launch-svod-service-zive-internationally/>.

⁵⁷ <https://www.maxdome.de/spielfilm>.

⁵⁸ E.g. RTL's Videoland in the Netherlands, see at: <http://www.broadbandtvnews.com/2013/08/07/rtl-buys-majority-in-videoland-vod/>.

⁵⁹ E.g. Telefonica's Yomvi in Spain, see at: <http://advanced-television.com/2015/11/27/telefonicas-ott-yomvi-gains-momentum/>.

⁶⁰ E.g. Filmin in Spain, <https://www.filmin.es/>; FilmoTV in France, <https://www.filmotv.fr/>; Flimmit in Austria, <https://www.flimmit.com/>.

⁶¹ <https://www.bloomberg.com/news/articles/2016-09-26/netflix-dominating-in-canada-as-rogers-shaw-shut-down-shomi>.

⁶² <http://www.ooyala.com/videomind/blog/australia-s-svod-market-consolidates-presto-closing>.

⁶³ Ene L., Grece C., Note 4 – Origin of Films in VOD Catalogues In the EU, European Audiovisual Observatory, Strasbourg, November 2015, <http://www.obs.coe.int/documents/205595/264625/DG+CNECT+-+Note+4-2015+-+Origin+Of+Films+In+VOD+Catalogues+In+The+EU28.pdf/9e28ec6f-f8af-4c9a-92f5-a82f79eb2cda>.



European content, such content will be part of SVOD catalogues. However, it is difficult to predicate how consumer tastes and choices will evolve in the future.⁶⁴ As other European SVOD services start to invest in digital original productions⁶⁵ to further differentiate their catalogues, SVOD services are already opening a new financing source for programming, in Europe and elsewhere.⁶⁶ As IHS stated it in its *World TV Production Report 2016*,⁶⁷ in 2015 Netflix and Amazon are already spent on programming more than all German audiovisual players combined, with their expenditures totalling USD 7.3 billion (Investments in programming in Western Europe in 2015 represented USD 38.6 billion with the United Kingdom representing USD 10.7 billion, Germany USD 7.3 billion, France USD 6.6 billion and Italy USD 4.6 billion).

1.1.2.1.2. Transactional VOD services

Transactional VOD services (TVOD) are services such as Apple's iTunes, which sell (also called electronic sell-through (EST)) or rent films and television content on a pay-per-view basis. TVOD services are basically replacing DVD and Blu-ray sold in physical stores for retail and rented in videoclubs. These services act as a digital store and videoclub as consumers pay their purchase or rental fees on a pay-per-view basis.

Their business model is to enable right holders and producers to sell their content on their digital platform, while taking a commission on every transaction (in the range of 30% of the selling/rental price). These services do not generally licence any content, nor do they produce original content. Their aim is to increase their revenues by selling and/or renting a large quantity of content. The advantage of TVOD services is their early access to feature film released in cinemas, as films are generally available 3 to 10 months after their theatrical release in Europe. Release windows vary from country to country (the TVOD window is generally the same as the DVD/Blu-ray window).⁶⁸

TVOD services do not have the upfront cost of investing heavily in order to licence, produce, and acquire content (even if some rightholders ask for minima guarantee). As such they are the business model for pay on-demand services which is the easiest to launch for established and new

⁶⁴ Netflix's example of producing European original content such as *Marseille* in France, *The Crown* in the United Kingdom or *Dark* in Germany, and localising further its local services by adopting the national language and acquiring more local content such as the service has done in Poland and Turkey with plans of national original production, demonstrate this need to propose local content to local audiences. See at: <http://www.reuters.com/article/us-netflix-china-idUSKCN11Q1HU>, and <http://www.hurriyetdailynews.com/netflix-localizes-in-turkey-.aspx?pageID=238&nID=104184&NewsCatID=345>.

⁶⁵ E.g. *FRAT* by CanalPlay, see at: <http://www.programme-tv.net/news/series-tv/65984-frat-une-serie-sur-le-terrorisme-pour-la-premiere-creation-originale-canalplay-video/>; *Swedish Dicks* by Viaplay, see at:

<http://www.businesswire.com/news/home/20160314005476/en/MTG-Keanu-Reeves-joins-Viaplay%E2%80%99s-original-production>.

⁶⁶ For more information on the European SVOD market with a pan-European overview and country profiles of the United Kingdom, France, Germany, the Nordic countries and the Netherlands, see at: Grece C., "The SVOD market in the EU – developments 2014 and 2015", report of the European Audiovisual Observatory commissioned by the European Commission, Strasbourg, November 2015, <http://www.obs.coe.int/documents/205595/264625/DG+CNECT+-+Note+3-2015+-+The+SVOD+Market+in+the+EU+-+Developments+2014-2015.pdf/ec00e7ff-7fb4-440b-8423-2221fefa0800>. For a detailed list of SVOD available and established in European countries, please consult the MAVISE database on TV channels and on-demand audiovisual services and companies in Europe, at: <http://mavise.obs.coe.int/>.

⁶⁷ E.g., Netflix and Amazon Outspend CBS, HBO and Turner on TV Programming, IHS Markit Says, see at: <http://news.ihsmarkit.com/press-release/technology/netflix-and-amazon-outspend-cbs-hbo-and-turner-tv-programming-ihsmarkit-sa>.

⁶⁸ Recently, content has been made with simultaneous theatrical and VOD release, called day-and-date release, or even pre-theatrical/premium VOD releases. However, this initiative is more optimal for indie and smaller budgets films, as theatrical exhibitors are fiercely fighting to keep their exclusive film release window. The industry as a whole is still trying to find the right trade-off between theatrical exclusivity and making a film quickly available on VOD services in order to benefit from marketing expenses and maximise revenue for new films which have been theatrically released. See at: <http://www.hollywoodreporter.com/news/3-biggest-problems-indies-face-666871>.



players. Many pay-TV operators,⁶⁹ broadcasters,⁷⁰ telecom operators,⁷¹ retail chains,⁷² online retailers,⁷³ independent players (although several have been acquired by bigger players since their launches),⁷⁴ and technology players,⁷⁵ are operating TVOD services for film and television content.

Tech players usually use TVOD as a complement to their core offerings,⁷⁶ whereas broadcasters, telecom operators, and pay-TV companies operate their VOD stores in order to have another monetization stream for their and other content, for diversification reasons and to be able to offer consumers ease of access to entertainment. For traditional retail stores, having TVOD services is a natural evolution of their core business, selling products to consumers, in the real world and, increasingly, also in the digital space.

Multiple TVOD services operate on a pan-European level, such as Apple's iTunes, Rakuten's wuaki.tv or the Italian ChiliTV, which have each have a presence in several EU countries. As these businesses act as stores and rental videoclub, difficulties for right holders and producers of smaller budget production lie in getting included in the catalogues. As each service has different technology standards for video content (encoding, technical specifications, etc), the costs associated with rendering films and television content compatible with each service can be a barrier for smaller budget producers.

As TVOD services proliferate,⁷⁷ they replace traditional physical home entertainment and video stores, making it easier for consumers to use (due to factors such as not having to leave their homes, instant access, large catalogues etc). However, as shown before, as long as the gap between the losses incurred in the physical market are not outweighed by the gains in the digital market, this evolution could pose problems for the financing and production of smaller budget films.

Concerning the promotion of European works, the European Audiovisual Observatory has learned that for the 75 VOD services analysed throughout Europe, the average share of European content was 29%, compared to 59% for US films and 12% for other international films.⁷⁸

TVOD services do not make a selection in their catalogues; instead they are rather focused on maximising their commission fees by increasing their digital sales of audiovisual content. They may enhance the consumption of films and television content by actively promoting them on their home pages.⁷⁹

Concerning the circulation of European works, the European Audiovisual Observatory has learned that, of the 75 VOD services analysed, European works have similar, yet slightly lower,

⁶⁹ E.g. CanalPlayVOD, <http://vod.canalplay.com/UpgradeYourBrowser>; SkyStore, <https://www.skystore.com/>;

⁷⁰ E.g. Arte, <http://boutique.arte.tv/>; France Télévision Pluzz, <http://pluzzvad.francetv.fr/>; Timvision Videostore, <http://www.timvision.it/main/Videostore>; MyTF1VOD, <http://mytf1vod.tf1.fr>;

⁷¹ E.g. OrangeVOD, <http://video-a-la-demande.orange.fr/#vod/home>. Deutsche Telekom's Videoland, <http://www.videoland.de/>.

⁷² E.g. FnacPlay, <https://www.fnacplay.com/>.

⁷³ E.g. CDiscount's Cstream, <http://www.cddiscount.com/cstream>; Amazon Instant Video VOD, <https://www.amazon.com/Amazon-Video/b?ie=UTF8&node=2858778011>.

⁷⁴ E.g. UniversCine, <http://www.universcine.com/>; ChiliTV, <https://it.chili.tv/>; Rakuten's <https://fr.wuaki.tv/>.

⁷⁵ E.g. Apple's iTunes, Google's Play store, Microsoft's Xbox Video, Sony's Playstations Store.

⁷⁶ E.g. video games in the case Microsoft and Sony, devices and digital services in the case of Apple and Google, fast deliveries in the case of Amazon.

⁷⁷ Please refer to the MAVISE database for listings of TVOD services available in each European country, *op. cit.*

⁷⁸ See report "The origin of films in VOD catalogues", *op. cit.*

⁷⁹ The report *op. cit.* "The Visibility of film on on-demand platforms in Germany, France and the United Kingdom" by the European Audiovisual Observatory has shown that most of the promotional spots are allocated to US films (between 55% and 57% of promotional spots), whereas European films are taking between 30% and 35% of promotional spots. Promotional spots are paid for by the distributors/right holders of the film and generally not solely allocated by the TVOD service.



circulation figures on VOD than for cinemas releases.⁸⁰ Furthermore, on average, EU films were released in four countries in cinemas and in 3.2 countries on TVOD, while US films were released on average in 10.9 countries in cinemas and available in 10.1 on VOD. From the figures it can be inferred that theatrical released films will be available on TVOD services.⁸¹

In summary, TVOD services are replacing traditional physical stores and videoclub for the purchase and rental of films and television shows. They have certainly contributed to the rapid decline of the physical home entertainment market, but as users pay on a transaction basis and prices are similar to those of the physical market, the impact comes rather from the gap in revenues generated in the physical and digital retail and rental market than from a value destruction. The high prices of digital rentals and retails, equivalent to physical transactions where consumers would acquire a physical object (DVD, Blu-ray) could be the start of an explanation of this gap, as could the increase in piracy of audiovisual content on peer-to-peer networks and illegal streaming sites. Concerning the promotion and circulation of European content, TVOD services appear to be similar to cinemas exhibitors, although this finding would still need further confirmation and investigation. Both SVOD and TVOD services are impacting the traditional audiovisual market by challenging incumbent players for subscribers, sales and rentals, and viewing time. SVOD players have the particularity of also being in the business of acquiring, producing, and commissioning content, thus impacting the whole value chain of content production by driving up prices and competing for exclusive licences. Another form of competition emerged with the Internet and new players, and the competition amongst tech players for the advertising budgets of commercial television channels.

1.1.2.2. Advertising-financed online audiovisual services

As seen in the preceding section, advertising revenues for television in Europe are stagnating,⁸² and were surpassed by online advertising revenues in 2015. A multitude of online players are competing for advertising budgets, however two companies seem to dominate online display advertising in Europe and worldwide: Google and Google's Youtube, and Facebook.⁸³

The business model of advertising-financed services, be it television, online, magazine and newspapers and other media financed by advertising, is to sell the attention of its audience to advertisers. In return, advertising revenues finance content on which their audience will spend time, demonstrating the principle of two-sided markets. Advertising online allows the transition from mass-advertising as it is done in commercial television to individualized advertising through the use of consumer data. This consumer data reveals interests, profiles, locations and demographics of

⁸⁰ See Grece, C., "How do films circulate on VOD services and in cinemas in the European Union? A comparative analysis", European Audiovisual Observatory, Strasbourg, May 2016, Section 4, at:

<http://www.obs.coe.int/documents/205595/264625/Circulation+of+films+in+cinemas+and+on+VOD+in+the+EU+-+EN.pdf/8eae4b-b979-4a12-8667-c241a35c8cbc>.

⁸¹ However, as the study covers all cinema releases in the time period 2005 to 2014 but only the availability of films on 75 VOD services in October 2015 this needs to be further demonstrated.

⁸² Advertising revenues in 2014 have only returned to their 2010 level.

⁸³ Online advertising taken into account in this section is display advertising, meaning video advertising, banner advertising. Search and Classified and Directories advertising are not directly competing with commercial TV for advertising budgets. For more information of online advertising in Europe please refer to: Grece, C., Lange A., Schneeberger A., Valais S, "The development of the European market for on-demand audiovisual services", European Audiovisual Observatory, Strasbourg, March 2015, available at: http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=9273. See also: Fontaine G and Grece C, "Online Advertising in the EU – Update 2014", European Audiovisual Observatory, Strasbourg, March 2015, <http://www.obs.coe.int/documents/205595/264625/DG+CNECT+-+Note+2-2015+-+Online+Advertising+In+The+EU+-+Update+2014.pdf>.



each single Internet user, thus permitting the precise targeting of each advertisement (also referred to as the “Big data” ecosystem).

In order to be able to gather an increasingly large amount of data, scale is needed. The more users an online service has, the more data it is able to gather on each user. Global players like Facebook, with more than a billion monthly users, or Google, have the required number of users to effectively gather this data much needed by advertisers for targeting but what about national players (commercial television, publishers etc) operating often only in their country? They do not have the required scale, often have less data on users, and do not own the necessary advertisement technology for efficient data targeting and gathering. Facebook on the other hand has a trove of data on its users, as does Google. Furthermore, users are spending an increasing amount of time on their services.⁸⁴ The combination of time spent on services (user engagement) and data on users (for targeting purposes), renders these two players juggernauts in the online advertising space.

Facebook and Google’s YouTube are not defining themselves as media companies,⁸⁵ but as tech players operating platforms. However, as their business model is based on selling the attention of users for the purposes of advertising one could argue that they are media companies.⁸⁶ As content on these services is not produced by these companies but by users and professional media companies, they are acting as platforms; they are aggregating content and services for their end-users, thus profiting from content created by others. A recent study,⁸⁷ commissioned by GESAC (Groupement européen des sociétés d’auteurs et compositeurs), found that cultural content represented 33% of Facebook’s revenues and 66% of YouTube’s revenues.

Naturally, even if YouTube and Google are dominating the online advertising space,⁸⁸ other players are active in the online advertising space. Main European players are national publishers,⁸⁹ television channels with their online offer and catch-up services,⁹⁰ and Internet service providers (telecom and cable operators). In each country in which audience data exists for advertising-financed websites and services (comScore), international players like Facebook, Google, and Microsoft trust the first places in terms of unique visitors (the top place) with national players in the top ranks coming either from the broadcasting, publishing, or telecom market.

As social networks and online video sharing platforms increase their popularity as an entertainment destination, they are set to further capture advertising budgets which would have gone to television. The “advertising pie” has a finite size in each country, and marketers, brands and advertisers are making trade-offs between the different media ad inventories by which they desire to reach their target audiences. As younger generations rely increasingly on these online social networks⁹¹ and video sharing platforms⁹² for entertainment and news, a sizeable share of advertising budgets will flow to these services. The impact on existing advertising-financed business models

⁸⁴ An average of 50 minutes per day for Facebook and its suite of applications such as Instagram, Facebook Messenger, and WhatsApp, <http://uk.businessinsider.com/how-much-time-do-people-spend-on-facebook-per-day-2016-4?r=US&IR=T>; An average of 40 minutes for a YouTube session spent by users, <https://www.wired.com/2015/07/spend-insane-amounts-time-watching-youtube-phones/>.

⁸⁵ <http://qz.com/770743/zuckerberg-says-facebook-will-never-be-a-media-company-despite-controlling-the-worlds-media/>.

⁸⁶ <http://www.recode.net/2016/8/30/12710318/facebook-media-company-advertising-chart>.

⁸⁷ Roland Berger Strategy Consultants, “Cultural content in the online environment: Analyzing the value transfer in Europe, Paris, November 2015, https://www.rolandberger.com/gallery/pdf/Report_for_GESAC_Online_Intermediaries_2015_Nov_EUR.pdf.

⁸⁸ With an estimated share of 39.2% of total worldwide display ad revenues in 2016 for the two companies, <http://www.emarketer.com/Article/Yahoo-Ad-Revenue-Drop-Nearly-14-This-Year/1013731>.

⁸⁹ E.g. The Guardian, LeMonde, etc.

⁹⁰ E.g. MyTF1, ITV’s Hub, etc.

⁹¹ E.g. Facebook, Snapchat, Twitter.

⁹² E.g. YouTube, Dailymotion, the German Clipfish and others more country-specific video sharing platforms.



such as commercial television is quite clear: a decline in advertising revenues as audiences diminish and core target audiences (younger generations) of brands are no longer tuning in. As commercial (and public) television is an important financing source for content production,⁹³ commissioning, and acquisition, these developments could have negative impacts on the creation and production of European works. The decline in advertising revenues has already had an impact on the production of original content by broadcasters in Italy, Spain, Ireland, and Portugal while original content production by broadcasters has remained stable in the period of 2009 to 2013.

Commercial channels are able to monetize their programmes through their catch-up services, mainly with pre-roll ads displayed before a viewer launches a programme. However, advertising rates for ads on catch-up services are much lower than those of linear broadcasts (linear broadcasts reach thousands/millions of viewers at the same time, whereas an advert on catch-up television reaches only the viewers in front of the television, which is less valuable to advertisers). The fact that there is a great monetization gap between their traditional advertising business on linear television and their advertising business on catch-up services, poses challenges to traditional commercial channels who have to rethink their core business in light of falling audiences. The aim is to be able to capture more of the advertising revenues being spent in the online space by adapting to the new requirements for successfully building an audience online and creating engaging content for younger audiences, which in the future will consume this content mainly online. Only by maintaining their advertising revenues and successfully building an online business model based on advertisements will traditional commercial television channels be able to create actively new programmes, and therefore European works.

Being confronted with increased competition from new entrants on the advertising market, traditional broadcasters have reacted by investing in multi-channel networks on YouTube,⁹⁴ launching YouTube channels,⁹⁵ or acquiring advertisement tech firms,⁹⁶ or investing in new forms of entertainment.⁹⁷ In short, commercial television channels with the required financial strength are diversifying in order to prepare for the future and the future of media consumption in our societies.

Until now, content financed by advertising-financed on-demand audiovisual services in Europe are mainly web series on YouTube, comedians on YouTube channels, and short-format entertainment but are not yet truly scripted television series or films.⁹⁸

YouTube invested millions into content creation, for example spending USD 100 million in 2012 on 96 YouTube channels and their creators (a plan that failed to work for YouTube). MakerStudios, a MCN on YouTube owned by The Walt Disney Company, has funded content for its channels, mainly short-form digital content.⁹⁹ Content created on advertising-funded on-demand

⁹³ See Kevin D., "Investments in original content by audiovisual services", European Audiovisual Observatory, Strasbourg, November 2015, <http://www.obs.coe.int/documents/205595/264625/OBS+-+REFIT+-+Note+B.3+Investment+in+original+programming.pdf/137f3dd6-fc0c-4634-a5c1-1b3037ab46d8>

⁹⁴ Investments such as StyleHaul acquired by RTL group for USD 107 million in 2014, Broadband TV acquired by RTL for USD 36 million, Collective media acquired by ProSiebenSat.1 for USD 83 million.

⁹⁵ Such as Golden Mustache by M6, see http://www.lesechos.fr/31/07/2013/lesechos.fr/0202928362764_avec-golden-moustache--m6-met-un-pied-dans-la-production-web.htm.

⁹⁶ RTL group's stake in ad tech provider SpotX for USD 144 million in 2014, see: <http://adexchanger.com/digital-tv/rtl-group-acquires-majority-stake-in-video-ssp-spotxchange/>.

⁹⁷ Such as Modern Times Group investment in ESL, the world biggest eSports group for EUR 78 million, see: <http://www.gamesindustry.biz/articles/2015-07-01-modern-times-group-acquires-majority-stake-in-esl-for-usd78m>.

⁹⁸ In the US, Sony Crackle's (<http://www.crackle.com/>) for example is financing content which is similar to content produced for TV networks, such as Jerry Seinfeld's *Comedians in Cars Getting Coffee* or even films such as *The Throwaways*.

⁹⁹ See <http://variety.com/2016/digital/news/maker-studios-content-funding-sparks-1201714970/>



audiovisual services remains mainly short-form entertainment created by popular YouTube, Snapchat or Vine creators.

Another trend is to make studios and production spaces available to content creators: Google has opened in YouTube spaces in Europe, including Paris, Berlin and London.

Facebook has allowed creators to publish native adverts¹⁰⁰ or videos with product placement, in order to further monetize their content and to attract creators from other platforms such as YouTube. Facebook also started to pay celebrities¹⁰¹ to use their live-streaming service in order to popularize live streaming.

The advertising-financed online space is experimenting with different types of creation models and the services present on this space are all competing to have relevant creators. Successful YouTube stars can even make feature films financed by Hollywood studios,¹⁰² as studios try to monetize their large audience. As YouTube stars become more popular than actual Hollywood actors for millennials,¹⁰³ "old media" is trying to monetize this audience, by either financing films and series of these YouTube and social media stars or recruiting them for traditional television shows and content.¹⁰⁴ Social networks and video sharing allow creators to build an audience, and the success of these new stars for millennial audience can be seen in VidCon, the yearly YouTube conference, where creators meet their fans.¹⁰⁵ New stars are born on social networks and new forms of entertainment, outside of the traditional media space, are created.

With the proliferation of social networks in our societies, with services such as Snapchat, Instagram, Facebook, or Twitter, independent content creators can experiment and adapt their content to the formats that work best on each network. The relative novelty of this form of creation allows for experiencing a multitude¹⁰⁶ of different newly created content. However, one thing seems to be clear; younger generations identify and like these new forms of entertainment, and the creative liberty allowed on these services will push content creation further, with young creators having a chance to stand out and build their audiences. However, as everywhere, only a few will become actual social media stars and live from their creations. YouTube takes 45% of ad revenues and with an average pay out of USD 1 to USD 5 per 1000 views¹⁰⁷ it takes a lot of views to be able to make a living out of one's creation.

This overview has shown the actual challenges with which traditional players on the European audiovisual market are confronted. New entrants, new services, changing consumption patterns by younger generations, and falling or stagnating revenues, viewers and subscribers seem to be, as of 2016, the main challenges for European players.

However, the digital ecosystem is innovating new forms of entertainment which could further challenge traditional business models:

¹⁰⁰ E.g. <http://www.recode.net/2016/4/8/11585970/facebook-video-creators-publish-branded-content>

¹⁰¹ E.g. <http://www.recode.net/2016/3/1/11586612/facebook-wants-celebrities-for-its-live-streaming-service-and-its>.

¹⁰² E.g. <http://www.hollywoodreporter.com/news/youtube-stars-invade-hollywood-how-874812>.

¹⁰³ E.g. <http://variety.com/2014/digital/news/survey-youtube-stars-more-popular-than-mainstream-celebs-among-u-s-teens-1201275245/>

¹⁰⁴ E.g. http://tvmag.lefigaro.fr/programme-tv/tf1-recrute-norman-et-cyprien-les-stars-de-youtube_760f24bc-3ab3-11e6-86e3-d4f668c3c978/

¹⁰⁵ E.g. <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-vidcon-popularty-20140627-story.html>

¹⁰⁶ 400 hours of new content was uploaded every minute to YouTube, mainly user-generated content, see:

<https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/>.

¹⁰⁷ See <https://www.quora.com/How-much-money-can-an-average-user-on-YouTube-earn-from-a-video>.



- the emergence of Virtual Reality as consumer entertainment with the launch by several tech players of VR headsets and services (Facebook, Google, Sony, HTC amongst others)
- the rise of live video streaming popularized by Twitter, YouTube, and Facebook;
- the popularity of e-Sports with younger generations, which is mainly consumed on Amazon's Twitch service.

All these new forms of entertainment will further challenge established positions and change the way audiovisual content and entertainment is consumed. However, one thing remains the same: great content is always appealing to consumers. The Internet has changed the distribution of content, created new forms of entertainment, and changed markets by enabling the entrance of new players, but fundamentally the desire of audiences to be entertained by great stories and engaging entertainment by audiences has not vanished but merely shifted; from the analogue world to the digital. If European works manage to engage and reach their audiences with compelling storytelling, European works will remain relevant to these new digital audiences.

European players should thus adapt to these new market settings and audience expectations and embrace rather than reject the digital transformation, which is not only changing the media market but several others at the same time (finance, automobiles, travel, work etc.). As is the case with each major paradigm shift, it will create losers and winners; those able to adapt and question their business model will increase their chances to be on the winning side.

1.2. Definitions and typologies of on-demand audiovisual services

With the development of the offer of audiovisual services in many directions and the changes in the consumption habits of viewers, as described above, the way in which the various services that provide audiovisual content online should be qualified becomes increasingly uncertain from a legal perspective.

In the last few years, the concept of “Over the top” (OTT) services has emerged in the audiovisual sector and surfaces often in the political debate. However, there is no legal definition of such concept, which covers in many occasions different types of services or applications. From a regulatory point of view, audiovisual media services are divided between linear services (television broadcasts)¹⁰⁸ and non-linear ones (or “on-demand” audiovisual media service, ODAVMS), according to a set of fixed criteria. However, on-demand audiovisual services are now increasingly provided through online platforms that provide access to aggregate or user uploaded content (or video-sharing platforms) which do not fulfil the traditional criteria used to categorise ODAVMS.

The blurring of definitions among these services is particularly important as, depending on the qualification that will be retained, they will fall under the scope of the Audiovisual Media Services Directive (AVMSD). The AVMSD brings a set of obligations, such as promotion obligations for European works and ex ante control on the content with respect to the protection of minors or human dignity. Failing this they will be assimilated to technical intermediaries and benefit from the exemptions from liability set out in the e-Commerce Directive.

¹⁰⁸ Article 1 (e) AVMSD defines “television broadcasting” or “television broadcast” (i.e. a linear audiovisual media service) as an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule.



1.2.1. The technical definition of Video on Demand

The technical definition recommended by the ITU in 2004 for the transmission of video on demand (VoD) was as follows: “Program transmission method whereby the program starts playing after a certain amount of data has been buffered while receiving subsequent data in the background, where the program is completely created by the content provider.”¹⁰⁹

This definition was, however, rather restrictive as it was related to the classical download of files, which has been since been complemented by other technical solutions (VoD through streaming, VoD over IP, VoD on cable, etc.). A broader definition was provided by the ITU in 2009 in a report on the requirements for the support of IPTV services:

Video-on-Demand (VoD): “A service in which the end-user can, on demand, select and view a video content and where the end-user can control the temporal order in which the video content is viewed (e.g. the ability to start the viewing, pause, fast forward, rewind, etc.)
*NOTE - The viewing may occur sometime after the selection of the video content.*¹¹⁰

In a technical context, the legal status, the usage forms and types of content are not taken into consideration. Services that offer films and television broadcasts generally put onto a server by professional providers may be included, as may services based on the principle of making programmes provided by individual users available (“user generated content”).¹¹¹

1.2.2. The undefined concept of “Over-the-top” services

The concept of Over-The-Top (OTT) services has appeared in the audiovisual sector in the 2010s’ to refer to the new market that was emerging alongside the traditional markets of television (terrestrial, satellite and cable television) that included new forms of delivering audio and other media content over the Internet. Today, this concept commonly refers to the provision of content and applications, including communications services over the Internet (e.g. voice services, hosting services, email services instant messaging, web-based content (news sites, social media, etc.), search engines, and video and multimedia content, etc). Usual examples of such services are WhatsApp for text messaging, Skype for video chat and voice call services, YouTube for video content sharing, Netflix and HBO for video streaming services, Spotify and Deezer for music streaming services, etc.

Although the concept of OTT services presents itself regularly in the public debate, there is neither single consensus nor a legal definition of it. In the telecommunications sector, BEREC, the Body of European Regulators of Electronic Communications, describes OTT services as “content, a service or an application that is provided to the end user over the open Internet”¹¹². BEREC notes that including in the definition that what is provided can be content, a service or an application,

¹⁰⁹ Transmission protocol for multimedia webcasting over TCP/IP networks, ITU, J.127 (04), 3.314, <https://www.itu.int/rec/T-REC-J.127-200406-I/en>.

¹¹⁰ Requirements for the support of IPTV services, [ITU-T Y.1901] adopted in 2009, <https://www.itu.int/rec/T-REC-Y.1901-200901-I>.

¹¹¹ See also Grece, C., On-demand audiovisual markets in the European Union, Final Report, A study prepared for the European Commission DG Communications Networks, Content & Technology by the European Audiovisual Observatory, Strasbourg, <https://ec.europa.eu/digital-single-market/en/news/demand-audiovisual-markets-european-union-smart-20120028>

¹¹² See BEREC Report on OTT services, BoR (16) 35, 29 January 2016, p. 14, http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5751-berec-report-on-ott-services.



means that anything provided over the open Internet is an OTT service. According to BEREC, this provision generally occurs without involvement of the Internet Access Provider (IAP) in the control or distribution of the service. BEREC further details that “Because the service is provided over the Internet this definition implies that OTT refers to content that usually arrives from a third party (OTT provider), not being provided by the IAP to which the end user is connected. However it is also possible that the IAP offers its own OTT services or partners with OTT providers.”

It is clear from the definition from BEREC that OTT refers to a way to deliver a service rather than to the nature of the service itself. Secondly, BEREC stresses that this definition does not exclude OTT services from qualifying as electronic communications services (ECS).¹¹³ Another implication of this broad definition is that some OTT services could potentially compete with ECS services. However, such a situation would be more common in the telecommunication sector rather than in the audiovisual one.

Specifically, on 14 September 2016, the Commission adopted a set of initiatives and legislative proposals related to Internet connectivity, which includes a new European Electronic Communications Code¹¹⁴ that will merge four existing telecoms Directives (Framework, Authorisation, Access, and Universal Service Directive). The proposed Directive refers to over-the-top players as new types of market players that compete with traditional telecom operators and define them as “service providers offering a wide variety of applications and services, including communications services, over the Internet.” The proposal establishes that new online players that provide equivalent communications services to those provided by traditional telecoms operators are covered by similar rules, in the interest of end-user protection. For OTT services that do not use numbers (e.g. WhatsApp), the proposal also sets out more focused obligations.

In the audiovisual sector, the concept of OTT services has generated different interpretations over time. OTT services are sometimes assimilated to any on-demand audiovisual services accessible online. On the contrary, some definitions refer exclusively by this term to services accessible through specific applications (PCs, tablets, Smart televisions, or hybrid boxes), while others characterise OTT services by the fact that they are provided by new stakeholders that are not part of the classical media operators’ ecosystem (cable, IPTV or satellite operators or broadcasters).¹¹⁵ Without engaging in such distinctions, it can be said that OTT services refer to the delivery of audio, video, and other media over the Internet without the involvement of a network operator in the control or distribution of the content. It is also the definition used in the Glossary Digital Single Market of the European Commission which state that OTT players “provide audiovisual content online generally without themselves being Internet service providers or network operators / electronic communications services and network providers.”¹¹⁶

Other differentiations among content and applications providers are sometimes proposed based on the characteristics of their underlying distribution mechanisms. This is the case for

¹¹³ According to BEREC, “Electronic communications services means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.”, Ibid. p. 11

¹¹⁴ Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast), COM(2016) 590 final, 14 September 2016, <https://ec.europa.eu/digital-single-market/en/news/proposed-directive-establishing-european-electronic-communications-code>.

¹¹⁵ See On-demand audiovisual markets in the European Union, Final Report, A study prepared for the European Commission DG Communications Networks, Content & Technology by the European Audiovisual Observatory

¹¹⁶ See Glossary Digital Single Market, <https://ec.europa.eu/digital-single-market/en/glossary>.



example for the distinction between “managed services” and “unmanaged online services”.¹¹⁷ According to this distinction, the services where the provider offering the service has control over the fixed or mobile access network used for its distribution would be qualified as “managed service”. Such services are closely linked to the underlying network (e.g. fixed and mobile and IPTV services offered by many network operators). On the contrary, services and applications that rely on the public Internet for at least part of their distribution would be qualified as “unmanaged online services” (or OTT services). In such cases, the provider has little or no control over a part of the distribution network in particular the access network (e.g. Skype or YouTube).

In any case, the question of whether a distinction should be made between the different types of OTT players is ancillary to the question of the impact they have on traditional media and telecommunications services. There is indeed a growing concern among media and telecommunications network operators about the challenges represented by the expansion of major OTT players (often based in the US) offering services that are direct substitutes for the traditional services they offer and which are not subject to the same regulatory obligations. The question of how to ensure a “level playing field” among operators is central to this debate. However, from a regulatory point of view, the distinction is made between on-demand audiovisual content delivered through on-demand audiovisual media services or through online platforms (video-sharing platforms).

1.2.3. The legal definition of on-demand audiovisual media services

A legal definition of on-demand audiovisual media services (ODAVMS) (or “non-linear” audiovisual media services, as opposed to linear programmes (television broadcasts)) is provided in the Directive 2010/13/EU on Audiovisual Media Service (AVMSD)¹¹⁸ of 2007, as follows:

“an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider” (Article 1(1)(g) AVMSD).

The AVMSD refers to editorially responsible providers based in EU member states, which offer video-on-demand services that are deemed to offer content comparable to broadcast television programmes (that are “TV-like”). The Directive provides in Article 1 a list of definitions that clarify to a certain extent its scope in relation ODAVMS. The recitals of the Directive further explain the meaning of the definition of AVMS.

According to the AVMSD an “audiovisual media service” provided by an audiovisual media service provider¹¹⁹ is defined as either one of the two following cases:

¹¹⁷ See Godlovitch I., Kotterink, B., Marcus, J. S., Nooren, P., Esmeijer, J., Roosendaal, A., “Over-the-Top players (OTTs)”, Study for the IMCO Committee, Policy Department A: Economic and Scientific Policy, December 2015,

[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU\(2015\)569979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU(2015)569979_EN.pdf).

¹¹⁸ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive)(codified version), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0013>.

¹¹⁹ Article 1 (1) (d) of the Directive further details that “media service provider” means the “natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organized. In addition, paragraph (e) defines “television broadcasting” or “television broadcasts” as “an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule”.



(i) a service as defined by Articles 56 and 57 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication.

The AVMSD does not provide further guidance as to what constitutes a catalogue or what is meant by ‘at the moment chosen by the user and at his individual request’. The definition of ODAVMS contains the following seven cumulative criteria:¹²⁰

1. That it be a service;¹²¹
2. That a media service provider has editorial responsibility;¹²²
3. That its principal purpose is the provision of programmes;¹²³
4. That the provided programmes are “TV-like”;¹²⁴
5. That the purpose of the programmes is to inform, entertain or educate;
6. That the target audience of the programmes is the general public;¹²⁵
7. That the programmes are delivered over electronic communications networks.¹²⁶

¹²⁰ For more details about the definition of on-demand AVMS, see Cabrera Blázquez F.J., Cappello M., Fontaine G., Valais S., “On-demand services and the material scope of the AVMSD”, IRIS Plus 2016-1, European Audiovisual Observatory, Strasbourg, 2016, <http://www.obs.coe.int/documents/205595/8351541/IRIS+Plus+2016-1+On-demand+services+and+the+material+scope+of+the+AVMSD.pdf/daba42e0-a5c8-4fba-9fb5-3bfaa27e191a>; See also about the various criteria set by the AVMSD for the assessment of a service in terms of being “TV-like” the lead article by Cabrera Blázquez F.J., “On-demand services: made in the likeness of TV?” in IRIS Plus2013-4, “What is an on-demand service”, Nikoltchev S. (Ed), European Audiovisual Observatory, Strasbourg 2013, www.obs.coe.int/documents/205595/264635/IRIS_plus_2013-4_text_EN_%28with_cover%29_BAT_optim.pdf.

¹²¹ Recital 21 AVMSD recalls that this definition covers any form of economic activity, including that of public service enterprises, but does not cover activities which are primarily non-economic and which are not in competition with television broadcasting. This excludes on-demand offerings of a private nature and no commercial relevance, such as private websites and blogs, as well as user-generated content hosted on dedicated platforms, such as YouTube.

¹²² According to Article 1(1)(c) AVMSD “editorial responsibility” means, in the case of on-demand audiovisual media services, the exercise of effective control both over the selection of the programmes and over their organisation in a catalogue. A “media service provider” is the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised (Article 1(1)(d) AVMSD). This definition excludes natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties, such as UGC platforms, as clarified in Recital 26 AVMSD.

¹²³ Recital 22 AVMSD defines the “provision of programmes as principal purpose” by excluding all services where the audiovisual content provided is merely incidental to the service and not its principal purpose. Examples of this are websites that contain animated graphical elements, short advertising spots, or information related to a product or non-audiovisual services. The definition excludes games of chance involving a stake that represents a sum of money, as well as online games and search engines, but not broadcasts devoted to gambling or games of chance. The definition also excludes any form of private correspondence, such as emails sent to a limited number of recipients.

¹²⁴ Only programme services “the form and content of which are comparable to the form and content of television broadcasting” shall be subject to the AVMSD. The intention of the EU legislator is to cover only on-demand and broadcast television audiovisual media services which are “television-like”, i.e. “that [...] compete for the same audiences as television broadcasts and the nature and the means of access to the service would lead the user to reasonably expect regulatory protection within the scope of the Directive” (Recital 24 AVMSD).

¹²⁵ According to Recital 21 AVMSD, the AVMSD covers audiovisual media services (television broadcasting and on-demand services) that are “mass media”; that is, intended for reception by a significant proportion of the general public and able to have a clear impact on it.



The legal definition provided in the AVMSD is therefore more restrictive than the previously mentioned technical definition of the ITU, as it excludes from its scope VoD forms that are not part of the normal service activities, or cases where the use of VoD techniques is not part of the “principal purpose” of a service (e.g. services consisting of programmes provided by end-users).

In a context of the ever-increasing convergence of services, it becomes more and more challenging to implement a two-layer approach distinguishing between:

- those on-demand services that are “TV-like” and fall under the editorial responsibility of a media provider and therefore are subject to the AVMSD rules, and;
- all other on-demand audiovisual content provided by Internet-based services, such as content hosted by online video-sharing platforms or by intermediaries, which continue to be qualified as an information society service and fall under the E-Commerce directive

Maintaining such completely separated regulatory approach among on-demand audiovisual services becomes even a public policy challenge for the EU legislator, especially when it comes to the protection of vulnerable groups of viewers such as children. In the presentation of the proposal to amend the AVMSD of 25 May 2016,¹²⁷ the European Commission thus announced as one of its goals: “to achieve a better balance of the rules which today apply to traditional broadcasters, video-on-demand providers and video-sharing platforms, especially when it comes to protecting children.”¹²⁸

As far as the definition of ODAVMS is concerned, the proposal has left many of the seven above-mentioned criteria substantially unchanged, with the exception of “TV-likeness and the criteria of the “principal purpose” of providing programmes. In addition, other concepts, such as “editorial responsibility” are being revisited in order to include new types of services.

In particular, the definition of a “programme” is modified, and there is no longer reference to the “TV-likeness” criterion. Instead, the Commission provides concrete examples and adds “videos of short duration” to the existing list, which comprises feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama (new Article 1.1.(b)).

With respect to the “principal purpose” requirement, the proposal provides that it should also be considered to be met “if the service has audiovisual content and form which is dissociable from the main activity of the service provider, such as stand-alone parts of online newspapers featuring audiovisual programmes or user-generated videos where those parts can be considered dissociable from their main activity” (Recital 3).¹²⁹ The Commission expressly excludes social media

¹²⁶ Electronic communications networks are defined in Article 2(a) of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive) as “transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed”. This definition excludes certain traditional forms of distributing audiovisual works, such as exhibition in cinemas and the selling and renting of DVDs or BluRays (even if the sale or rental is made through a website).

¹²⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council amending 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 in view of changing market realities, 25 May 2016, COM (2016) 287.

<https://ec.europa.eu/digital-single-market/en/news/proposal-updated-audiovisual-media-services-directive>.

¹²⁸ European Commission, Press release, “Commission updates EU audiovisual rules and presents targeted approach to online platforms”, 25 May 2016, http://europa.eu/rapid/press-release_IP-16-1873_en.htm.

¹²⁹ Proposal for a Directive amending Directive 2010/13/EU, *op.cit.*, Article 1.1(a)(i),



services, except if they provide a service that falls under the definition of a video-sharing platform. On the other hand, new services which according to the Commission are not editorially responsible, such as video-sharing platform services, will enter into the scope of the AVMSD, as will be explained in the next section.

1.2.4. The typology of online platforms delivering audiovisual content

1.2.4.1. Online platforms: a broad and undefined concept

The definition of “online platforms” has been the source of much debate in the EU and there is currently no generally agreed definition of this notion. Online platforms may cover a broad range of services (e.g. Amazon, eBay, Facebook, Uber, etc.) and business models (e.g. social media, search engines, app stores, e-commerce platforms, price comparison websites, etc.), which have little in common.¹³⁰ They may take various shapes, have different sizes and they are constantly evolving in a context of rapid technological developments. Nonetheless, it is a concept which is mentioned in various policy initiatives at EU level.

The Digital Single Market (DSM) Strategy for Europe¹³¹ refers to online platforms in several key actions recommended by the European Commission. However, rather than fixing a “one-size-fits-all” definition, the Commission prefers to provide a wide-ranging set of examples. As outlined by the Commission in the Staff Working Document¹³² accompanying “Online Platforms Communication on Online Platforms and the Digital Single Market¹³³ of 25 May 2016, “a clear-cut definition would likely be too narrow, or conversely apply to a very wide range of Internet services”. The Communication accordingly focuses on the main characteristics of online platforms:

- *they have the ability to create and shape new markets, to challenge traditional ones and to organise new forms of participation or conducting business based on collecting, processing, and editing large amounts of data;*
- *they operate in multisided markets but with varying degrees of control over direct interactions between groups of users;*
- *they benefit from network effects, where, broadly speaking, the value of the service increases with the number of users;*
- *they often rely on information and communications technologies to reach their users [...];*

<https://ec.europa.eu/digital-single-market/en/news/proposal-updated-audiovisual-media-services-directive>.

¹³⁰ For a detailed discussion of different approaches to defining online platforms, see: Martens, B. (2016) “An economic policy perspective on online platforms”. JRC/IPTS Digital Economy Working Paper 2016-05, available at <https://ec.europa.eu/jrc/sites/default/files/JRC101501.pdf>.

¹³¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Digital Single Market Strategy for Europe”, SWD(2015) 100 final, COM(2015) 192 final, Brussels, 6 May 2015, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=FR>.

¹³² Commission Staff Working Document, Online Platforms accompanying the document “Online Platforms and the Digital Single Market (COM(2016) 288), http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=15947.

¹³³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe, Brussels, 25 May 2016, COM(2016) 288 final, <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-288-EN-F1-1.PDF>.



- *they play a key role in digital value creation, notably by capturing significant value (including through data accumulation), facilitating new business ventures, and creating new strategic dependencies.*

A list of activities falling within the scope of online platforms accompanies this description, which includes online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services,¹³⁴ payment systems, and platforms for the collaborative economy.

Although no specific definition is included in the Communication on Online Platforms and the Digital Single Market, it is worth mentioning that the Staff Working document accompanying this Communication¹³⁵ gives a broad definition of online platforms, as follows:

[...] "two-sided" or "multi-sided" markets where users are brought together by a platform operator in order to facilitate an interaction (exchange of information, a commercial transaction, etc.). In the context of digital markets, depending on a platform's business model, users can be buyers of products or services, sellers, advertisers, software developers, etc.

In the same vein, the glossary of the Digital Single Market,¹³⁶ insists on the role of online platforms in social and economic life and for consumers and gives some key characteristics common to all of them, "including the use of information and communication technologies to facilitate interactions (including commercial transactions) between users, collection and use of data concerning these interactions, and network effects which make the use of the platforms with most users most valuable to other users."¹³⁷

In the audiovisual field, online platforms that provide access to aggregated or user uploaded content (video-sharing platforms), such as YouTube, Dailymotion, Facebook, etc. are increasingly popular among viewers. Despite the fact that some of these online platforms are used for similar purposes as other traditional on-demand audiovisual services, they are assimilated, from a regulatory perspective, to "information society services" (ISS)¹³⁸ and fall under the scope of the e-Commerce Directive.¹³⁹ This Directive provides for a special limited liability regime for those ISS, the activity of which is limited "to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient." "This activity is considered to be of a mere technical, automatic, and passive nature, which implies that the ISS has

¹³⁴ The list initially provided by the Commission for the purpose of the Consultation carried out previously to the adoption of the Communication did not include "communication services", which potentially covers a wide range of activities many of which would not usually be regarded as platforms.

¹³⁵ Commission Staff Working Document, Online Platforms *accompanying the document* "Online Platforms and the Digital Single Market (COM(2016) 288), http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=15947.

¹³⁶ Op. cit.

¹³⁷ See also TNO, Ecorys and IViR, "Digital platforms: an analytical framework for identifying and evaluating policy options report, Final Report, at <http://www.ivir.nl/publicaties/download/1703>.

¹³⁸ An "information society service" is defined as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services, within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:217:0018:0026:en:PDF>.

¹³⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=en>.



neither knowledge of nor control over the information which is transmitted or stored.” However, as outlined by the Commission in the Communication on Online Platforms and the Digital Single Market, it is not always clear to define the limits on what intermediaries can do with the content that they transmit, store or host before losing the possibility to benefit from the exemptions from liability set out in the e-Commerce Directive. Recent EU legislative developments show an evolution of the role of some online platforms as mere technical intermediaries, which may come with a new typologies of these players, as will be detailed in the next section.

Other horizontal legislations apply to online platforms, as for example relating to consumer protection and data protection. Viewers of on-demand content are also consumers, and as such they are concerned with the same rules as consumers of other goods and services. The Directive on Consumer Rights¹⁴⁰ includes in the definition of “digital content” music and videos irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Although online platforms are not defined in this directive, they are referred to in a way that tends to reflect the intermediary nature of the platform with respect to the trader, as follows: “The notion of an organised distance sales or service provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform.”¹⁴¹ With regard to personal data protection, the Data Protection Directive¹⁴² is applicable to online platforms, as is/will be the General Data Protection Regulation (GDPR) adopted in April 2016.¹⁴³

1.2.4.2. Ensuring that online platforms act responsibly

As outlined during the Consultation carried out in the context of the Communication on Online Platforms and the Digital Single Market, platforms are increasingly taking centre stage in respect of access to information and content for many parts of society, with the added responsibilities that this role brings.

The limited liability regime for intermediary service providers of the e-Commerce Directive was set out at a time when online platforms did not have the same characteristics and scale as they have today. Although a technology-neutral regulatory environment was – and in many aspects still is – considered by stakeholders as important for the development of the digital economy in the EU, new issues have arisen that need to be addressed at the regulatory level and which call for greater transparency of platforms.

In relation to unlawful content, for example, the Commission has already suggested in the DSM Strategy that it will investigate “whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems – a duty of care”.

¹⁴⁰ See Article 2(11) and Recital 19 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0083>.

¹⁴¹ Recital 20.

¹⁴² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN>.

¹⁴³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>.



In the same way, and more interestingly as far as definitions and typologies of online platforms are concerned, the Commission has proposed a new definition of “video-sharing platforms services” in its proposal of 25 May 2016 to amend the AVMSD, in order to address the proliferation on video-sharing platforms of content that is harmful to minors or which contains hate speech. According to this proposal, “video-sharing platforms services” are defined as the services which meet all of the following requirements:¹⁴⁴

- (i) *the service consists of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility;*
- (ii) *the organisation of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing;*
- (iii) *the principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate;*
- (iv) *the service is made available by electronic communication networks (...).*

In practice, the concept of “editorial responsibility” appears decreasingly relevant in relation to the material scope of the AVMS Directive, as illustrated otherwise in Recital 3 of the amending proposal, which states as follows:

[...] “A service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity. As such, channels or any other audiovisual services under the editorial responsibility of a provider may constitute audiovisual media services in themselves, even if they are offered in the framework of a video-sharing platform which is characterised by the absence of editorial responsibility. In such cases, it will be up to the providers with editorial responsibility to abide by the provisions of this Directive”.

The Commission considers that a notable share of the content stored on video-sharing platform is not under the editorial responsibility of the video-sharing platform provider. However, it acknowledges that these providers intervene in some way in the organisation of the content, programmes or user-generated video, and that this intervention is not merely the result of automatic means or algorithms.

As a general rule, social media, such as Facebook or other services, would not be included in this definition as they do not have as a principal purpose the provision of programmes or user-generated videos to the public.¹⁴⁵ Of course, this may evolve with time and if a particular social media provider meets all the characteristics of a video-sharing platform, they will be covered as such. While newspaper websites remain outside the scope of the Directive, standalone parts of

¹⁴⁴ See new Article 1.1 (aa) of the Proposal for a Directive of the European Parliament and of the Council amending 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 in view of changing market realities, COM(2016) 287 final, Brussels, 25 May 2016, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0287&from=EN>.

¹⁴⁵ It is worth noting that the proposal also provides for a new definition of “user-generated video” as “a set of moving images with or without sound constituting an individual item that is created and/or uploaded to a video-sharing platform by one or more users” (Article 1.1. (ba), *Ibid*). In addition, “video-sharing platform providers” are defined as “the natural or legal person who provides a video-sharing platform service” (Article 1.1 (da), *Ibid*).



newspaper websites which feature audiovisual programme or user-generated videos will be considered as video-sharing platforms for the purpose of the AVMSD. However, any occasional use of videos in websites, blogs, or newspapers will be outside the scope of the Directive.

As with any Directive, the AVMSD will be implemented in national law. On the basis of the criteria set out in the Directive, national audiovisual regulators will determine which players are covered. The Commission's monitoring of the implementation of the Directive will ensure a consistent approach.

The second issue where the Commission intervenes towards an increased responsibility of online platforms concerns the allocation of revenues generated by the online distribution of copyright-protected content. In view of the increasingly central role of video-sharing platforms in the distribution of copyright-protected content uploaded by end-users, and considering the growing economic benefits that these platforms obtain from such content, there is a growing concern at EU political level as to whether the value generated by some of these new forms of online content distribution is fairly shared between distributors and rights holders.

The Commission addresses this question of “fair sharing of value” through sector-specific regulation in the area of copyright. The proposal of 14 September 2016 for a Directive on copyright in the Digital Single Market¹⁴⁶ provides for specific measures aimed at improving the position of rightholders to negotiate with and be remunerated for the exploitation of their content by the online services giving access to user-uploaded content. The online platforms concerned by these measures are referred to as “information society service providers” that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users. No further definition is given in the proposal nor in the accompanying documents about the services concerned by this measure.

1.2.5. A “new notion of media”

The Council of Europe has developed over the years a significant body of standards with regard to the media in order to assist media policy makers in their necessary endeavour to offer media the protection it needs for its proper functioning and in its related regulatory activities. On 21 September 2011, the Committee of Ministers adopted a Recommendation on a New Notion of Media.¹⁴⁷ The Recommendation comes with an Appendix aimed at proposing guidance to the member states in order to facilitate the implementation of the Recommendation. The Appendix gives a number of key criteria and accompanying indicators for discerning whether particular activities, services or actors might be categorised as media. The criteria used by the Council of Europe are as follows.

¹⁴⁶ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016) 593 final) of 14 September 2016, <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF>.

¹⁴⁷ Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media? 21 September 2011, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2011\)7&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2011)7&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true).



1.2.5.1. Intent to act as media

This criterion refers to the self-labelling as media; the application of working methods which are typical for media; the commitment to professional media standards; and making practical arrangements for mass communication. The Recommendation clarifies that in a new communications environment, this extends to action taken to arrange, aggregate or select (for example by means of algorithms) and to disseminate the above-mentioned content to potentially large numbers of people through means of mass communication. It also extends to operating applications for collective online shared spaces which are designed to facilitate interactive mass communication (or mass communication in aggregate) or other content-based large-scale interactive experiences. It can, in particular, be evidenced by the means, arrangements or structures put in place for mass communication (for example platform or bandwidth enabling mass outreach).

1.2.5.2. Purpose and underlying objectives of media

This includes the production, aggregation or dissemination of media content; the operation of applications or platforms designed to facilitate interactive mass communication or mass communication in aggregate (such as social networks) and/or the provision of content-based large-scale interactive experiences (such as online games). The media's purpose and underlying objectives remain a determining factor, especially as regards its role in and impact on society. This criterion will therefore be an important tool when considering a differentiated and graduated response at the regulatory level.

With respect to platforms, the Recommendation details that:

arranging, aggregating, selecting or, on occasion, even promoting content for its broad dissemination are relevant. Depending on the degree to which criteria are met, the notion of producer may need to be distinguished from media (for example in respect of content-sharing platforms subject to light touch editorial control or ex post moderation). In this respect, reference to traditional media's interactive or user generated content (for example collaborative, audience participation, call-in, quiz or talk show formats) may be useful.

1.2.5.3. Editorial control

Editorial control can be evidenced by the editorial policy (decision to promote certain content, ways to arrange or present content, etc.). The Recommendation outlines that "in the new communications environments, editorial policies can be embedded in mission statements or in terms and conditions of use (which may contain very detailed provisions on content), or may be expressed informally as a commitment to certain principles (for example netiquette, motto)." This criterion is also consistent with the involvement of editorial staff and different levels of editorial control.

Consequently, the Recommendation considers that "a provider of an intermediary or auxiliary service which contributes to the functioning or accessing of a media but does not – or should not – itself exercise editorial control, and therefore has limited or no editorial responsibility, should not be considered to be media." Nonetheless, action taken by providers of intermediary or auxiliary services as a result of legal obligations (for example, the take down of content in response to a judicial order) should not be considered as editorial control.



1.2.5.4. Professional standards

This criterion refers to a commitment to preserve the values of media (e.g. deontology, ethics and standards), compliance procedures, complaints procedures, and asserting prerogatives, rights, or privileges.

1.2.5.5. Outreach and dissemination

The Recommendation stresses that outreach or actual dissemination (the number of copies, viewers, or users) is an important indicator in identifying media and in distinguishing it from private communication, including private communication taking place in a public space. However, there is no single or common understanding of what constitutes a mass or large audience; it can easily range from a territorial, interest, or other community (for example the target of local, professional, or community media) to potentially global audiences (in the case of satellite television or certain Internet services). This is particularly true in a context of increasing on-demand delivery of content, conditional access, personalisation of content, etc. with a full range of public (one-to-many, many-to-many) communication, as well as group (few-to-few) and private communication (one-to-one) taking place on the Internet. For an assessment of outreach, the Recommendation considers that “attention should be paid to the aggregated audience, namely all those sharing the platform or common features of the service and who can be reached by the content produced, arranged, selected, aggregated or distributed by the operator, including when the delivery of or access to content is not simultaneous” (e.g. the number of registered users can constitute a useful indicator in this regard).

1.2.5.6. Public expectation

This criterion includes different components such as the availability, pluralism and diversity, reliability, respect of professional and ethical standards, accountability, and transparency of the service.

Based on these criteria, the Recommendation offers guidance to policy makers on how to apply media standards to new media activities, services, or actors in a graduated and differentiated manner. Furthermore, it provides a substantive basis for implementing the recommendation that member states engage in dialogue with all actors in the media ecosystem in order for them to be properly apprised of the applicable legal framework. It should also assist media actors in any self-regulatory exercise in which they may engage.





2. International and European legal framework

2.1. International framework

2.1.1. International trade negotiations and the audiovisual sector

According to the concept of “cultural exception” (or exemption), which was promoted by France in the General Agreement on Tariffs and Trade (GATT) negotiations in 1993, culture should be treated differently from other commercial products, and cultural goods and services should be left out of international treaties and agreements. In practice this concept translates in the audiovisual sector into a set of measures aimed at promoting the creation, production, distribution and diffusion of works, including regulation mechanisms, financing tools, tax measures, etc. Besides their specificities, these measures are based on common principles: the promotion of creation, ensuring the diversity of the cultural offer, the guaranteeing the access of the public to a varied and diversified cultural offer, and contributing to the financing and support of the sector.¹⁴⁸

In 2005 the specificities of the cultural sector were recognised at international level with the adoption of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions as a binding legal instrument which recognises the rights of Parties to take measures to protect and promote the diversity of cultural expressions, and impose obligations at both domestic and international levels on Parties.¹⁴⁹ The Convention was signed by the EU through a Council Decision in 2006,¹⁵⁰ and entered into force on 18 March 2007.¹⁵¹

The main objective of the Convention is to protect and promote the diversity of cultural expressions, while strengthening economic growth and cultural acceptance. Among other objectives, the Conventions give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values, and meaning. It also reaffirms the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and

¹⁴⁸ See European Parliamentary Research Service Blog, “TTIP and the cultural exception”, <https://epthinktank.eu/2014/08/29/ttip-and-the-cultural-exception/>.

¹⁴⁹ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 October 2005, http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹⁵⁰ Council decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:201:0015:0030:EN:PDF>.

¹⁵¹ In accordance with Article 29: “1. This Convention shall enter into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States or regional economic integration organizations that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date. It shall enter into force with respect to any other Party three months after the deposit of its instrument of ratification, acceptance, approval or accession.”



promotion of the diversity of cultural expressions on their territory. According to Article 6 of the Convention, each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.¹⁵²

Beyond the EU's legal obligations to protect and promote the diversity of cultural expressions under the UNESCO Convention, Article 167 of the Treaty on the Functioning of the European Union (TFEU) provides that the Union "shall contribute to the flowering of the cultures of the member states, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore".¹⁵³ Paragraph 4 of this Article states that "the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures". Moreover, Article 207(4)(a) TFEU provides that the Council of the EU shall act unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity. This means that each member state effectively has a right to veto any trade negotiation in respect of audiovisual matters.

The position of the European Union concerning international trade negotiations has always been to ensure that the Union and its member states maintain the possibility to preserve and develop the capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity.¹⁵⁴ This has been the case during the negotiations on the General Agreement on Trade in Services (GATS),¹⁵⁵ and more recently during the Transatlantic Trade and Investment Partnership (TTIP)¹⁵⁶ negotiations. Regarding the latter, on 22 May 2013 the European Commission's Commissioner for Trade, Mr Karel De Gucht, declared during a plenary debate of the European Parliament on the TTIP¹⁵⁷ that minimum requirements during the negotiation as follows:

- *The EU and the Member State measures in support of their audio-visual sector can be maintained and will not be subject to negotiations. The EU and the Member States will retain the policy space to promote cultural diversity, for example, through subsidies, tax incentives etc. This will of course also include the development of new instruments to finance cultural works. This applies, in particular, to cinema and public broadcasting.*
- *No one will touch the existing quotas or the necessary policy space to adjust our policy in view of the technological change, but, on the other hand, we do not believe there could be a serious argument in favour of increasing such space, for example, by reserving the right to forbid 100% foreign movies and television programmes, for example, on video on demand services.*

We acknowledge that the main challenge in the future to support Europe's audiovisual sector is to address the evolution of digital technology. The EU and the Member States will need

¹⁵² This may be done within the framework of each Party's cultural policies and measures as defined in Article 4.6 and taking into account its own particular circumstances and needs.

¹⁵³ Consolidated version of the Treaty on the Functioning of the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

¹⁵⁴ See Herold A., "European Public Film Support within the WTO Framework", IRIS plus 2003-6, European Audiovisual Observatory, 2003, <http://www.obs.coe.int/documents/205595/264575/IRIS+plus+2003en3LA.pdf/846a8556-cc1e-4606-bd1a-823cbd39ec44>.

¹⁵⁵ General Agreement on Trade in Services and related instruments, https://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm

¹⁵⁶ <http://ec.europa.eu/trade/policy/in-focus/ttip/>.

¹⁵⁷ Karel De Gucht, European Commissioner for Trade, "Remarks on the Transatlantic Trade and Investment Partnership", 22 May 2013, http://europa.eu/rapid/press-release_SPEECH-13-446_en.htm.



policy space to do this. We will reserve the necessary policy space to regulate at the EU level in order to adapt our policies to technological evolutions in the audio-visual sector!

Later, the European Parliament recommended in a resolution of 8 July 2015¹⁵⁸ that it is ensured:

via a legally binding general clause applicable to the entire agreement, in full compliance with the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, that the parties, reserve their right to adopt or maintain any measure (in particularly those of a regulatory and/or financial nature) with respect to the protection or promotion of cultural and linguistic diversity, in line with the relevant Articles as established in the Treaty on the Functioning of the European Union, as well as media freedom and media pluralism, irrespective of the technology or distribution platform used and keeping in mind that the mandate given to the European Commission by the Member States explicitly excludes the audiovisual services.

Furthermore, the resolution recommends:

to specify that nothing in the agreement shall affect the ability of the EU or EU Member States to subsidise and provide financial support to cultural industries and cultural, educational, audiovisual and press services.

2.1.2. The Council of Europe

2.1.2.1. The European Convention on Transfrontier Television

The European Convention on Transfrontier Television (ECTT) adopted in 1989,¹⁵⁹ and amended in 1998¹⁶⁰ to align to the revised TWF Directive 97/36/EC,¹⁶¹ was adopted with the purpose to facilitate, among the Parties, the transfrontier transmission and the retransmission of television programme services. Article 10 ECTT, concerning cultural objectives, introduced an obligation for broadcasters to reserve for European works a majority proportion of its transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services, and tele-shopping. The Parties also undertook to look together for the most appropriate instruments and procedures to support, without discrimination between broadcasters, the activity and development of European production, particularly in countries with a low audiovisual production capacity or restricted language area.

¹⁵⁸ European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN>.

¹⁵⁹ European Convention on Transfrontier Television, Strasbourg 5 May 1989, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007b0d8>.

¹⁶⁰ Protocol amending the European Convention on Transfrontier Television, Strasbourg 1 October 1998, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f2cd>.

¹⁶¹ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31997L0036>.



Originally the ECTT served as a model for the EU regulatory efforts in this field.¹⁶² However, it remains unchanged since its amendment in 1998.¹⁶³ Indeed, plans for a further update to the Convention were halted in 2011, after objections from the European Commission that it alone had exclusive competence in this field as regards EU member states, i.e. EU member states are not allowed to become party to the Convention on their own.¹⁶⁴ The Parliamentary Assembly of the Council of Europe¹⁶⁵ in 2014 called for a resumption of the revision of the Convention. However, the position of the European Commission remained unchanged and, in September 2014,¹⁶⁶ the Committee of Ministers of the Council of Europe replied that:

one of the main achievements of the Convention was to set binding legal standards in relations between European Union member States and non-European Union member States which are parties to the convention. It considers the discontinuation of the revision of the convention as a serious step back from this perspective, but sees no possibility to continue this work at the present stage, since it has been informed by the European Union delegation that most issues covered by the convention fall under the exclusive external competence of the European Union and that the European Union does not have any intention to become party to the convention. As the draft revised convention contains a number of provisions which might not necessarily be in line with the European Union acquis, individual European Union member States would not be able to become party to the revised convention if it were to be adopted.” In this context, the Committee of Ministers informed the Parliamentary Assembly that “(it) has not allocated any resources to work on the European Convention on Transfrontier Television over the last three years and sees no reason to review its position for the time being.

There is therefore a significant asymmetric regulatory framework across Europe, with 28 EU members bound by the AVMSD as amended in 2007, and the other 15 European countries that have signed or ratified the Convention¹⁶⁷ remaining under an old set of rules which, for example, do not include on-demand audiovisual media services in their scope. In the current situation, these countries are prevented, in a constantly changing media environment, from having an updated legal instrument, with a consequent risk of standards diverging.

¹⁶² See section 2.2. of this publication.

¹⁶³ For an outlook of the issues discussed by the Standing committee on transfrontier television, see the Report by Andreas Grünwald on possible options for the review of the European Convention on Transfrontier Television, <https://rm.coe.int/CoERMPublicCommonSearchServices/sso/SSODisplayDCTMContent?documentId=09000016805949d7>. Undoubtedly the discussions carried out under the umbrella of the Council of Europe on different types of media services and new media paved the way for the on-demand differentiation in the AVMSD.

¹⁶⁴ In its proposal for a Directive amending the AVMSD of 25 May 2016, the European Commission states that “to the extent that some of the existing AVMSD rules are less strict than the Convention rules, implementation of the AVMSD rules by EU member states which are contracting parties to the Convention could already result in some differences between EU member states depending on whether they are contracting parties to the Convention in respect of their international obligations. This will also be the case for some amendments contained in this proposal, which could introduce in the AVMSD further rules that are less strict than the Convention rules”. The Commission notes that “For the matters covered by the AVMSD the Union has acquired exclusive competence to enter into international agreements. Any changes of the obligations stemming from the Convention would thus require action on the part of the Union.”

¹⁶⁵ Parliamentary Assembly Recommendation 2036 (2014) on the Revision of the European Convention on Transfrontier Television, 31 January 2014, www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=20507&lang=en.

¹⁶⁶ Committee of Ministers Reply to the Parliamentary Assembly, 23 September 2014, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21152&lang=en>.

¹⁶⁷ Andorra, Armenia, Azerbaijan and Monaco are members of the Council of Europe but not Parties to the ECTT.



2.1.2.2. The Recommendation on a new notion of media

On 21 September 2011, the Committee of Ministers of the Council of Europe adopted a Recommendation on a new notion of media.¹⁶⁸ This is a follow-up to the First Council of Europe Conference of Ministers responsible for Media and New Communication Services, entitled “A new notion of media?”, which was held on 28-29 May 2009 in Reykjavik (Iceland).¹⁶⁹

The Recommendation takes into consideration various technology-driven changes in the media sector and their broader consequences, which require a re-examination of existing media policy. The Recommendation states that “[a]ll actors - whether new or traditional - who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection and provides a clear indication of their duties and responsibilities in line with Council of Europe standards”. It continues: “[t]he response should be graduated and differentiated according to the part that media services play in content production and dissemination processes”. Accordingly, the Committee of Ministers recommends that member states:

- “adopt a new, broad notion of media” encompassing all relevant actors”;
- “review regulatory needs in respect of all actors”;
- “apply the criteria set out” in the Appendix “when considering a graduated and differentiated response for actors [...], having regard to their specific functions in the media process and their potential impact and significance in ensuring or enhancing good governance in democratic society”;
- “engage in dialogue with all actors in the media ecosystem in order for them to be properly apprised of the applicable legal framework [...]”;
- “adopt strategies to promote, develop or ensure suitable levels of public service delivery” so as to ensure, inter alia, “a satisfactory level of pluralism, diversity of content and consumer choice”;
- “remain attentive to addressing situations of strong concentration in the media ecosystem [...]”;
- “undertake action, individually or collectively, to promote these approaches in appropriate international fora”.

The Appendix to the Recommendation comprises two substantive parts and an extensive list of relevant Council of Europe standards that complete the international framework of interpretative tools.¹⁷⁰

¹⁶⁸ Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media,

<https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec%282011%297&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true>

¹⁶⁹ 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, ‘A new notion of media?’, 28-29 May 2009, Reykjavik, Iceland, http://www.coe.int/t/dc/files/ministerial_conferences/2009_media_communication/default_EN.asp.

¹⁷⁰ See Chapter 1.2.5. for more details on Council of Europe standards regarding the new notion of media.



2.2. The EU framework

2.2.1. The EU and the promotion of culture in the field of media

The actions of the European Union in the field of culture are governed by the principles of conferral, subsidiarity and proportionality enshrined in Article 5 of the Treaty on European Union (TEU). Under the principle of conferral (Article 5(2) TEU), the European Union acts only within the limits of the competences conferred upon it by the member states in the Treaties with the purpose of fulfilling the objectives set out therein. Under the principle of subsidiarity (Article 5(3) TEU), in cases where the Union does not have exclusive competence, the Union can only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states but can rather be better achieved at Union level. Under the principle of proportionality, the content and form of Union action cannot go beyond what is necessary to achieve the objectives of the Treaties (Article 5(4) TEU). The Protocol (No. 2) on the application of the principles of subsidiarity and proportionality further regulates the action of the European Union under these principles.

Under Article 2(5) and Article 6(c) of the Treaty on the Functioning of the European Union (TFEU), the European Union has the competence to carry out actions to support, co-ordinate, or supplement the actions of the member states in the field of culture.

The Treaty of Rome did not provide for any direct powers in the field of audiovisual and media policy, nor does the TFEU. Competence over media policy is rather drawn from various articles within the TFEU in order to construct policies for the various media and communication technology sectors and to provide direction on basic features that underlie media policy. Considering the complex nature of media goods and services, which can be defined neither solely as cultural goods nor simply as economic goods, the legal bases for the construction of audiovisual and media policy are therefore varied and draw on multiple sources.¹⁷¹ The central ones for media policy are Articles 167 (Culture) and 173 (Industry).

According to Article 167 TFEU, the European Union contributes “to the flowering of the cultures of the member states, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”. Action by the Union shall be aimed at encouraging co-operation between member states and, if necessary, supporting and supplementing their action concerning, inter alia, artistic and literary creation, including in the audiovisual sector. Also, the European Union has to take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. Finally, the European Parliament and the Council may adopt incentive measures, excluding any harmonisation of the laws and regulations of the member states, and the Council, on a proposal from the Commission, may adopt recommendations.

Article 173 lays down a shared competence between the EU and its member states, as they both “shall ensure that the conditions necessary for the competitiveness of the Union's industry exist”. The objectives to achieve include accelerating the adjustment of industry to structural changes, encouraging an environment favourable to undertakings and their cooperation throughout

¹⁷¹ The most relevant provisions of the TFEU for media policy are enshrined in Articles 28, 30, 34, 35 (free movement of goods); 45-62 (free movement of persons, services and capital); 101-109 (competition policy); 114 (technological harmonisation, or the use of similar technological standards, for instance, in Internet productions); 165 (education); 166 (vocational training); 167 (culture); and 173 (industry). See European Parliament, Factsheet on Audiovisual and Media Policy, June 2016,

http://www.europarl.europa.eu/ftu/pdf/en/FTU_5.13.2.pdf.



the Union and to foster better exploitation of the industrial potential of policies of innovation, research, and technological development.

Apart from concrete funding actions under the Creative Europe programme, which address the audiovisual industry through the MEDIA sub-programme,¹⁷² or other measures concerning online accessibility of content,¹⁷³ European film heritage,¹⁷⁴ media literacy,¹⁷⁵ and media pluralism,¹⁷⁶ the most relevant regulatory initiative is the Audiovisual Media Services Directive (AVMSD).¹⁷⁷

2.2.2. Culture-related aspects in the AVMSD

Within the limits set by the legal basis as briefly described above, the AVMSD contains both reference to cultural and industry related aspects. Recitals 4-7 describe the context in which the rules are set:

*Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services.*¹⁷⁸

Since Article 167 TFEU requires “the Union to take cultural aspects into account in its action under other provisions of that Treaty, in particular in order to respect and to promote the diversity of its cultures”, the AVMSD includes, and this ever since its first version as TVWFD,¹⁷⁹ provisions on the promotion of European and independent audiovisual works.

2.2.2.1. European works in linear services

Promotional obligations on linear (broadcasting) services have existed since 1989. Articles 4 and 5 of the TVWFD provides that: in order to encourage the distribution and production of European television programmes, member states must ensure, where practicable, that broadcasters reserve

¹⁷² The Creative Europe programme was set up in 2014 to replace the MEDIA, MEDIA Mundus and Culture programmes, with a total budget of EUR 1.46 billion (2014-2020), of which at least 56% is set aside for the MEDIA sub-programme, at least 31% for the Culture sub-programme and at most 13% for the cross-sectoral strand. For further details, see <https://ec.europa.eu/programmes/creative-europe/>.

¹⁷³ European Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/en_4.pdf.

¹⁷⁴ Recommendation 2005/865/CE of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005H0865&rid=1>.

¹⁷⁵ European Commission, Call for proposals – Pilot Project “Media literacy for all”, 30 August 2016, <https://ec.europa.eu/digital-single-market/en/news/pilot-project-media-literacy-all>.

¹⁷⁶ European Commission grant to the Centre for Media Pluralism and Media Freedom (CMPF) at the European University Institute to implement the Media Pluralism Monitor (MPM), <https://ec.europa.eu/digital-single-market/en/media-pluralism-monitor-mpm>.

¹⁷⁷ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:en:PDF>.

¹⁷⁸ Recital 5, AVMSD.

¹⁷⁹ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation, or administrative action in member states concerning the pursuit of television broadcasting activities, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31989L0552>.



for European works a majority proportion of their transmission time, excluding the time allocated to news, sports events, games, advertising, and teletext and teleshopping services; they must also reserve at least 10% of their transmission time or 10% of their programming budget for European works from independent producers.

The application of these rules has been monitored by the European Commission through biennial reports submitted by the member states, providing a statistical statement on the fulfilment of the quotas referred to in Articles 4 and 5.¹⁸⁰

These articles remain unchanged during the two revision processes in 1997 and 2007, just the numbering changes to 16 and 17, still requiring broadcasters to reserve a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping, for European works (Article 16). In addition, 10% of their transmission time or 10% of their programming budget has to be devoted to independent works (Article 17).

2.2.2.2. European works in non-linear services

It is only with the revision in 2007 that non-linear (on-demand) services are included in the scope of promotion and distribution obligations. Member states are free to choose which type of measure to comply with, which can consist in financial obligations or a minimum share in the catalogue or in prominence requirements.

Article 13 replicates the same progressive approach that was foreseen for promotion obligations for broadcasting services in Articles 16 and 17 (formerly 4 and 5) and there is a significant freedom for member states to decide which measure to adopt.¹⁸¹ It should be noted that, as this principle is likely to be affected under the ongoing revision process of the AVMSD, these measures are limited to services that fall under the jurisdiction of each concerned member state.¹⁸²

¹⁸⁰ The **first** report of the European Commission on the application of Articles 4 and 5, COM(95) 57 final of 3 March 1994, <http://aei.pitt.edu/3114/1/3114.pdf>, was presented together with the proposal to amend the Directive, and gave a substantially positive evaluation of the compliance with the quotas, with most member states above the 51%, and contained the first Guidelines on the monitoring in Annex 1. The **second** report, COM(96) 302 final of 15 July 1996, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0302&rid=3>, showed an improvement of the fulfilment of the reporting obligations, both in terms of provision of data as of compliance with the rules. The **third** report, COM (98) 199 final of 3 April 1998, <http://aei.pitt.edu/3113/1/3113.pdf>, also contained an overall assessment of the period 1991-1996, and pointed to a fully operational monitoring activity which showed a significant increase both in channels as in promoted European works. The **fourth** report, COM (2000) 442 final of 17 July 2000, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0442&rid=3>, shows that most member states have introduced stricter rules and that the compliance with the quotas is more than satisfactory.

The **fifth** report, COM (2002) of 8 November 2001, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0612&rid=2>, which covers the first period regulated by the revised Directive, 97/36/EC, shows for the first time the general trends observed both at Community level and in the individual member states concerned. The **sixth** report, COM (2004) 524 final of 28 July 2004, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0524&rid=5>, shows that demand for national and European works, which was constantly increasing over the last decade, has reached a new peak in 2002, with almost 2/3 of all qualifying transmissions at Community level. The **seventh** report, COM(2006) 459 final of 14 August 2006, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0459&rid=3>, confirms the positive results of the previous reports, which is also the case of the **eight** report, COM(2008) 481 of 21 July 2008, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0481&rid=9>.

The **ninth** report, COM(2010) 450 final of 23 September 2010, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0450&rid=6>, which concerns the first period covered by the newly revised Directive, 2007/65/EC, shows, against a decrease of the broadcasting channels together with the growth of new services, a substantial stability of European works.

¹⁸¹ See Chapter 3 for a description of the national implementing measures.

¹⁸² See Chapter 6 for a description of the new approach put forward by the European Commission in its revision proposal of 25 May 2016.



*Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.*¹⁸³

Recital 69 puts the provisions into context, and clarifies that on-demand services may partially replace television broadcasting and are therefore called to actively contribute to the promotion of cultural diversity:

*On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. [...]*¹⁸⁴

As for obligations on linear services, the European Commission is called upon to monitor the implementation through the periodical reports of the member states.¹⁸⁵

2.2.3. Interpretative issues concerning non-linear services

In the context of the online environment there are various interpretative aspects that may be at stake when assessing the application of the rules concerning the promotion of European and independent works.

A first issue concerns the material scope of the rules, and how to identify the “TV-like” channels that fall under the Directive according to the interpretation of the CJEU.¹⁸⁶ According to Recital 24 only on-demand audiovisual media services which are “television-like” shall be covered by the AVMSD, i.e. services “that [...] compete for the same audiences as television broadcasts and the nature and the means of access to the service would lead the user to reasonably expect regulatory

¹⁸³ Article 13(1) of the AVMSD.

¹⁸⁴ Recital 69, first part, of the AVMSD.

¹⁸⁵ The **first** report on the implementation of Articles 13, 16 and 17 of the AVMSD, COM(2012) 522 final of 24 September 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0522&rid=7>, showed a quite uneven panorama, with only half of the member states being able to report, and a very divergent state of market development. In order to get a better understanding of the state of the art, the Commission circulated a questionnaire, and the results of this were published in a summary in July 2014, http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=6296.

The **second** report was presented as Annex 8 of the Ex-post REFIT evaluation, SWD(2016) 170 final of 25 May 2016, accompanying the revision proposal, COM(2016) 287 final, http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=15962. The Report concerns only Articles 16 and 17, i.e. only broadcasting services, and confirms the divergences in reporting methodology and also the difficulties in collecting the data. As to Article 13, the REFIT document contains an overview table of the measures adopted by the member states as Annex 4.

¹⁸⁶ CJEU, *New Media Online v Bundeskommunikationssenat*, Case C-347/14, Judgment of 21 October 2015, <http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0347&lang1=fr&type=TEXT&ancre=>. See Ó Fathaigh R., “New Media Online v. Bundeskommunikationssenat”, IRIS 2015-10/3, <http://merlin.obs.coe.int/iris/2015/10/article3.en.html>.



protection within the scope of the Directive". It follows from this Recital that the concept of "programme" has to be interpreted in a dynamic way, taking into account developments in television broadcasting in order to prevent disparities as regards free movement and competition. How the television-likeness should then be combined with the concept of "principal purpose", according to the definition of an AVMS provider, is not always self-evident when it comes to aggregator services.

Another aspect concerns the definition of the borders of editorial responsibility which, according to Recital 25, is linked to the concept of "effective control" over the selection and the organisation of the content within a catalogue. This concept may be further specified by member states, but should never be with prejudice to the exemption of liability established by the e-Commerce Directive.¹⁸⁷ How this concept should be applied to channels that are automatically generated by platforms' algorithms, as YouTube auto-generated channels, does not find any answer in the current directive, but clearly poses issues in terms of level playing field in the online environment.

A third question regards the effectiveness of these provisions in the absence of a coherent set of rules on access and findability. Must-carry and must-offer rules¹⁸⁸ introduced at national level under the telecom package and prominence obligations under the AVMSD may compensate for this, but as long as they are not mandatory and member states may opt out from them, they would not meet these expectations.

A last, but not less relevant issue concerns the applicability of the country of origin principle to on-demand services and the risk of forum-shopping by global players. As the European Commission has pointed out in the REFIT exercise, some VoD service providers are established in one member states but mainly target a different member state because they often choose to establish themselves in countries with the most favourable regulatory treatment). Thus on-demand providers do not contribute to the promotion obligations (particularly investment in creative production and distribution) in the member states they target, when different from their country of establishment.

¹⁸⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031>.

¹⁸⁸ See van Eijk N. and van der Sloot B., "Must-carry Regulation: a Must or a Burden?", in *IRIS Plus*, 2012-5, European Audiovisual Observatory, Strasbourg, 2012, [http://www.obs.coe.int/documents/205595/264635/Iris_plus_2012-5_EN_\(cover%2Btext\).pdf](http://www.obs.coe.int/documents/205595/264635/Iris_plus_2012-5_EN_(cover%2Btext).pdf), and Scheuer A. and Schweda S., "Progress in the Must-offer Debate? Exclusivity in Media and Communication", *IRIS Plus*, 2008-10, European Audiovisual Observatory, Strasbourg, 2008, <http://www.obs.coe.int/documents/205595/264585/IRIS+plus+2008en6LA.pdf>.



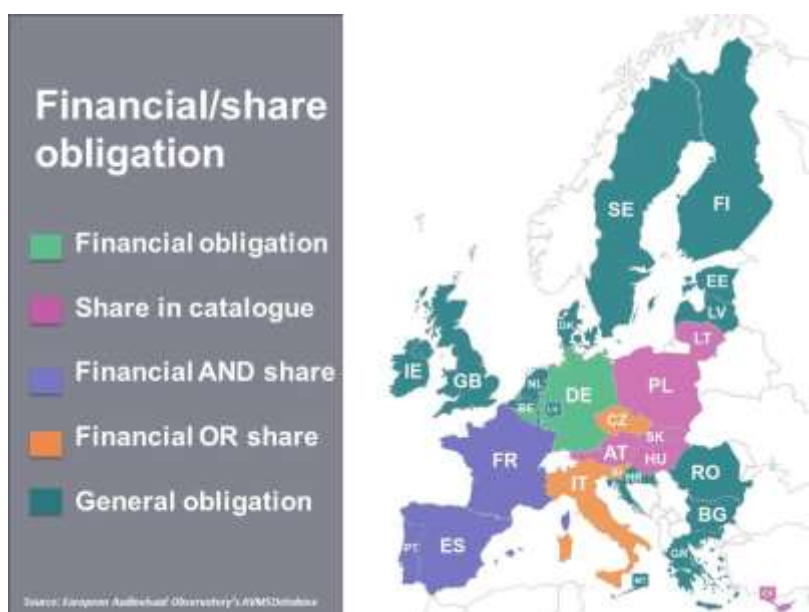
3. National legal framework

3.1. Comparison

As explained in Chapter 2 of this publication, Article 13 AVMSD provides that on-demand AVMS must promote, where practicable and by appropriate means, the production of and access to European works. As possible ways of fulfilling this obligation, the AVMSD lists, inter alia, the financial contribution made by such services to the production and rights acquisition of European works, or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.

Given the flexibility with which the member states may implement the provisions of Article 13 AVMSD, a map of its transposition into national law provides quite a colourful picture. As the following map shows, many member states have introduced a general obligation without providing details about how to fulfil this obligation. 2 member states have decided to introduce financial obligations, 6 have opted for a quota obligation concerning European works in catalogues, 3 cumulate both obligations, and 3 give service providers the choice between the two options.

Figure 1 – Financial / share obligations (EU-28)

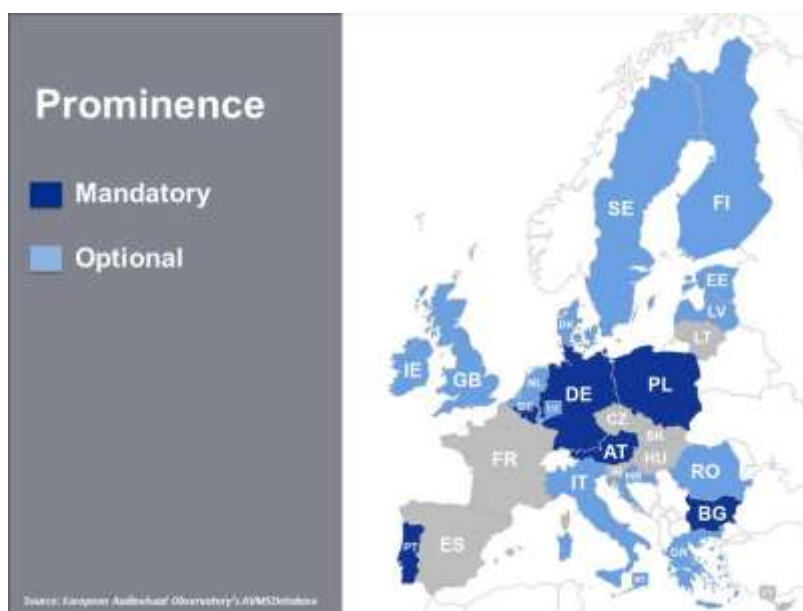


Source: European Audiovisual Observatory AVMSDatabase



With regard to the attractive presentation of European works in electronic programme guides, only 5 countries (6 counting the French Community of Belgium) have introduced an explicit obligation to give visibility to EU works in the catalogues of on-demand AVMS, as shown in the following map:

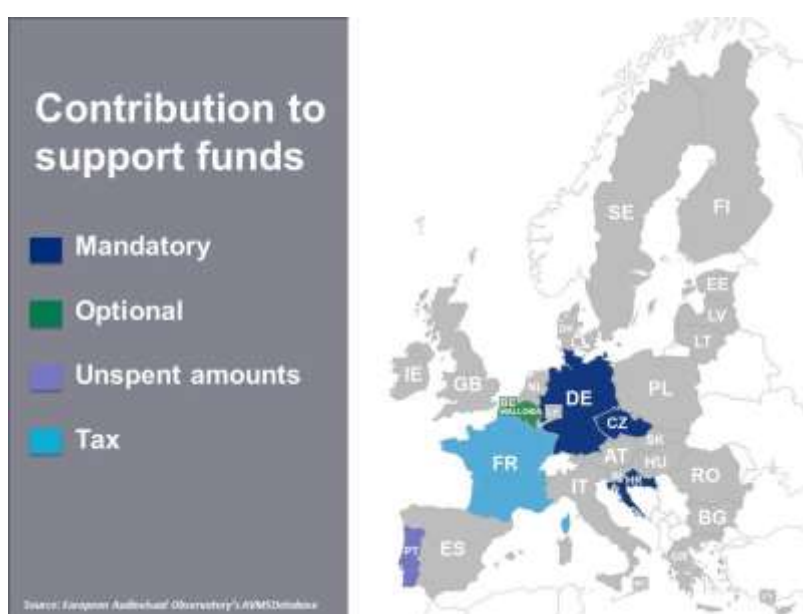
Figure 2 – Prominence obligations (EU-28)



Source: European Audiovisual Observatory AVMSDatabase

Otherwise, some member states have introduced obligations that go beyond the rules of Article 13 AVMSD, notably the obligation of on-demand AVMS to contribute to support funds either as a separate obligation (CZ, DE, HR) or as an option (BE(fr)). In Portugal, unspent investment amounts are given to the Institute of Cinema and Audiovisual (ICA). France has a 2% tax on revenues imposed on paying on-demand services, but this tax does not feed any particular fund.

Figure 3 – Contribution to support funds in EU-28



Source: European Audiovisual Observatory AVMSDatabase



3.2. Country-per-country analysis¹⁸⁹

3.2.1. AT - Austria

Austrian Law makes a clear distinction between on-demand services provided by the public service broadcaster ORF and those provided by private providers. On the one hand, Article 12 of the Federal Act on the Austrian Broadcasting Corporation (ORF-G)¹⁹⁰ provides that the majority of programmes in on-demand services offered by the ORF or its subsidiaries, where practicable and subject to the use of reasonable means, shall consist of European works.¹⁹¹ On the other hand, Article 40 (1) of the Federal Act on Audio-visual Media Services (AMD-G)¹⁹² merely provides that on-demand service providers shall promote European works in the presentation of their catalogue of programmes by giving due prominence to or appropriately designating such works, without giving any details about how this obligation shall be implemented.

3.2.2. BE - Belgium

3.2.2.1. Flemish community

Article 157 of the Act on Radio and Television Broadcasting¹⁹³ transposes the text of Article 13 AVMSD in a rather literal way. The only particularity lies in the obligation for service providers of non-linear services to use a considerable share of the promotional resources for Dutch-language European productions.

3.2.2.2. French-speaking Community

Article 46 of the Audiovisual media services Decree¹⁹⁴ introduces a prominence obligation for non-linear television services: they must place particular emphasis on the European works in their catalogue, including original works by authors from the French-speaking Community of Belgium, by using an attractive presentation to highlight the list of European works available.

¹⁸⁹ This section was revised by the following IRIS correspondents: Eva Lievens (BE), Christophoros Christophorou (CY), Jan Fučík (CZ), Gianna Iacino (DE), Andres Joesaar (EE), Enric Enrich (ES), Anette Alén-Savikko (FI), Amélie Blocman (FR), Lorna Woods (GB), Alexandros Economou (GR), Polyák Gábor (HU), Ronan Ó Fathaigh (IE and NL), Ernesto Apa (IT), Kevin Aquilina (MT), Jurgita Iešmantaitė (LT), Ieva Andersone (LV), Mariana Lameiras (PT), Eugen Cojocariu (RO), Erik Ullberg (SE). All legal texts mentioned refer to the current version in force after relevant amendments. The links to these texts that are provided in the footnotes point to consolidated versions (whenever available).

¹⁹⁰ Bundesgesetz über den Österreichischen Rundfunk (ORF-Gesetz, ORF-G), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000785>.

¹⁹¹ Without prejudice to the requirements of Articles 4e and 4f in connection with the provisions of Part 1a.

¹⁹² Bundesgesetz über audiovisuelle Mediendienste (Audiovisuelle Mediendienste-Gesetz – AMD-G), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001412>.

¹⁹³ Mediadecreet van 27 maart 2009 – bijgewerkt tot 15.12.2015, http://www.vlaamseregulatoremedia.be/sites/default/files/mediadecreet_270309.pdf.

A unofficial translation of the Act on Radio and Television Broadcasting of 27 March 2009 (updated 12.08.2014) is available at: http://www.vlaamseregulatoremedia.be/sites/default/files/act_on_radio_and_television_broadcasting.pdf.

¹⁹⁴ Décret coordonné sur les services de médias audiovisuels du 26 mars 2009, <http://www.csa.be/documents/1440>.



Moreover, Article 41 introduces obligations for both linear and non-linear television services to contribute to the production of audiovisual works.¹⁹⁵ This contribution shall be made either in the form of co-production or the pre-purchase of audiovisual works or in the form of a contribution paid directly to the *Centre du cinéma et de l'audiovisuel* (the film and audio-visual fund of the French Community). The minimum amount of contribution is fixed on a sliding scale based on the operator's annual turnover:

- between EUR 300 000 and EUR 5 million: 1.4% of the AVMS provider's annual turnover;
- between EUR 5 and EUR 10 million: 1.6% of the annual AVMS provider's turnover;
- between EUR 10 and EUR 15 million: 1.8% of the AVMS provider's annual turnover;
- between EUR 15 and EUR 20 million: 2% of the AVMS provider's annual turnover;
- above EUR 20 million: 2.2% of the AVMS provider's annual turnover.¹⁹⁶

3.2.2.3. German Community

Article 40 of the Decree on Radio Broadcasting and Cinema Presentations¹⁹⁷ essentially reproduces the text of Article 13 AVMSD. It further states that the government defines further arrangements, and that the government can define other appropriate forms of promotion.

3.2.3. BG - Bulgaria

Articles 19 (2) and (3) of the Bulgarian Radio and Television Act¹⁹⁸ state that the creation of and access to European works in the case of on-demand audiovisual media services shall be promoted, where practicable and by appropriate means. Service providers are required to make an attractive presentation of European works in the catalogue of programmes offered by the audiovisual media service.

3.2.4. CY - Cyprus

Articles 31A(2)(a) and (b) of the Law on Radio and Television Stations¹⁹⁹ provide that on-demand services should make available in their catalogues a minimum of 20% of European titles. This percentage may be revised periodically by the Cyprus Radio-Television Authority following consultations with the audiovisual media service providers.

¹⁹⁵ The act does not specify whether these audiovisual works have to be European or not.

¹⁹⁶ These amounts may be reviewed annually (Article 41(3) of the AMS Decree).

¹⁹⁷ Dekret über die audiovisuellen Mediendienste und die Kinovorstellungen, 27 June 2005, http://medienrat.be/files/Dekret_AVMD_Stand_2.3.2015.pdf.

¹⁹⁸ Закон за радиото и телевизията, <http://lex.bg/laws/ldoc/2134447616>.

¹⁹⁹ Ο περί Ραδιοφωνικών και Τηλεοπτικών Οργανισμών Νόμος του 1998 (7(I)/1998), http://www.cylaw.org/nomoi/enop/non-ind/1998_1_7/full.html.



3.2.5. CZ - Czech Republic

According to Article 7(1) and (2) of Act 132/2010 on On-demand Audiovisual Media Services,²⁰⁰ on-demand audiovisual media service providers shall, where practicable, reserve for European works at least 10% of the total number of programmes offered in their catalogues. News programmes, recordings of sports events, or competitive programmes are excluded from the count. Alternatively, the obligation under paragraph (1) shall be regarded as having been satisfied if an on-demand audiovisual media service provider spends at least 1% of total revenues generated by the service in a reporting period on either:

- the production of European works; or
- the paid acquisition of rights to use European works through the on-demand audiovisual media service.

Furthermore, Article 27 of Act No. 496/2012 on Audiovisual Works and Support for Cinematography²⁰¹ states that on-demand audiovisual services will have to pay to the *Státního fondu kinematografie* (State Cinematography Fund - SFK) a 0.5% fee on the price paid by the end user of their service in a calendar year.

3.2.6. DE - Germany

The Interstate Treaty on Broadcasting and Telemedia (RStV)²⁰² includes an obligation to promote European works for audiovisual media services on demand which offer single programmes that can be bought with individual fees. Article 6 RStV contains an obligation for television broadcasters to promote European works. Article 58 III 2 RStV states that Article 6 RStV is applicable to offers according to Article 2 III No. 5 RStV, which refers to offers which consist of single programmes that can be bought individually.

Moreover, Article 66a of the Film Support Act (FFG)²⁰³ contains an obligation to contribute to the Federal Film Board²⁰⁴ for video distributors and providers of VoD services with a net annual turnover above EUR 50 000. The rate of the levy depends on the turnover:

- 1.8% for companies with a turnover of up to EUR 30 million.
- 2% for companies with a turnover between EUR 30 and 60 million,
- 2.3% for companies with a turnover of over EUR 60 million.

²⁰⁰ Zákon č. 132/2010 Sb. Zákon o audiovizuálních mediálních službách na vyžádání a o změně některých zákonů (zákon o audiovizuálních mediálních službách na vyžádání), <http://www.zakonyprolidi.cz/cs/2010-132/zneni-20160907>.

²⁰¹ Zákon č. 496/2012 Sb. Zákon o audiovizuálních dílech a podpoře kinematografie a o změně některých zákonů (zákon o audiovizu), <http://www.zakonyprolidi.cz/cs/2012-496>

²⁰² Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV) vom 31. August 1991, in der Fassung des Neunzehnten Staatsvertrages zur Änderung rundfunkrechtlicher Staatsverträge (Neunzehnter Rundfunkänderungsstaatsvertrag) in Kraft seit 1. Oktober 2016, http://www.ard-werbung.de/fileadmin/user_upload/media-perspektiven/Dokumentation/Rundfunkstaatsvertrag_in_Kraft_seit_1-10-2016.pdf.

²⁰³ Gesetz über Maßnahmen zur Förderung des deutschen Films (Filmförderungsgesetz – FFG), in der Fassung der Bekanntmachung vom 24. August 2004 (BGBl. I S. 2277) zuletzt geändert durch das Siebte Gesetz zur Änderung des Filmförderungsgesetzes vom 7. August 2013 (BGBl. I S. 3082, in Kraft getreten am 1. Januar 2014) <http://www.ffa.de/ffg.html>.

²⁰⁴ Filmförderungsanstalt, <http://www.ffa.de/>.



Article 66a(2)(2) FFG stipulates that VoD service providers not established in Germany will be subjected to the film levy in respect of income that they derive from selling services on German-language websites to customers in Germany – provided that these transactions are not subject to any comparable financial contribution to the promotion of cinematographic works by a film funding institution in the service’s country of origin.

The German Government notified the FFG to the Commission on 4 March 2014. The Commission expressed its “doubts as to the compatibility with the internal market of the notified amendment” by Decision of 17 October 2014.²⁰⁵ In particular, it considers that this measure could be “in contravention of Article 13(1) of the AVMS Directive in combination with Articles 2 and 3 AVMSD” and requested Germany to submit its comments according to the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU). Despite these doubts, on 1 September 2016, the Commission found that the measures were compatible with the TFEU, and did not infringe the AVMSD.²⁰⁶

3.2.7. DK - Denmark

Article 48 of the Radio and Television Broadcasting Act²⁰⁷ empowers the minister for Culture to lay down rules concerning broadcasting, including inter alia the promotion of European works and rules of the availability of programs. Pursuant to this, Article 10 (1) of Executive Order on Registration-Based Programme Activity and On-Demand Audiovisual Programme Activities²⁰⁸ obliges providers of on-demand audiovisual media services to use appropriate means to promote the production of and access to European works and do so themselves when possible.

3.2.8. EE - Estonia

Article 24(1) of Media Service Act²⁰⁹ provides that on-demand services have to promote the production of and accessibility to European works, taking account of the specific nature and opportunities of the service. Among other options, this can be achieved by:

- providing financial support for the production of European works, ordering works or securing the rights for the transmission thereof;

²⁰⁵ State aid SA.38418 (2014/N) (ex 2014/N) – Germany – Filmförderungsgesetz, Brussels, 17 October 2014, C(2014) 7665 final, http://ec.europa.eu/competition/state_aid/cases/254981/254981_1599283_12_2.pdf.

²⁰⁶ European Commission, Commission decision of 1.9.2016 on the aid scheme SA.38418 - 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution, C(2016) 5551 final, 1 September 2016, http://ec.europa.eu/competition/state_aid/cases/254981/254981_1779718_146_2.pdf. For more information on this case see Section 5 of this publication.

²⁰⁷ Bekendtgørelse af lov om radio- og fjernsynsvirksomhed, <https://www.retsinformation.dk/Forms/R0710.aspx?id=138757>.

²⁰⁸ Bekendtgørelse om programvirksomhed på grundlag af registrering samt on-demand audiovisuel programvirksomhed, <https://www.retsinformation.dk/Forms/R0710.aspx?id=180509>.

²⁰⁹ Meediateenuste seadus, <https://www.riigiteataja.ee/akt/104032015014>. English version available at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/511052015002/consolide>.



- highlighting European works in the programme catalogue, including works completed during the last five years, presenting the country of origin and the year of completion of such works;
- highlighting own production programmes and the year of their completion in the programme catalogue.

3.2.9. ES - Spain

According to Article 5(2) of General Act No 7/2010 of 31 March on Audiovisual Media,²¹⁰ providers of a catalogue of programmes (on-demand services) shall reserve 30% of the catalogue for European works. Half of this amount shall be in one of Spain's official languages.²¹¹

Furthermore, on-demand services, together with broadcasters²¹² and electronic media service providers who transmit television channels, are subject to the funding obligation laid down in Article 5(3). This article obliges the service providers mentioned above to finance European cinematographic works, television films and series, as well as documentary films and animation films and series.²¹³ The obligation, which can be applied to production costs or the acquisition of rights, applies to services whose programming schedules include films which are less than seven years old by reference to their date of production. The obligation amounts are as follows:

- 5% of the income earned by the operator in the previous financial year (6% for public service broadcasters):
 - Of this amount, 60% (75% in the case of public service broadcasters) must be allocated to cinema films
 - 60% must be allocated to works – of any type – produced in one of Spain's official languages.
 - Of this amount, 50% must be allocated to independent production.
- 40% of their remaining financial investment (25% in the case of public service broadcasters) may be allocated to the financing of television films, series or mini-series.
 - Within these percentages, public service audiovisual media providers must allocate at least 50% to television films or mini-series.

Providers of audiovisual media services whose investment obligation comes from providing, exclusively or in a percentage higher than 70% of total time of annual emission of a single type of content, being these films, television series, animation and documentary productions, may materialize investment in this type of content only provided that it is done in photochemical or digital high definition support.

²¹⁰ Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, http://noticias.juridicas.com/base_datos/Admin/l7-2010.html.

²¹¹ Spanish, Catalan, Basque, and Galician.

²¹² Excluded from this obligation are local television stations that are not part of a national network.

²¹³ This obligation applies also to broadcasters and electronic media service providers who transmit television channels.



It cannot be counted for the purposes of this article investing or buying rights for works which are likely to receive an X rating in accordance with the Cinema Act.²¹⁴

3.2.10. FI - Finland

Article 209(3) of the Information Society Code²¹⁵ provides that on-demand audiovisual service providers are to promote the production and availability of European works in their services by means of financing productions, acquiring programmes, increasing the visibility of European works, or by other corresponding means.

3.2.11. FR - France

The On-demand Audiovisual Services Decree No. 2010-1379 of 12 November 2010 regulates the contribution of on-demand services to the production and promotion of European works.²¹⁶

Article 3 provides that catch-up television services shall devote each year part of their net annual revenues of the previous financial year to the development of the production of both European cinematographic works and original French-language works. The proportion which shall be contributed shall be identical to that to which the provider of services is subject in respect of the operation of the television service from which the catch-up service has originated. This obligation is not applicable to catch-up television services whose revenues are included in the resources of the television service from which they have originated.

Article 4 provides that subscription-based services shall devote each year a proportion of their net annual revenues of the previous financial year to expenditure contributing to the development and production of European cinematographic and audiovisual works and original French-language works. The proportion shall respectively be at least:

- 26% and 22% when they offer at least 10 full-length cinematographic works a year within a period less than twenty-two months after their cinema release in France;
- 21% and 17% when they offer at least 10 full-length cinematographic works a year within a period of less than thirty-six months and equal to or more than twenty-two months after their cinema release in France;
- 15% and 12% in other cases.

Expenditure resulting from the application of the provisions of section I shall be invested in the production of cinematographic and audiovisual works, excluding pornographic works and works inciting violence, in accordance with the shares of each of these two genres of works in the total number of items downloaded or viewed during the previous financial year. When the service offers fewer than 10 full-length cinematographic works or fewer than 10 audiovisual works a year, the

²¹⁴ Ley 55/2007, de 28 de diciembre, del Cine, http://noticias.juridicas.com/base_datos/Admin/I55-2007.html.

²¹⁵ Tietoyhteiskuntakaari 917/2014, <http://www.finlex.fi/fi/laki/ajantasa/2014/20140917>.

²¹⁶ Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023038244&dateTexte=20160922>.



expenditure shall be invested only in the production of works in respect of which the threshold has been reached.

Article 5 provides that services other than those mentioned in Articles 3 and 4, especially pay-per-view services, shall devote each year:

- at least 15% of their net annual revenues from the exploitation of cinematographic works during the previous financial year to expenditure contributing to the development of the production of European cinematographic works, of which at least 12% to expenditure contributing to the development of the production of original French-language cinematographic works;
- at least 15% of their net annual revenues from the exploitation of audiovisual works (excluding pornographic works and works inciting violence) of the previous financial year to expenditure contributing to the development and production of European audiovisual works, of which at least 12% to expenditure contributing to the development of the production of original French-language audiovisual works.

The proportion of turnover originating from revenues other than those referred to in section I shall be taken into account when calculating the revenues mentioned in paragraphs 1 and 2 of section I in proportion to the respective amounts of the latter.

Notwithstanding Articles 4 and 5 of this decree, the proportions set out in paragraphs 1, 2 and 3 of section I of Article 4 and paragraphs 1 and 2 of section I of Article 5 shall be as follows:

YEAR	Percentage of obligation (Article 4 I (1))	
	European works	Original French-language works
1st year	22 %	18 %
2nd year	24 %	20 %
From 3rd year	26 %	22 %

YEAR	Percentage of obligation (Article 4 I (2))	
	European works	Original French-language works
1st year	17 %	13 %
2nd year	19 %	15 %
From 3rd year	21 %	17 %

YEAR	Percentage of obligation (Article 4 I (3) and Article 5(1) and (2))	
	European works	Original French-language works



1st year	11 %	8 %
2nd year	13 %	10 %
From 3rd year	15 %	12 %

According to Article 12, providers of services shall reserve, of the total number of full-length cinematographic works and audiovisual works made available to the public, a proportion at least equal to:

- 60% for European works;
- 40% for original French-language audiovisual works.

However, these proportions are for a period of three years from their first application to services reaching one of the two thresholds mentioned in Article 11, set at 50% and 35% respectively. For services existing before the entry into force of this decree, this period may not begin before 1 January 2011.

Moreover, Article 1609 sexdecies B of the General Tax Code²¹⁷ contains a 2% tax on revenues imposed on on-demand services. This tax is 10% for services providing pornographic works and works inciting violence. According to Article 30 IV B of the Amending Finance Act 2013,²¹⁸ this tax should also be applied to revenues of foreign video retailers (physical or online). However, this obligation will only enter into force on a date laid down by decree, but no more than six months after the date the government receives the reply from the European Commission permitting the legislative instrument notified to it to be regarded as compliant with European Union state aid law.²¹⁹

3.2.12. GB - United Kingdom

Sections 368C (3) and 368Q (3) of the Audiovisual Media Services Regulations 2009²²⁰ gives the appropriate regulatory authorities the powers to ensure that providers of on-demand programme services promote, where practicable and by appropriate means, production of and access to European works.

The Authority for Television On Demand Limited (ATVOD) was entrusted by Ofcom to, inter alia, “ensure that Service Providers promote, where practicable and by appropriate means,

²¹⁷ Code général des impôts,

https://www.legifrance.gouv.fr/affichCode.do;jsessionid=736461D13B36B9A48F5DC00074D0464F.tpdila12v_1?cidTexte=LEGITEXT000006069577&dateTexte=22220222.

²¹⁸ Loi n° 2013-1279 du 29 décembre 2013 de finances rectificative pour 2013,

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028400921&dateTexte=20160930>.

²¹⁹ France has indeed sent notification to the European Commission and the latter's reply is currently pending. For more information on this case see Chapter 5.2. of this publication.

²²⁰ The Audiovisual Media Services Regulations 2009, <http://www.legislation.gov.uk/uksi/2009/2979/contents/made>.



production of and access to European works”.²²¹ From 1 January 2016, Ofcom took sole responsibility for regulating video-on-demand programme services.²²²

In its European Works Plan 2012-2015, ATVOD set out a detailed plan as to how it would fulfil its duties under Paragraph 5(vi) and Paragraph 7(xxi) of the Ofcom Designation, for the period 2012 to 2015. ATVOD noted that on-demand services are at a nascent stage in their development, and so is the regulation of on-demand programme services as compared to the detailed regulations imposed on linear broadcast services. Although many on-demand programme services comprise content that is also included in linear broadcast services, and may therefore be expected to benefit from the existing requirements as to the proportion of programming of European origin, the range of on-demand programme services that fell within ATVOD’s jurisdiction is much wider and of a less uniform format than linear services, with content provided from a variety of sources. Furthermore, it was the view of ATVOD that the Communications Act 2003 (“the Act”) does not give the appropriate regulatory authority powers to require service providers to operate a quota system with regard to European works.

ATVOD’s strategy with regard to the promotion of European works was based on encouragement, collection of data and provision of information. Accordingly, ATVOD committed to writing to each provider of an On Demand Programme Service annually to encourage them to promote, where practicable and by appropriate means, production of and access to European works.

3.2.13. GR - Greece

Article 14 (1) of the Presidential Decree on Audiovisual Media Services No. 109/2010²²³ essentially reproduces the text of Article 13 AVMSD.

3.2.14. HR - Croatia

Articles 21 (1)-(2) of the Electronic Media Act²²⁴ essentially reproduces the text of Article 13(1) AVMSD. Article 21(3) provides that the on-demand audiovisual media service providers shall attain and increase the financial contribution or the share and/or prominence of European works in the catalogue of programmes, in accordance with the criteria and method laid down in an ordinance adopted by the Electronic Media Council (AEM). Accordingly, AEM’s Rules on the criteria and the

²²¹ Designation pursuant to section 368B of the Communications Act 2003 of functions to the Authority for Television On Demand in relation to the regulation of on-demand programme services, http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/ATVOD_revised_Designation.pdf.

²²² See “Ofcom brings regulation of ‘video-on-demand’ in-house”, <http://media.ofcom.org.uk/news/2015/1520333/>.

²²³ 109 Εναρμόνιση της ελληνικής ραδιοτηλεοπτικής νομοθεσίας στις διατάξεις της Οδηγίας 2010/13/ΕΕ (ΕΕ L 95 της 15.4.2010) του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου, με την οποία κωδικοποιήθηκαν οι διατάξεις της Οδηγίας 89/552/ΕΟΚ (ΕΕ L 298 της 17.10.1989) του Συμβουλίου, όπως ίσχυε μετά την τελευταία τροποποίησή της από την Οδηγία 2007/65/ΕΚ (ΕΕ L 332 της 18.12.2007) του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου για το συντονισμό ορισμένων νομοθετικών, κανονιστικών και διοικητικών διατάξεων των κρατών μελών σχετικά με την παροχή υπηρεσιών οπτικοακουστικών μέσων, <http://www.esr.gr/arxeion-xml/pages/esr/esrSite/file-get?arx-files-disposition=attachment&arx-files-entry-id=cd5df3fccf2d1e7c83571826e98263e5>.

²²⁴ Zakon o elektroničkim medijima, NN 153/09, 84/11, 94/13, 136/13 – neslužbeni pročišćeni tekst, http://www.e-mediji.hr/repository_files/file/490/.



method of increasing the share of European works²²⁵ provide that 20% of the catalogue must be comprised of European works.

Furthermore, Article 36 of the modified Act on Audiovisual Works²²⁶ obliges on-demand services to allocate 2% of their annual gross income to the Croatian Audiovisual Centre (HAVC),²²⁷ which is responsible for the National Programme for the Promotion of Creative Audiovisual Works.

3.2.15. HU - Hungary

Article 20 (2) of Act CLXXXV of 2010 on Media Services and Mass Communication²²⁸ provides that the catalogue of on-demand audiovisual media services shall be composed of European works in over one-quarter of the total sum of the length of the programmes made available in a given calendar year. At least 10% of the schedule shall be composed of Hungarian works.

3.2.16. IE - Ireland

Section 11(1) of the European Communities (Audiovisual Media Services)²²⁹ Regulation reproduces verbatim the text of Article 13(1) AVMSD.

3.2.17. IT - Italy

Article 44(4) of the Audiovisual Media Services Code²³⁰ provides that on-demand services shall, taking market conditions into account, gradually promote the production of European works and access to the same, in accordance with the rules laid down by the Authority in its regulations. Article 44(7) empowers AGCOM (the Italian media authority) to provide, by means of co-regulation procedures, for the preparation of detailed regulations regarding the financial contribution of on-demand services to the production and rights acquisition of European works, or to the share or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.

According to this, the regulation²³¹ approved by AGCOM Decision No. 66/09/CONS of 13 February 2009²³² (as amended by AGCOM Decision No. 188/11/CONS of 6 April 2011,²³³ and more

²²⁵ Pravilnik o kriterijima i načinu povećanja opsega udjela europskih djela NN 77/15, http://www.e-mediji.hr/repository_files/file/675/.

²²⁶ Zakon o audiovizualnim djelatnostima (NN 76/07), <http://www.nn.hr/clanci/sluzbeno/2007/2398.htm> and Zakon o izmjenama i dopuni zakona o audiovizualnim djelatnostima (NN 90/11), http://narodne-novine.nn.hr/clanci/sluzbeni/2011_08_90_1930.html.

²²⁷ Hrvatski audiovizualni centar, <http://www.havc.hr/>.

²²⁸ 2010. évi CLXXXV. törvény -a médiaszolgáltatásokról és a tömegkommunikációról, http://njt.hu/cgi_bin/njt_doc.cgi?docid=133252.287595.

²²⁹ S.I. No. 258/2010 - European Communities (Audiovisual Media Services) Regulations 2010, <http://www.irishstatutebook.ie/eli/2010/si/258/made/en/print>.

²³⁰ Decreto legislativo 31 luglio 2005, n. 177 (Testo unico dei servizi di media audiovisivi e radiofonici), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005-07-31;177!vig->.

²³¹ Allegato A alla delibera n. 66/09/CONS del 13 Febbraio 2009.



precisely its Appendix²³⁴), sets forth, in Article 4-bis, that the obligation for on-demand services to promote European works, gradually and taking into account the development of the market, has to be carried out through one of the following measures:

- A minimum 20% share of European works in VOD catalogues, calculated in terms of the total number of hours of programming made available each year in the same catalogue; or
- An annual financial contribution to the production of, or acquisition of rights in, European works for their catalogues, representing at least 5% of the revenues specifically attributable to the public provision of on-demand audiovisual content within the same catalogues in the preceding year. AVMS providers that fail to meet the financial contribution percentage by less than 1% under such requirement must comply during the subsequent year.

AVMS providers must state the reasons for any variation falling short of the above-mentioned threshold. For providers that own or control more than one catalogue, compliance with the abovementioned requirements is determined on the basis of all catalogues provided. For such providers, the percentage under the first requirement must be calculated as the percentage of hours for European works compared to the total hours of programming made available in all the catalogues. By Decision No. 526/14/CONS, AGCOM has amended the regulation on the promotion of European works with the aim of (a) clarifying that the content and investment quotas apply also to VOD providers who are exempted from the duty to apply for a general authorization; and (b) introducing the option (not the obligation) for the VOD providers to afford European works a certain prominence within the catalogue. VOD providers will be free to decide whether to adopt technical and/or editorial measures aimed at giving prominence to European works. VOD providers who implement such measures will benefit from a reduction up to 20% of the relevant quotas (either content or investment quotas, depending on the choice of the provider). AGCOM Decision No. 149/15/CONS, adopted by means of co-regulation procedures, sets forth such measures and the relevant reduction percentage linked to each measure.

Although AGCOM Decision no. 188/11/CONS came into force on 5 May 2011, a transitional period of four years was allowed. AVMS providers were able within the fourth year to implement these obligations gradually, taking into account market conditions and offers of rights. During the transitional period either the programming hours made available in the catalogue must be at least 5% a year, or the financial contribution must be at least 2% a year. On-demand services may obtain an exception from AGCOM with respect to the obligation to promote European works if they have not made a profit in the past two years, if their market share in terms of revenue is below 1%, or if

²³² Delibera n. 66/09/CONS - Regolamento in materia di obblighi di programmazione ed investimento a favore di opere europee e di opere di produttori indipendenti adottato ai sensi degli articoli 6 e 44 del decreto legislativo 31 luglio 2005, n. 177, https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlodu&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=828253&_101_INSTANCE_kidx9GUnlodu_type=document.

²³³ Delibera n. 188/11/CONS - Approvazione del Regolamento riguardante la promozione della produzione e della distribuzione di opere europee da parte dei servizi di media audiovisivi a richiesta ai sensi dell'articolo 44, comma 7, del Testo unico dei servizi di media audiovisivi e radiofonici, https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlodu&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=864604&_101_INSTANCE_kidx9GUnlodu_type=document.

²³⁴ Allegato A alla delibera n. 188/11/CONS del 6 Aprile 2011, <https://www.agcom.it/documents/10179/539575/Allegato+06-04-2011+2/cbeb1b22-5866-438a-8c56-67601db6509a?version=1.0>.



they offer a thematic catalogue. Exemptions are set forth in Annex A to AGCOM Decision No. 186/13/CONS.

3.2.18. LT - Lithuania

Article 40⁴ of the Act on the Provision of Information to the Public²³⁵ creates an obligation for both providers of on-demand audiovisual media services to promote, where practicable and by appropriate means, the production of and access to European works. On-demand services shall ensure that at least half of the programmes in the catalogue of on-demand audiovisual media services are European works.

3.2.19. LU - Luxembourg

Article 7 of the Grand Ducal Regulation of 17 December 2010 introduced a new Article 5bis (1) in the Grand Ducal Regulation of 5 April 2001,²³⁶ whereby on-demand audiovisual media service providers shall promote, where practicable and by appropriate means, the production of European works as well as access to said works.

3.2.20. LT - Latvia

Article 23(5) of the Electronic Mass Media Act²³⁷ simply states that an electronic mass medium which provides on-demand audiovisual services shall include European audiovisual works in its catalogue.

3.2.21. MT - Malta

Article 16N(2) of the Broadcasting Act 350²³⁸ directly reproduces the text of Article 13(1) AVMSD.

²³⁵ Lietuvos Respublikos visuomenės informavimo įstatymo pakeitimo įstatymas, <https://www.e-tar.lt/portal/lt/legalAct/TAR.065AB8483E1E/UxgrIdRrcD>.

²³⁶ Règlement grand-ducal du 17 décembre 2010 portant modification du règlement grand-ducal du 5 avril 2001 fixant les règles applicables en matière de contenu en œuvres européennes et en œuvres de producteurs indépendants des programmes de télévision réputés relever de la compétence du Luxembourg conformément à la directive européenne «Télévision sans frontières», <http://www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf>.

²³⁷ Elektronisko plašsaziņas līdzekļu likums, <http://likumi.lv/doc.php?id=214039>.

²³⁸ Chapter 350, Broadcasting Act, <http://www.ba-malta.org/file.aspx?f=3>.



3.2.22. NL - Netherlands

Article 3.29c of the Media Act 2008²³⁹ creates the obligation of an on demand service to promote the production and the access to European works within the meaning of Article 1 of the AVMS Directive

3.2.23. PL - Poland

Article 47f of the Broadcasting Act²⁴⁰ states the obligation that on-demand services promote European works, including works produced originally in the Polish language, in particular through:

- proper identification of the origin of programmes available in the catalogue of programmes as well as providing the option to search for European works, including works produced originally in the Polish language; or
- placement of information and materials promoting European works, including works produced originally in the Polish language.

They must allocate at least 20% of the content in their catalogue for European works, including works produced originally in the Polish language, and shall provide adequate visibility to such programmes in the catalogue. This percentage shall be calculated based on the total duration of the programmes multiplied by the total broadcasting time of the programmes in the catalogue during a given calendar quarter. However, this obligation shall not apply to catalogues in which only audiovisual programs other than European works are provided to the general public.

3.2.24. PT - Portugal

Article 45(2) of the Television Act no. 27/2007²⁴¹ states that on-demand services shall contribute to the promotion of European works, specifically through financial contributions to their production or through their progressive incorporation into the respective catalogue. According to Article 45 (3) they also have to give particular visibility to European works in their catalogue, implementing features which enable the public to search for such works by origin.

Direct investments obligations are defined in Article 16 of the Cinema Act,²⁴² which foresees that on-demand services have to spend at least 1% of their revenues in national cinematographic works, in an amount set annually by specific legislation, and in a percentage not inferior to 1% of their revenue. This investment can be done in different forms: through participation in the financing or the production of the work, advances to the production in the form of minimum guarantees, and acquisition of distribution rights. Unspent investment amounts are given to the Institute of Cinema and Audiovisual (ICA).²⁴³ The participation of on-demand services is further ensured through the

²³⁹ Mediawet 2008, <http://wetten.overheid.nl/BWBR0025028>.

²⁴⁰ Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji, <http://prawo.lego.pl/prawo/ustawa-z-dnia-29-grudnia-1992-r-o-radiofonii-i-telewizji/>.

²⁴¹ Lei n.º 27/2007, de 30 de Julho - Lei da Televisão e dos Serviços Audiovisuais a Pedido, <http://www.gmcs.pt/pt/lei-n-272007-de-30-de-julho-lei-da-televisao-e-dos-servicos-audiovisuais-a-pedido>.

²⁴² Lei n.º 55/2012, de 6 de setembro, http://www.anacom.pt/render.jsp?contentId=1136975#V_JfzMnDi-k.

²⁴³ Instituto do Cinema e do Audiovisual, <http://www.ica-ip.pt/en/>.



creation, in their platforms, of an area dedicated to national works, in which aided works and other national production of works are made available, for the purpose of rental or sale of the works, in conditions such as to assign rightsholders a revenue percentage no less than 50%.

Law-Decree 124/2013²⁴⁴ further implements the Cinema Act with regard to the modalities of the investment obligation.

3.2.25. RO - Romania

Article 23(1) of the Audiovisual Act²⁴⁵ directly reproduces the text of Article 13 AVMSD.

3.2.26. SE - Sweden

Chapter 5, Article 8 of the Radio and Television Act²⁴⁶ states that any party providing on-demand television by a means other than cable shall, when it is practicable, use a suitable method to promote the production of and access to programmes of European origin.

3.2.27. SI - Slovenia

According to Article 16(2) and (3) of the Audiovisual Media Services Act,²⁴⁷ European audiovisual works must account for at least 10% of the programmes in the catalogue of programmes of an on-demand audiovisual media service in an individual calendar year, unless this Act determines otherwise. If this proportion is not attained the provider must, every calendar year, earmark funds amounting to at least 1% of all revenues from its audiovisual media services in that calendar year for the production of or acquisition of the rights to European audiovisual works that it provides via its on-demand audiovisual media services.

3.2.28. SK - Slovakia

Article 27a(1) of Act 308/2000 on Broadcasting and Retransmission and on the amendment of Act No. 195/2000 on Telecommunications²⁴⁸ contains an obligation for on-demand services to reserve at least 20% of total time of programmes offered in the catalogue of programmes per calendar month to European works, for each on-demand audiovisual media service individually. For the purpose of the calculation of total time, the news, sports events, and games shall be excluded.

²⁴⁴ Decreto-Lei n.º 124/2013 de 30 de agosto, http://www.anacom.pt/render.jsp?contentId=1172454#.V_Jd2cnDi-k.

²⁴⁵ Lege Nr. 504 din 11 Iulie 2002 - Legea audiovizualului, http://www.cna.ro/IMG/pdf/LEGEA_504_CU_ULTIMELE_MODIFICARI.pdf.

²⁴⁶ Radio- och tv-lag (2010:696), http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/radio-och-tv-lag-2010696_sfs-2010-696.

²⁴⁷ Zakon o avdiovizualnih medijskih storitvah (ZAvMS), <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6225>.

²⁴⁸ Zákon č. 308/2000 Z. z. Zákon o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách, <http://www.zakonypreludi.sk/zz/2000-308>.







4. The role of self and co-regulation

4.1. Self- and co-regulation towards ODAVMS

The role of self- and co-regulation in the field of audiovisual media regulation has been recognised by the AVMSD as a valuable complementary approach to legal provisions. Indeed, Article 4(7) encourages member states to use co-regulatory and/or self-regulatory regimes “in the fields coordinated by th[e] Directive to the extent permitted by their legal systems”.

The directive defines “self-regulation” as a “type of voluntary initiative” which “enables economic operators, social partners, non-governmental organisations, or associations to adopt common guidelines amongst themselves and for themselves.” On the other hand, co-regulation is defined as creating, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the member states.

The success of the implementation of self- and co-regulation systems largely relies on different conditions. The AVMSD sets two conditions for their implementation:

- They must be broadly accepted by the main stakeholders in the member states concerned.
- In addition, they must provide for effective enforcement.
- On the other hand, the industry needs sufficient incentives to support such a regime. Transparency and openness are also found to be vital to build trust in the mechanisms.

4.2. A flexible response to new challenges

Self- and co-regulation include a variety of different approaches within different sectors and countries, as well on the supranational level.²⁴⁹ One particular area in the media sector where the Commission has been promoting further development of self- or co-regulation relates to the protection of minors from harmful and illegal content in the online environment. The changes in

²⁴⁹ For example: the Safer Internet Programme (SIP); the Pan-European Games Information System (PEGI) adopted after close consultation with the industry and civil society, including parental and consumer associations; You Rate It, developed by NICAM and the British Board of Classification (BBFC). At international level, see for example the International Age Rating Coalition (IARC), the MIRACLE Project (Machine-readable and Interoperable Age Classification Labels in Europe), etc. For further information on self- and co-regulatory initiatives in relation to protection of minors against harmful content, see Cabrera Blázquez, F. J., Cappello, Lépinard, A., Valais, S., The protection of minors in a converged media environment, IRIS Plus 2015-1, European Audiovisual Observatory, Strasbourg, 2015, p. 43 and following, at: <http://www.obs.coe.int/documents/205595/8261963/The+protection+of+minors+in+a+converged+media+environment.pdf/bc80d13a-eeedc-4b0a-8824-40bc2cdd6e47>.



consumption patterns among young audiences tends increasingly towards on-demand and online videos, and the fact that the current AVMSD offers greater protection on television and less in the online world have prompted the Commission to encouraging the industry to develop tools which provide sufficient information to viewers about the possible harmful nature of the content. At national level, many countries have established such tools through self or co-regulation systems with a view to better protect children and young audiences in on-demand audiovisual media services (e.g. Finland, Germany, Hungary, and Ireland).²⁵⁰

As far as co-regulation is concerned, an interesting example was provided in the UK until the beginning of 2016 for non-linear AVMS through the Authority for Television On Demand Services (ATVOD). Indeed, although the UK Communications Act 2003 conferred functions to the Office of Communications (Ofcom) for the regulation of on-demand programme services (ODPS), it allowed Ofcom to delegate certain functions to an ad hoc co-regulatory authority. On 18 March 2010, Ofcom delegated some of its functions and powers in relation to the regulation of ODPS to ATVOD, which became the independent co-regulator for the editorial content of UK VoD services that fall within the statutory definition of ODPS. ATVOD was in principle responsible for determining whether a service falls under the statutory definition of ODPS, but Ofcom, as the regulatory authority, had the final say in these matters, so that appeals could be brought to Ofcom against ATVOD's decisions. Following a review, Ofcom announced on 14 October 2015 that as of 1 January 2016 it would act as sole regulator of these services.²⁵¹ The reasons put forward by Ofcom were that this move would create operational efficiencies and would allow editorial content of VoD to sit alongside Ofcom's existing regulation of broadcast content. Advertising content on VoD services will continue to be subject to a process of co-regulation involving the Advertising Standards Authority.

Self-regulation is also commonly used in the field of copyright enforcement, e.g. through notice and take down procedures, and awareness campaigns or 'follow the money' approaches.²⁵² The Commission has also relied on industry initiatives in the field of cross-border circulation of content, e.g. to facilitate practical industry-led solutions through the stakeholder dialogue "Licences for Europe",²⁵³ or to encourage the industry to work towards an increased cross-border portability of lawfully-acquired audiovisual content.²⁵⁴

4.3. Towards "Union's codes of conduct"

The proposal amending the AVMSD confirms and strengthens the trend towards an increased use of self- and co-regulation in the audiovisual sector. This development is in line with the Communication on Better Regulation for Better Results – an EU Agenda,²⁵⁵ which encourages the Commission to

²⁵⁰ See Cabrera Blázquez, F. J., Cappello, Lépinard, A., Valais, S., The protection of minors in a converged media environment, *op. cit.*

²⁵¹ Ofcom, Press release, 14 October 2015, <http://media.ofcom.org.uk/news/2015/1520333/>.

²⁵² See Cabrera Blázquez, F. J., Cappello, M., Grece, C., Valais, S., Copyright enforcement online: policies and mechanisms, IRIS *Plus* 2015-3, European Audiovisual Observatory, Strasbourg, 2016, <http://publi.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en3.pdf/890ed458-f2a3-40b1-b4a6-2ac0d6310cbe>.

²⁵³ <http://ec.europa.eu/licences-for-europe-dialogue/>.

²⁵⁴ See Cabrera Blázquez, F. J., Cappello, M., Grece, C., Valais, S., Territoriality and its impact on the financing of audiovisual works, IRIS *Plus* 2015-2, European Audiovisual Observatory, Strasbourg, 2015, <http://www.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en2.pdf/ad5c5a8f-4e85-4e3c-b763-9c763895da1e>.

²⁵⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better Regulation for Better Results – an EU Agenda, COM(2015) 215 final, 19 May 2015, http://ec.europa.eu/smart-regulation/better-regulation/documents/com_2015_215_en.pdf.



consider “well-designed non-regulatory means, modelled on the Community of practice and the Principles for Better Self- and Co-regulation”²⁵⁶ when considering policy solutions. It also reflects the nature of the interactions which govern the digital environment in general and the transnational character of online platforms delivering audiovisual content in particular, which call for targeted policy measures to ensure a level-playing field for comparable digital services while requiring flexible answers.

In this way, the proposal encourages, in its general provisions (applicable to all audiovisual media services, i.e. including video-sharing platforms), the use of “codes of conducts” adopted at national level in the fields coordinated by the Directive to the extent permitted by their legal systems. The Commission insists on the enforcement’s dimension, by specifying that the codes shall establish specific targets and objectives allowing for the regular, transparent and independent monitoring and evaluation of the objectives of the codes. In addition, the codes shall provide for graduated sanctions to guarantee an effective enforcement (new Article 4.7 of the proposal). It is interesting to note, in this regard, the new role attributed by the Commission to national regulators gathered in the European Regulators Group for Audiovisual Media Services (ERGA), in relation to self-regulation. In fact, the proposal provides that draft Union codes of conduct and amendments and extensions to existing Union codes of conduct shall be submitted to the Commission by the signatories of these codes and that the Commission may ask ERGA to give an opinion on the drafts, amendments, or extensions of those codes.

In relation to the empowerment of viewers in the online environment, the proposal provides that member states shall encourage co-regulation to ensure that audiovisual media service providers offer sufficient information about content that may impair minors’ physical, mental, or oral development (e.g. through the introduction of a system of content descriptors indicating the nature of content). Self- and co-regulatory codes of conduct are also encouraged by the Commission to reduce the exposure of children and minors to audiovisual commercial communications for foods and beverages that are not nutritionally-fit or for alcoholic beverages. In this respect, the proposal provides that the Commission shall encourage the exchange of best practices on self- and co-regulatory systems across the Union and, where appropriate, facilitate the development of “Union codes of conduct”, as a means of ensuring a more coherent and effective approach (new Article 6a). Here, again, the role of ERGA in the development of such codes by audiovisual media services providers is strengthened.

4.4. Towards an increased responsibility of online platforms

4.4.1. The pioneer role of the Council of Europe in Internet governance

The role of Internet service providers (ISPs) in relation to the content they deliver is at the very heart of many current human rights problems related to the Internet governance (e.g. net neutrality, data retention, the fight against misuse of information, and illegal hate speech online). Discussions on the governance of the Internet are taking place in different national and international fora and involve governments, the private sector, and civil society, to shape common views on Internet policies.

²⁵⁶ The Principles for Better Self- and co- Regulation are designed to offer guidance in cases where two or more actors (public or private) decide to work together to improve the status quo, by resolving a problem or exploiting an opportunity. They offer a benchmark for effective social and corporate responsibility but are not final or comprehensive, <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/CoP%20-%20Principles%20for%20better%20self-%20and%20co-regulation.pdf>.



The Council of Europe takes an active part in these discussions and dialogue with all stakeholders to secure that the rights and freedoms protected by the Convention for the Protection of Human Rights and Fundamental Freedoms²⁵⁷ are at the forefront of all development regarding the Internet.²⁵⁸ In this field the Council of Europe has adopted a concrete multi-stakeholder approach involving the industry (e.g. the Interactive Software Federation of Europe (ISFE), and the European Internet Services Providers Association (EuroISPA)). This collaboration has led to the elaboration with the industry of guidelines for protecting human rights on the Internet. Specifically, in 2008, two sets of guidelines were released,²⁵⁹ for online games providers and for ISPs respectively.

In relation to ISPs, the 2008 Guidelines encourage providers to inform users about potential risks on the Internet, such as the risks for children of encountering content that is illegal or may cause them harm (pornography, violence, or demeaning or racist expressions) or of being exposed to harmful behaviour from other users (e.g. grooming, bullying), security risks (e.g. data integrity, confidentiality, phishing or network security), and privacy risks (e.g. spyware, profiling). The Guidelines bring an important organizational link between EU member states and European non-EU member.

Within the framework of its strategy 2016-2019 in relation to Internet Governance,²⁶⁰ the Council of Europe has reasserted the need to protect and empower citizens without hindering their freedom to use the Internet for everyday activities. The Council of Europe was also in contact with a number of public and private actors at both the European and global level in order to deliver important messages, such as “doing no harm” to the Internet and “no hate speech” online. Among its strategic objectives, the Council of Europe will focus on establishing a platform between governments and major Internet companies and representative associations on their respect for human rights online, including on measures to protect, respect, and remedy challenges and violations to them.

4.4.2. EU Codes of conduct to combating illegal hate speech online

At the EU level, the European Commission and some of the major Internet companies (Facebook, Twitter, YouTube, and Microsoft - the “IT companies”) presented on 31 May 2016 a Code of Conduct, aimed at combating the spread of illegal hate speech online in Europe.²⁶¹ Through the Code, the IT companies recognise that they share, together with other platforms and social media companies, a collective responsibility not only in promoting and facilitating freedom of expression

²⁵⁷ European Convention on Human Rights and Fundamental Freedoms, <http://www.echr.coe.int/pages/home.aspx?p=basictexts>.

²⁵⁸ The Council of Europe is one of the key organisers of the European Dialogue on Internet Governance (EuroDIG) and an active participant in the global Internet Governance Forum (IGF). It is also an observer to the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN), and has solidly established relations with both international organisations and agencies and non-state actors. This enables the Council of Europe to develop partnerships and synergies with a range of state and non-state actors. This also enhances its expertise, networks and the (global) reach of its instruments, monitoring and cooperation mechanisms within and beyond the geographical borders of its member states. See also: <http://www.coe.int/en/web/freedom-expression/internet-governance>.

²⁵⁹ Human Rights guidelines for Internet Service providers and online game designers and publishers, <http://www.coe.int/en/web/portal/guidelines-for-providers>.

²⁶⁰ Council of Europe, Internet Governance – Council of Europe Strategy 2016-2019, Democracy, human rights and the rule of law in the digital world, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c1b60.

²⁶¹ Code of conduct on countering illegal hate speech online, 31 May 2016, http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf.



throughout the online world, but also in combatting the negative impact of illegal hate speech online.

As a follow-up to the “EU Internet Forum” held in December 2015, and based on the Framework Decision on Combatting Racism and Xenophobia,²⁶² which criminalises the public incitement to violence or hatred directed against persons defined by reference to race, colour, religion, descent, or national or ethnic origin, the Code includes a series of commitments aimed at guiding the activities of the IT companies and sharing best practices with other Internet companies, platforms, and social media operators.

These commitments comprise the continued development of internal procedures and staff training in relation to the removal of illegal hate speech content. In particular, the IT companies commit to establish clear and effective processes to review notifications regarding illegal hate speech on their services so they can remove or disable access to such content. This commitment will be accompanied by Rules or Community Guidelines clarifying that the promotion of incitement to violence and hateful conduct is prohibited.

In addition, the IT companies commit to strengthen partnerships with civil society organisations that help flag illegal hate speech content. They also agree to continue their work with the Commission in identifying and promoting counter speech against hateful rhetoric and prejudice, new ideas and initiatives, and supporting educational programs that encourage critical thinking. Educating and raising awareness with users about the types of content not permitted under their rules and community guidelines will also be included in their actions. Finally, the Code provides that the IT Companies will intensify cooperation between themselves and other platforms and social media companies to enhance best practice sharing.

The Code prescribes that the European Commission shall promote, in coordination with member states, the adherence to these commitments also to other relevant platforms and social media companies.

The IT Companies and the European Commission agree to assess the public commitments in this code of conduct on a regular basis, including their impact. They also agree to further discuss how to promote transparency and encourage counter and alternative narratives. To this end, regular meetings will take place and a preliminary assessment will be reported to the High Level Group on Combating Racism, Xenophobia and all forms of intolerance by the end of 2016.

²⁶² Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Al33178>.





5. Case law

In order to avoid “jurisdiction shopping”, whereby operators choose their country of establishment, and thus of jurisdiction, according to the rules that would become applicable and be most beneficial to them,²⁶³ some countries have started to adopt specific rules aimed at bringing these services under their regulatory framework.

This has been the case so far in Germany and France, which have notified the Commission of the extension of certain taxes aimed at promoting European works to VoD distributors located outside of their national territory.

5.1. The Commission Decision on Germany

5.1.1. Tax on VoD providers located outside of Germany

As detailed in Chapter 3, in Germany, cinema operators, broadcasters, video distributors and on-demand service providers are required to financially contribute to the promotion of the film industry through the Film Support Act (*Filmförderungsgesetz* - FFG). The FFG includes measures for the promotion of German cinema and details the conditions for audiovisual support given by the German Federal Film Board (*Filmförderungsanstalt* - FFA).²⁶⁴

Specifically, the existing German federal scheme for the funding of film production, distribution, and exhibition is financed through a special tax (*Sonderabgabe*) imposed on undertakings in the cinema and video industry and the broadcasting sector. Cinema operators, video suppliers and VoD providers have to pay a compulsory tax to the FFA based on their incomes from film exploitation. Cinema operators are taxed based on the box office revenues per screen. Video suppliers and VoD providers are taxed based on their net annual turnover, provided that it exceeds EUR 50 000. So far, only suppliers of VoD services with a registered office or a branch office in Germany were compelled to pay the film levy. Consistently, only VoD service providers with a registered office or a branch office in Germany were entitled to apply for audiovisual support from the FFA.

²⁶³ Machet E. and Dupont C., “Content regulation and New Media: Jurisdiction Challenges in a VOD environment”, background document prepared for the EPRA meeting in 2011, <http://www.epra.org/attachments/brussels-2011-plenary-1-jurisdiction-vod-background-paper>. On the year-long conflict between Belgium and Luxembourg, see Laurent P. and Sasserath O., “RTL Group Wins Battle against the CSA”, IRIS 2009-4/5, European Audiovisual Observatory, Strasbourg, 2009, <http://merlin.obs.coe.int/iris/2009/4/article5.en.html>.

²⁶⁴ See Chapter 3.2.6.



In July 2013, the FFG was amended through Section 66a(2), which stipulates that VoD service providers not established in Germany will be subject to the film levy. The levy will apply to the income that such providers derive from selling services on German-language websites to customers in Germany, provided that these transactions are not subject to any comparable financial contribution to the promotion of cinematographic works by a film funding institution in the service's country of origin.²⁶⁵ As a result from this new obligation, the VoD providers located abroad that are subject to the tax would, under the new Section 66a(2) FFG, also be entitled to audiovisual support from the FFA, in the same way as those providers with a registered office or branch office in Germany.

Germany justified this inclusion of VoD distributors located outside Germany firstly due to the context of rapid technological developments, particularly in the distribution of films, with an increasing share of on-demand access to films. Secondly, Germany stated that it was necessary to take into account major global VoD players which serve different countries from a single establishment located in a member state. According to the German authorities, the objective of the extension is to remain in line with the existing system and philosophy of the FFG, whereby the consumption of films in Germany on any carrier ensures income for a government-owned fund, which supports various cultural objectives including films production and distribution. The estimated annual amount of funds available from the proceeds of the tax on video supply is EUR 13 million.

The German Government notified the amendment to the FFG to the European Commission on 4 March 2014. The Commission expressed its "doubts as to the compatibility with the internal market of the notified amendment" by Decision of 17 October 2014.²⁶⁶ In particular, the Commission considered that this measure could be in contravention of Article 13(1) AVMSD in combination with Articles 2 and 3 AVMSD, and requested that Germany submit its comments according to the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU). In addition, as the measure involved para-fiscal charges, the Commission also questioned the compatibility of the measure under Article 110 TFEU, according to which no member state shall impose on the products of other member states a tax which it does not impose on similar domestic products. Although the foreign providers of German language films would apparently benefit indirectly from the support of film production in Germany in the same way as their German competitors, the Commission needed also to verify that in practice the condition did not structurally favour domestic operators.

After having complied with the procedure of sending observations and receiving comments from interested parties, the Commission issued its Decision on 1 September 2016, whereby it found that the measures were compatible with the TFEU, and did not infringe the AVMSD.²⁶⁷

²⁶⁵ Section 66a(2) of the Filmförderungsgesetz: "Für Anbieter von Videoabrufdiensten, die weder einen Sitz noch eine Niederlassung im Inland haben, gilt die Abgabepflicht nur für Angebote über einen Internetauftritt in deutscher Sprache in Bezug auf die Umsätze, die sie mit Kunden in Deutschland erzielt haben, und nur wenn diese Umsätze nicht am Ort des Unternehmenssitzes zu einem vergleichbaren finanziellen Beitrag zur Förderung von Kinofilmen durch eine Filmförderungseinrichtung herangezogen werden", www.gesetze-im-internet.de/ffg_1979/_66a.html.

²⁶⁶ State aid SA.38418 (2014/N) (ex 2014/N) – Germany – Filmförderungsgesetz, Brussels, 17 October 2014, C(2014) 7665 final, http://ec.europa.eu/competition/state_aid/cases/254981/254981_1599283_12_2.pdf.

²⁶⁷ European Commission, Commission decision of 1.9.2016 on the aid scheme SA.38418 - 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution, C(2016) 5551 final, 1 September 2016, http://ec.europa.eu/competition/state_aid/cases/254981/254981_1779718_146_2.pdf.



5.1.2. Assessment of the proposed measure by the Commission

5.1.2.1. Compatibility with the Treaty

The Commission first assessed the presence of State aid, within the meaning of Article 107(1) of the Treaty, by acknowledging that film distribution support is granted out of State resources, and that it confers a selective economic advantage to undertakings that is capable of distorting or threatening to distort competition and trade in the internal market.

The Commission found that the notified measure was an amendment to the scheme which it had already approved until 31 December 2016, and that the extension of the scheme to foreign VoD providers was equally compatible with the Treaty, as far as the foreign undertakings' access to the funding was concerned.

5.1.2.2. Compatibility with the AVMSD

More interestingly, the Commission had to pronounce itself on the question of whether the concerned tax, which is imposed on services targeted at an audience in Germany, would fall within the scope of the AVMSD. Specifically, Article 13(1) AVMSD is intended to cover measures which are linked to the promotion of European works by ODAVMS. It provides that member states having jurisdiction over the provider of such services ensures that promotion. This can be done for example through a financial contribution made by such services to the production of European works.

The Commission first considers that the fact that the tax serves to contribute to funding a public body which "as only one task among others has the obligation to support the production and distribution of European works, raises doubts as to whether it may fall under Article 13(1) [AVMSD]".

It then acknowledges that the application of such tax to services targeted from one member state to the market in another member state could raise the question of whether such tax would not call into doubt the principle of jurisdiction of the "country of origin".

Finally, the Commission refers to the proposal of 25 May 2016 amending the AVMSD, which clarifies in particular that member states have the right to require providers of ODAVMS targeting audiences in their territories, but established in other member states, to make a financial contribution to the production of European works. The Commission stresses that in this case, the proposed amendment foresees that financial contributions shall be based only on the revenues earned in the targeted member state.

Remarkably enough, the Commission concludes that the proposed wording currently under discussion constitutes a clarification of what could already be possible under the AVMSD, on the grounds that it is necessary to ensure a level-playing field among VoD distributors in the EU. It further specifies that taxation of ODAVMSD is "only an example of measures which can be taken by the member state which has jurisdiction".

5.2. Tax on the revenues of foreign video retailers in France

France has acted in a similar way, also taxing the revenues of foreign video retailers. The budget law 2013 expanded the scope of the general rule applicable to VOD providers not established in France,



but providing their services on the French territory.²⁶⁸ More precisely, the 2% tax concerns sales and rentals of videograms for private use of members of the public and the provision of a paid service providing individual access to cinematographic or audiovisual works in response to an individual request made by electronic means.²⁶⁹

This extension of the tax to VOD services based outside of France was also justified by the government's desire to restore equality between sellers and renters of videos, in physical or dematerialised form, regardless of where they are established.

The European Commission was notified of the law in autumn 2014, and it will enter into force only after the response of the Commission.²⁷⁰ No official texts are available at the date of publication of this report.

²⁶⁸ Article 1609 sexdecies B of the Code général des impôts, as amended by Article 30 of *Loi de finances rectificative pour 2013* (Law no. 2013-1279 of 29 December 2013) (Supplementary budget law for 2013): "Il est institué, à compter du 1er juillet 2003, une taxe sur les ventes et locations en France, y compris dans les départements d'outre-mer, de vidéogrammes destinés à l'usage privé du public. Pour l'application du présent article, est assimilée à une activité de vente ou de location de vidéogrammes la mise à disposition du public d'un service offrant l'accès à titre onéreux à des oeuvres cinématographiques ou audiovisuelles, sur demande individuelle formulée par un procédé de communication électronique. Cette taxe est due par les personnes, qu'elles soient établies en France ou hors de France, qui vendent ou louent des vidéogrammes à toute personne qui elle-même n'a pas pour activité la vente ou la location de vidéogrammes. (...) ", http://legifrance.gouv.fr/affichCodeArticle.do;jsessionid=41DBBDD3BFAB7313DFE1D6D27BF8926A.tpdila07v_2?idArticle=LEGIARTI000028448150&cidTexte=LEGITEXT000006069577&categorieLien=id&dateTexte=22220222.

²⁶⁹ See also TCA – Taxe sur les ventes et les locations de vidéogrammes destinés à l'usage privé du public, <http://bofip.impots.gouv.fr/bofip/194-PGP>.

²⁷⁰ NOTA: Loi n° 2013-1279 du 29 décembre 2013 de finances rectificative pour 2013, art. 30 IV B : "[Cette disposition] entre en vigueur à une date fixée par un décret, qui ne peut être postérieure de plus de six mois à la date de réception par le Gouvernement de la réponse de la Commission européenne permettant de regarder le dispositif législatif lui ayant été notifié comme conforme au droit de l'Union européenne en matière d'aides d'Etat."



6. State of play

6.1. The revision process of the AVMSD

The EU Digital Single Market Strategy and the Work Programme 2015 of the Commission,²⁷¹ announced that a proposal would be tabled in 2016 to scrutinise the scope of the Directive and the nature of the rules applicable to all market players. Accordingly, in 2015 the Commission started a broad assessment of the AVMSD via the new Regulatory Fitness and Performance Programme (REFIT).²⁷² The REFIT evaluation process aims to identify burdens, gaps and inefficient or ineffective measures, including possibilities for the simplification or repeal of existing regulation.

As part of this exercise, during summer 2015 the Commission carried out a public consultation entitled "Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century".²⁷³ Through this new consultation, the Commission sought input from stakeholders on the functioning and impact of the AVMSD and on policy options for the future of the Directive. On 25 May 2016 the European Commission presented a proposal to amend the AVMSD.²⁷⁴

The proposal intervenes on a variety of topics: the scope, the country of origin, protection of minors, hate speech and violence, European works, commercial communications, and regulatory authorities. As the Commission noted in its press release, the aim of the proposal is:

to achieve a better balance of the rules which today apply to traditional broadcasters, video-on-demand providers and video-sharing platforms, especially when it comes to protecting children. The revised AVMSD also strengthens the promotion of European cultural diversity,

²⁷¹ Annex 3 to COM (2014)910 final of 16 December 2014, http://ec.europa.eu/atwork/pdf/cwp_2015_refit_actions_en.pdf.

²⁷² For more details on the REFIT process, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "EU Regulatory Fitness", COM(2012) 746 final of 12 December 2012, http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2013_en.pdf, and Commission Staff Working Document, "Regulatory Fitness and Performance Programme (REFIT): Initial Results of the Mapping of the Acquis", SWD(2013) 401 final of 1 August 2013, http://ec.europa.eu/smart-regulation/docs/reg_fitn_perf_prog_en.pdf.

²⁷³ European Commission, Consultation on Directive 2010/13/EU on audiovisual media services (AVMSD) - A media framework for the 21st century, <https://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st>.

²⁷⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council amending 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 in view of changing market realities, 25 May 2016, COM (2016) 287, <https://ec.europa.eu/digital-single-market/en/news/proposal-updated-audiovisual-media-services-directive>. For a general overview see Chapter 6 of IRIS Plus 2016-1, "On-demand services and the material scope of the AVMSD", <http://www.obs.coe.int/documents/205595/8351541/IRIS+Plus+2016-1+On-demand+services+and+the+material+scope+of+the+AVMSD.pdf>.



*ensures the independence of audiovisual regulators and gives more flexibility to broadcasters over advertising.*²⁷⁵

The main changes pertain to the following aspects:

- Scope: apart from the removal of the principle of the “TV-likeness”, video-sharing platforms are to a certain extent subject to the Directive;
- Country of origin: this principle is maintained, transparency obligations are reinforced, and the procedures for assessing jurisdiction are simplified;
- Protection of minors: the two-tier approach is replaced by common rules concerning content that “may impair”, and a provision that special measures must be put in place for the most harmful content;
- Incitement to hatred: there is reinforcement of the grounds for prohibiting hate speech;
- European works: the obligations on broadcasters are maintained, while those on non-linear services are reinforced, also with regard to targeting countries;
- Commercial communications: there is a relaxation of the rules, but also a reinforcement of self- and co-regulatory codes;
- Audiovisual regulators: the principle of independence is recognised and ERGA will play a bigger role, including in assessing jurisdiction and adopting Union codes.

On 5 September 2016 the two rapporteurs from the Committee on Culture and Education (CULT Committee) of the European Parliament presented a Draft Report.²⁷⁶ While identifying that in the Commission’s proposal “the scope of the Directive is being extended to cover not only traditional broadcasting and on-demand services, but also video-sharing platform services as well as user-generated videos”, the Explanatory Statement to the Draft Report explains that the purpose of the proposed amendments is to “align the provisions for these services and to create a genuine level playing field”. Several rules have therefore been restructured “in order to establish common rules for audiovisual media services, video-sharing platform services and user-generated videos.”

A public hearing with experts was held on 26 September 2016 during which, among others, the topic of European works was discussed.²⁷⁷ Two main aspects were discussed:²⁷⁸ the appropriateness of the minimum share of 20% of European works in the on-demand providers’ catalogues, and what constitutes appropriate ways of presenting these works. For example, it was

²⁷⁵ European Commission, Press release, “Commission updates EU audiovisual rules and presents targeted approach to online platforms”, 25 May 2016, http://europa.eu/rapid/press-release_IP-16-1873_en.htm.

²⁷⁶ European Parliament, Committee on culture and education, Draft opinion of the rapporteurs Verheyen S. and Kammerevert P., on the proposal for a directive of the European Parliament and of the Council amending 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 in view of changing market realities, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-587.655+02+DOC+PDF+V0//EN&language=EN>.

²⁷⁷ European Parliament, Committee on culture and education, Public hearing on “The Audiovisual Media Services Directive Review” of 26 September 2016, <http://www.europarl.europa.eu/committees/en/cult/events-hearings.html?id=20160926CHE00171>. The agenda is available at:

<https://polcms.secure.europarl.europa.eu/cmsdata/upload/b7d90837-2d51-421a-ac52-e6db62b3792d/AVMSCULTPH26092016.pdf>.

²⁷⁸ Peifer K.N., “Promotion of audiovisual works and commercial communications” (in German), Brussels, 26 September 2016, <https://polcms.secure.europarl.europa.eu/cmsdata/upload/85d7330c-3148-4fdf-8070-303045b4d4c6/Public%20Hearing%20AVMS-Statement-Peifer.pdf>.



discussed if a section called “foreign works” could be considered satisfactory in this regard, or even a mere tagging of the works in the form of metadata.

The presentation of amendments to the Draft Report was closed on 19 October 2016, and the vote on the Opinion of the CULT Committee foreseen under the ordinary legislative procedure (ex-codecision procedure) is expected to be on 24 February 2017.²⁷⁹

6.2. The proposed new rules concerning European works

Concerning the issue of European works, the obligations on broadcasters are maintained, while those on non-linear services are reinforced, also with regard to targeting countries. This means that Articles 16 and 17 remain unchanged, whereas Article 13 is significantly strengthened.

A two-tier regulatory approach is maintained between traditional linear services and on-demand audiovisual media services. However, more stringent requirements can be seen for non-linear providers, who will have to comply with new obligations in terms of a minimum share of 20% of European works and prominence in catalogues (new Article 13.1). Member states may also set out financial contribution obligations on European production, which may include direct investments in content and contributions to national funds (new Article 13.2, first part).

1. Member States shall ensure that providers of on-demand audiovisual media services under their jurisdiction secure at least a 20% share of European works in their catalogue and ensure prominence of these works.

*2. Member States may require providers of on-demand audiovisual media services under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contributions to national funds. (...)*²⁸⁰

The financial obligations can also concern providers established outside the jurisdiction of the state in question in the case of targeting services (new Article 13.2, second part). This implies an exception to the country of origin principle, since the proposal allows for the imposition of financial contributions on on-demand services established in other member states, if they are targeting another country. In this case, the targeted member state can extend its jurisdiction and include in its scope of intervention the concerned service, but the definition of the service as such has to be assessed according to the same criteria applied to AVMS in general.²⁸¹

The contributions must be limited to the revenues earned in the targeted member state, to be identified on the basis of a set of “indicators such as advertisement or other promotions specifically aiming at customers in its territory, the main language of the service or the existence of content or commercial communications aiming specifically at the audience in the Member State of reception” (Recital 23).

2. (...) Member States may require providers of on-demand audiovisual media services, targeting audiences in their territories, but established in other Member States to make such

²⁷⁹ [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0151\(COD\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2016/0151(COD)).

²⁸⁰ Article 13(1 and 2, first part) of the AVMSD.

²⁸¹ See Cabrera Blázquez F.J., Cappello M., Grece C., Valais S., *Territoriality and its impact on the financing of audiovisual works*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015.



*financial contributions. In this case, the financial contribution shall be based only on the revenues earned in the targeted Member States. If the Member State where the provider is established imposes a financial contribution, it shall take into account any financial contributions imposed by targeted Member States. Any financial contribution shall comply with Union law, in particular with State aid rules.*²⁸²

How the calculations should be dealt with in practice is something that still needs to be explored. The decision of the European Commission in the state aid case concerning Germany mentioned the revision proposal in its reasoning, whereby it considered the measure justified under EU law:²⁸³

(59) The Commission considers the proposed wording of Article 13 of Directive 2010/13/EU as a clarification of what could already be possible under the Directive currently in force. This article, also when applied for the purpose of this Decision, could not be considered as attributing an exclusive competence to the Member State where the provider is established for the taxation of on-demand media service providers so as to contribute to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service. Indeed, its wording is not categorical and unreserved. Furthermore the taxation of on-demand audiovisual media services providers is only an example of measures which can be taken by the Member State which has jurisdiction.

Nevertheless, no details were provided on how these measures should be dealt with in practice.

²⁸² Article 13(2, second part), of the AVMSD.

²⁸³ European Commission, Decision (EU) 2016/2042 of 1 September 2016 on the aid scheme SA.38418 — 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution (notified under document C(2016) 5551) (Text with EEA relevance), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016D2042>. For further details see Section 5.1. of this publication.

