



# Introduction to media law and the Audiovisual Media Services (AVMS) directive

Erich Pommer Institut, 16 November 2022

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# Main pillars of EU action in the media field

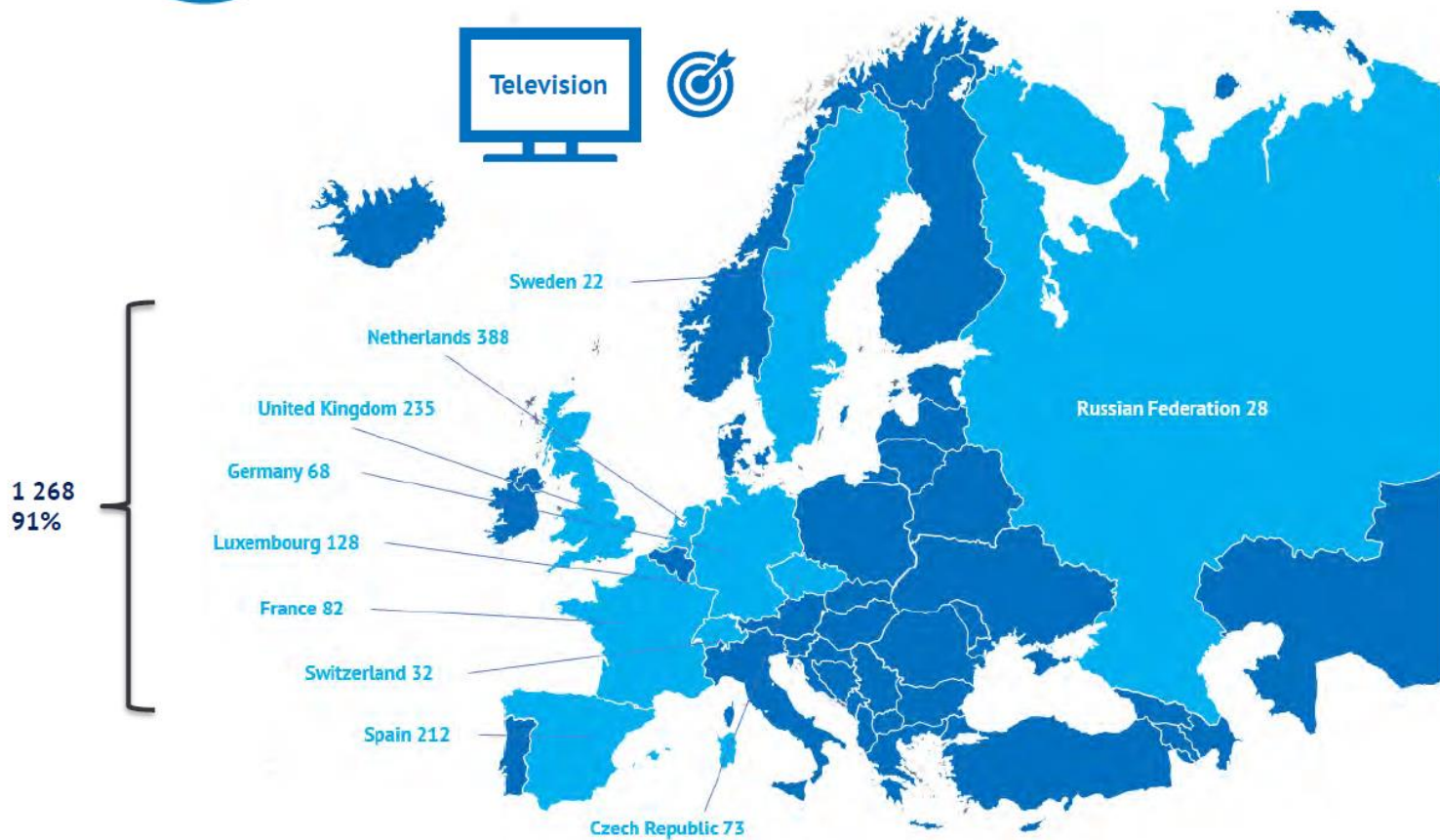
- Freedom of provision of audiovisual services
- Freedom of expression and media pluralism
- Guarantees for public service media
  
- Creative Europe and promotion measures
- Piracy and enforcement measures
- Involvement of national regulatory authorities
  
- Newly adopted DSA package
- Newly proposed European Media Freedom Act

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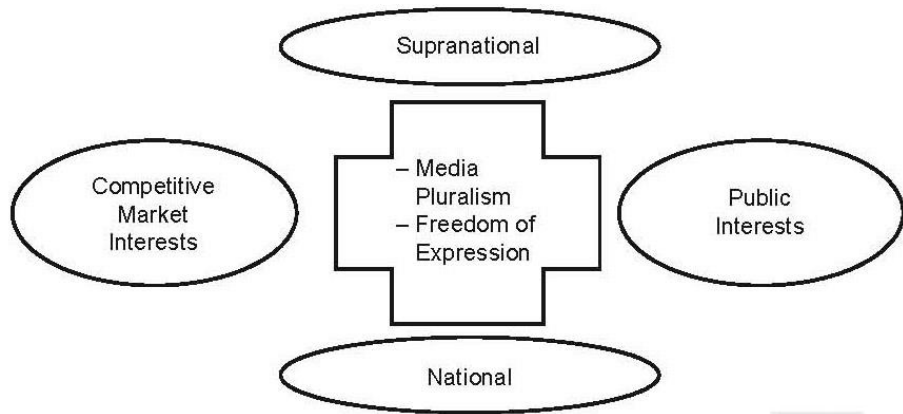


## What are the top 10 hubs for television channels aimed at non-domestic markets?

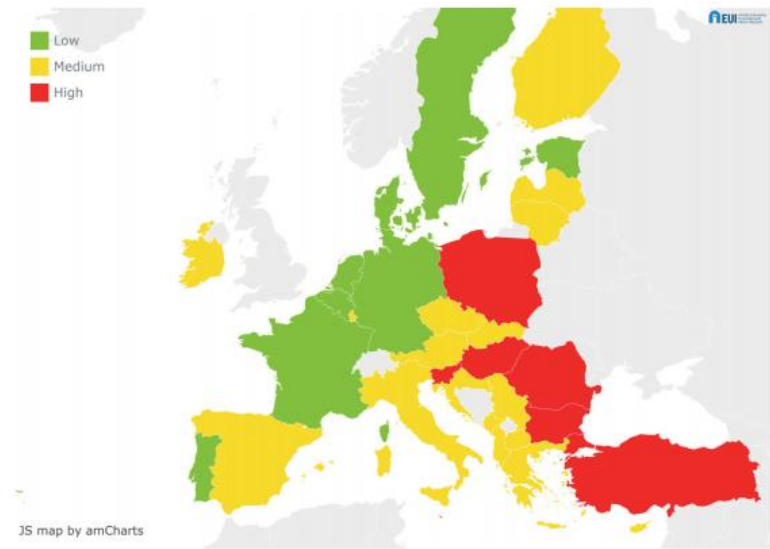


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Source: Media freedom and pluralism, CEU Press



Source: Media pluralism monitor, EUI

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## **The Amsterdam protocol (1997)**

The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.



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### **CULTURE strand**

Initiatives promoting and enhancing artistic and cultural cooperation at European level.

[Find out more](#) →



### **MEDIA strand**

Actions encouraging the competitiveness, innovation and sustainability of the European audiovisual sector.

[Find out more](#) →



### **CROSS-SECTORAL strand**

Initiatives promoting innovative actions and collaboration across the audiovisual and cultural sectors.

[Find out more](#) →

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# Most recent national remedies for online blocking of pirated content



## Dynamic injunctions

Extend blocking orders to future URLs  
(not limited to currently-existing websites)

## Live-blocking injunctions

Allow repeated blocking of a site every time  
a live broadcast is in process

## De-indexing injunctions

Require search engine to remove the  
appearance of the results leading to pages  
containing illicit copyrighted content

Source: European Audiovisual Observatory, Mapping report on national remedies against online piracy of sports content

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# EU Digital Services Package

## Digital Services Act

Ensure a safe and proper functioning of the Digital Single Market


## Digital Markets Act

Ensure fair, contestable and open markets for digital services

### Scope


#### Intermediary Services

##### Online Platforms

Online Marketplaces 

Content Sharing 

Social Networks 

App Stores 

Very Large Online Platforms (VLOPs):  
Specific rules for platforms reaching  
10% of 450 million consumers in Europe

Cloud  
Services  


Web  
Hosting  


##### Core Platform Services

- Online intermediation
- Online search engines
- Social networks
- Video-sharing platforms
- Messaging services
- Operating systems
- Cloud computing

##### Gatekeeper Criteria

- Strong economic position: significant impact on internal market and active in multiple EU countries
- Important gateway: strong intermediation position
- Durable position and impact in the market

##### Other Market Features

- Entry barriers derived from network effects and data driven advantages
- Scale and scope effects the provider benefits from, including with regard to data
- Business user or end user lock-in effects

### DSA

### Key Elements

### DMA

- Builds upon the principles of the E-commerce directive
- Introduces tailor-made provisions for online marketplaces
- Provides for a high standard of transparency for users
- Changes public supervision of online advertising run by VLOPs
- Proportionate obligations depending on the size of the provider
- A new enforcement mechanism e.g. Digital Services Coordinator

- Designated 'gatekeepers' to comply with prohibitions & obligations
- Clearly defined and circumscribed practices deemed as unfair
- Limited exemptions, e.g. public security and public health
- Compliance to be ensured within 6 months following designation
- Obligations apply to core platform services that meet the conditions
- Enforcement and governance, e.g. new investigative powers and digital advisory committees

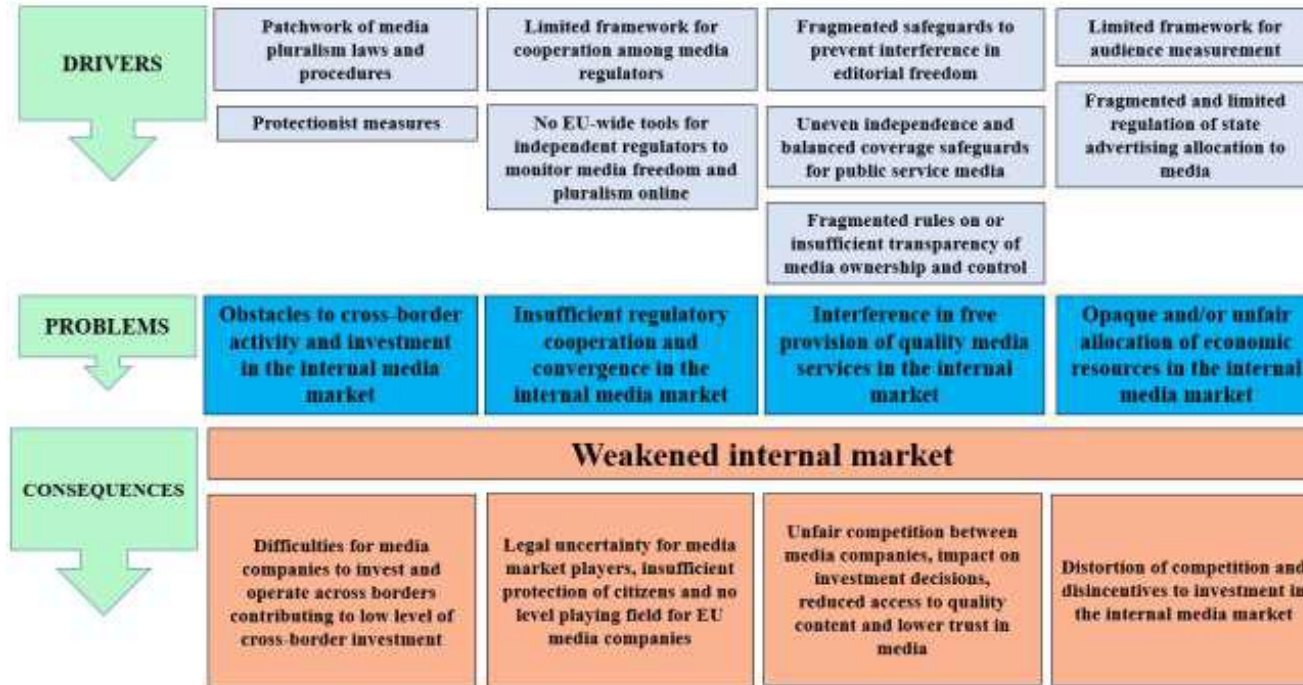
Source: European Commission



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# The EMFA “problem tree”



Source: European Commission, EMFA impact assessment

**The  
Audiovisual Media Services  
Directive**

# Audiovisual Media Services Directive (AVMSD)

a media framework for the 21<sup>st</sup> century

#AVMSD #DigitalSingleMarket

## Why?

For a better balance of rules



## Context

Before



Average TV viewing time is decreasing.

Young people's TV viewing time has **dropped by 7.5%** and is **half** that of the average viewer

Now



### Videos on the Internet



Internet video share in consumer internet traffic is **expected to increase** from **64%** in 2014 to **80%** by 2019

### TV channels target more and more foreign markets



In 2013, **±20%** of broadcasters revenues was invested in **original programming** vs **1%** for **on-demand services**.

### Industry faces fragmented rules on the share of European content across the EU



On average **31%** of VoD services available in one EU Member State are **established in another Member State**

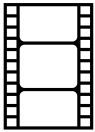


Need for **more independence of regulators** from government & industry

# Key new features of the directive



- Update on establishment and jurisdiction



- Promotion of European works for VOD services



- Role and responsibilities of video-sharing platforms



- Media literacy measures

# 1. Update on establishment and jurisdiction



# Establishment of AVMS

An AVMS is under the jurisdiction of the Member State where it is:

- effectively **established** on its territory, **Art. 2(2)**, or
- deemed to be established, following the criteria outlined under **Art. 2(3)**:



Head office



Editorial decisions

Defined in the revision



workforce involved in  
**programme-related**  
activity

Added in the  
revision

No agreement → European Commission may ask ERGA to provide an opinion.

## Jurisdiction over an AVMS



AVMS shall inform regulators of changes potentially affecting the determination of jurisdiction, **Art. 2(5a)**.

Member States shall keep an **updated list** of AVMS providers established on their territory, **Art. 2(5b)**.



AVMS Providers have to **make accessible the information** on the member State of jurisdiction and regulatory authorities/supervisory bodies, **Art. 5**.



# Right to lay down stricter or more detailed rules

Member States may lay down stricter or more detailed rules **Art. 4(1) for AVMS** and **Art. 28b(6) for VSPs**.

For AVMS, measures can be taken against the provider of the targeting AVMS established in another MS in order to circumvent the stricter or more detailed rules, if **Art. 4(4)**:



Measures were notified to Commission and Member State where the AVMS is established



**AVMS provider's right of defence were respected**



Measure assessed as compatible with EU law by Commission and ERGA

Added in the revision

**If needed, Commission may request further information within 1 month**

## To sum it up ...

- The Country of Origin principle is maintained.
- Assessment criteria for the determination of the Member State of establishment are clarified.
- Measures for transparency and follow-up over the question of jurisdiction are introduced.
- Assessment process of Member States' restrictive measures by the Commission is detailed.

# Movement of SERVICES



## **Audiovisual Media Services Directive (AVMSD)**

allows freedom of reception and retransmission  
of TV and on-demand services

# Movement of SERVICES



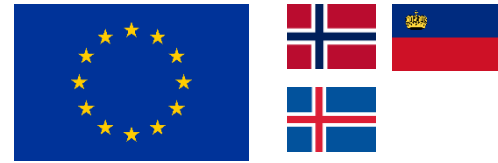
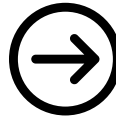
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# Movement of SERVICES



Broadcasting



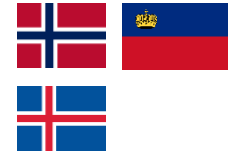
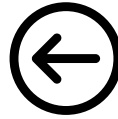
- **ONE Ofcom licence** for services receivable in the UK and in 22 EEA countries that have signed and ratified the European Convention on Transfrontier Television (ECTT)
- **SEVEN licences** from EEA countries not party to the ECTT.

- Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia and Spain
- **Belgium, Denmark, Greece, Ireland, Luxembourg, the Netherlands and Sweden**

# Movement of SERVICES



Broadcasting

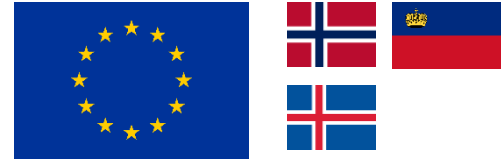
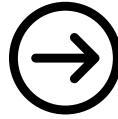


- **National licence** for services receivable in the UK from 22 EEA countries that have signed and ratified the European Convention on Transfrontier Television (ECTT)
- **Ofcom licence** for services from EEA countries not party to the ECTT.

- Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia and Spain
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# Movement of SERVICES

VoD

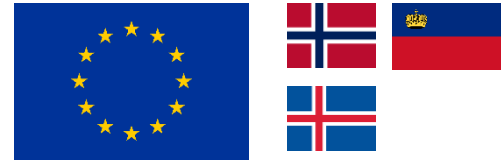


- **Video on demand (VOD) services are not covered by the scope of the ECTT**
- UK providers will need to **comply with AVMSD jurisdiction rules** as “third country” if they provide VOD services in an EEA country

# Movement of SERVICES



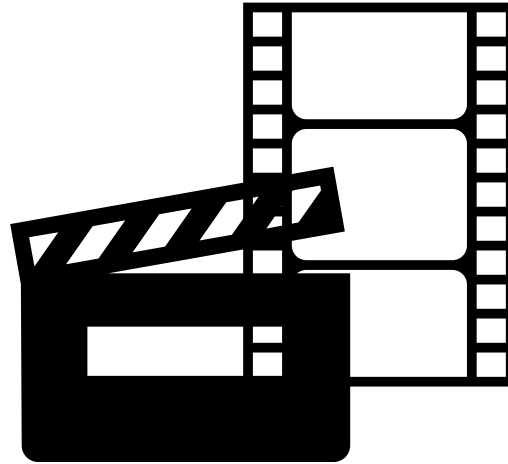
VoD



- If a VOD service's head office and **editorial decision-making capacity are based in the UK**, the provider must **notify this to Ofcom** before providing the service
- **VOD services not under UK jurisdiction** will continue to be **available to UK audiences**



## 2. Promotion of European works



# Promotion of European works – Linear services (Art. 16-17)

Obligations of broadcasters remain unchanged from the old Directive.



**of transmission time  
to European works**



**of transmission  
time/programming budget to  
independent European works**

# European WORKS



**Brexit**

## Audiovisual Media Services Directive (AVMSD)

### Article 1 (n)

**‘European works’** means the following:

(i) works originating in Member States;

(ii) works originating in **European third States party to the European Convention on Transfrontier Television of the Council of Europe** and fulfilling the conditions of paragraph 3;

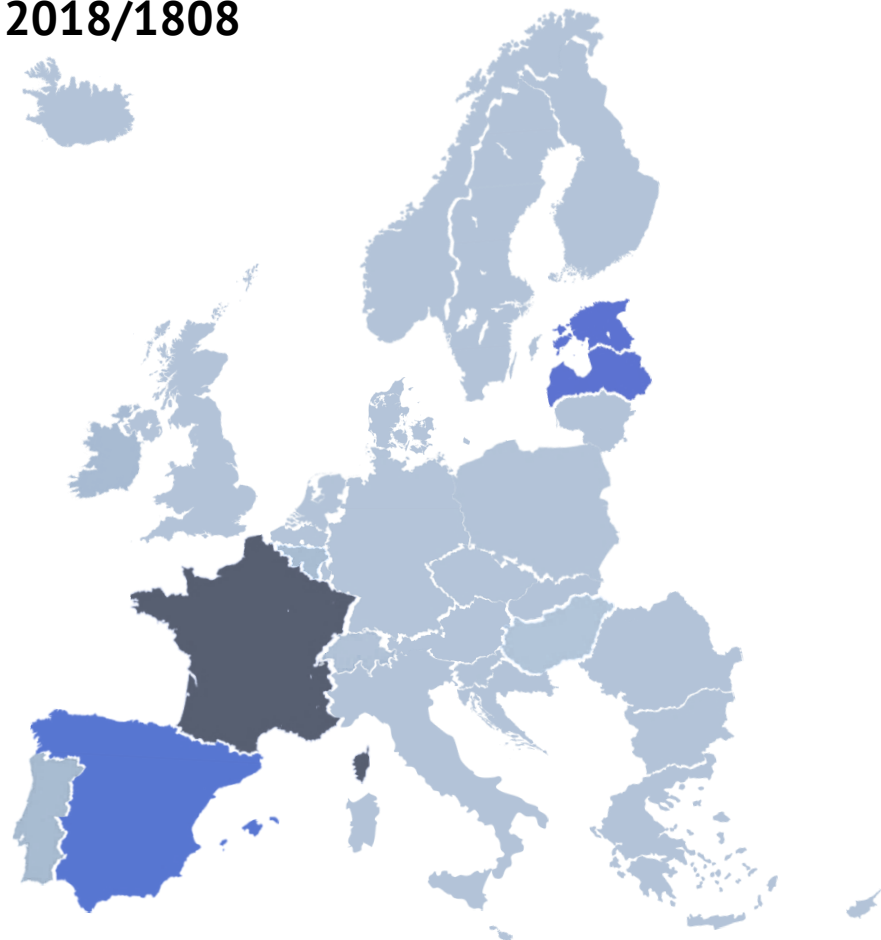
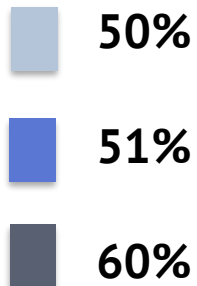
(iii) works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.

2. The application of the provisions of points (n)(i) and (ii) of paragraph 1 shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned.

3. The works referred to in points (n)(i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the States referred to in those provisions provided that they comply with one of the following three conditions:

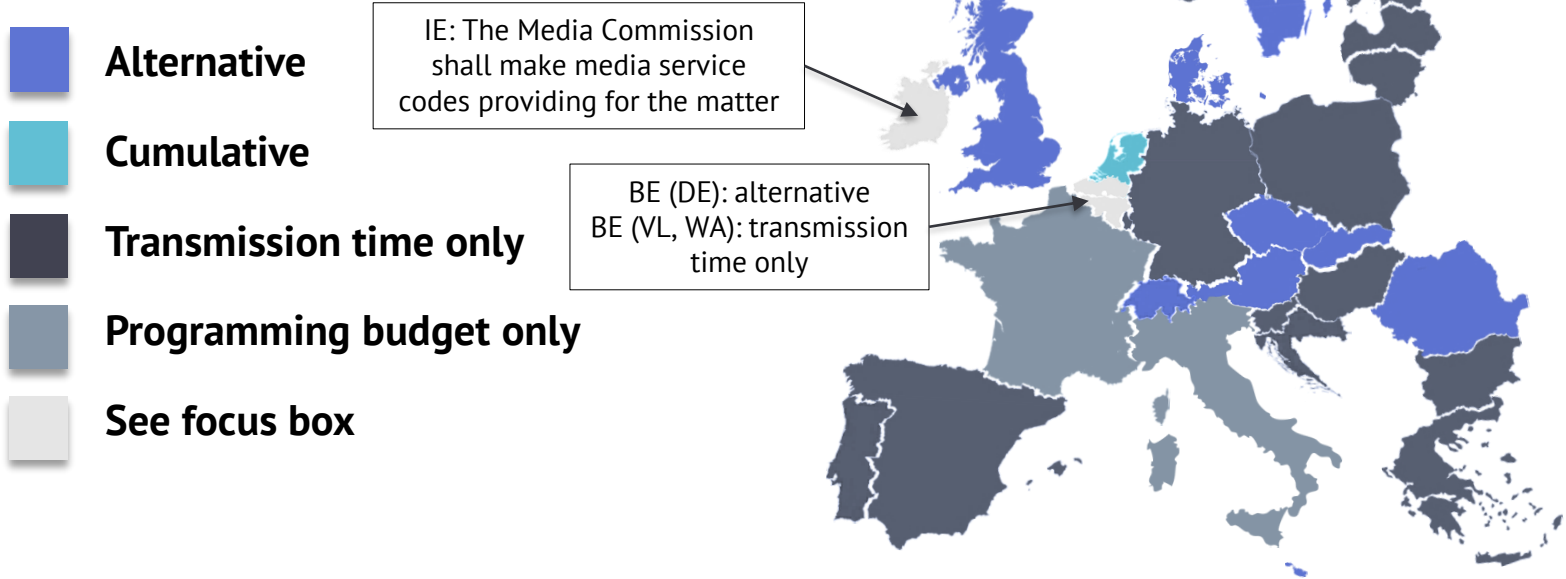
# State of implementation of the AVMSD 2018/1808

## Minimum proportion of broadcasting time of European audiovisual works



# State of implementation of the AVMSD 2018/1808

## Quota of broadcasting time/programming budget for independent European works



# Promotion of European works – VoD (Art. 13)

## OBLIGATION



Minimum  
share in  
catalogues

+

Prominence

## VOLUNTARY



Financial contribution:

- Production
- Direct investments
- National funds

Including targeting services

### Under the previous Directive of 2010

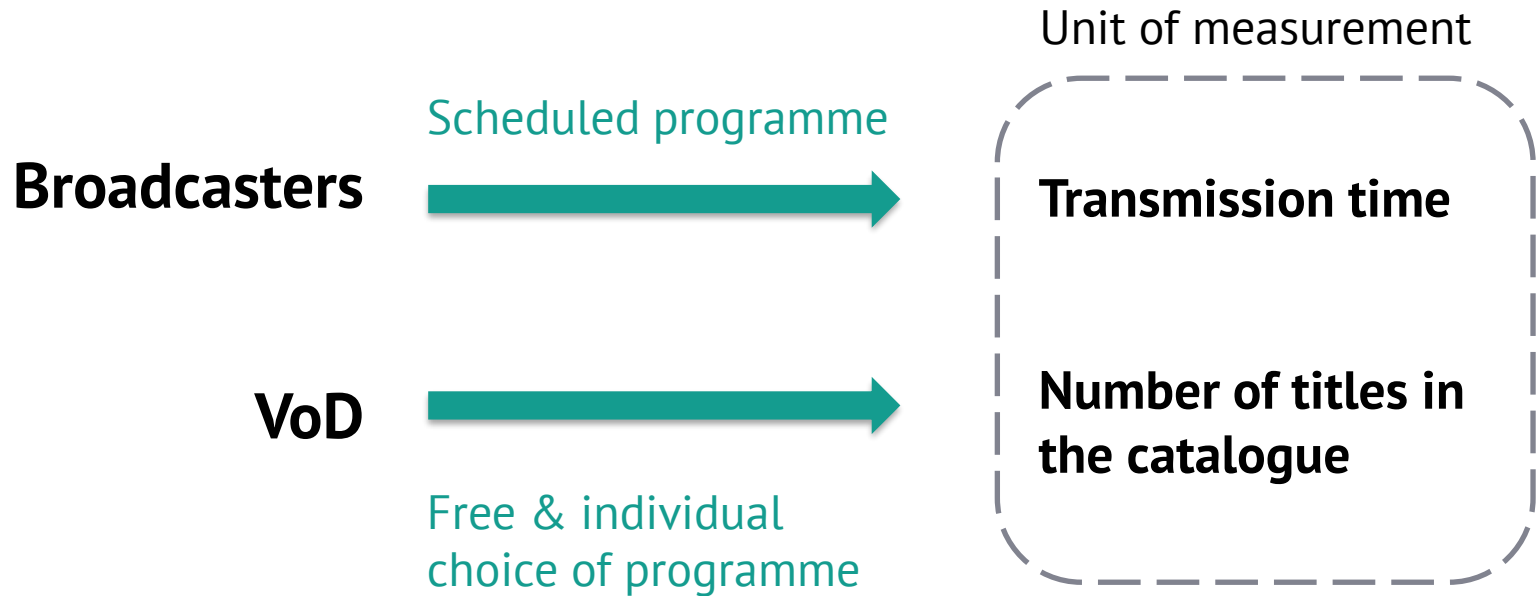
- Financial contribution to production/rights acquisition in European works
- Share of European works in VOD catalogues
- Prominence obligation

## Promotion of European works – VoD (Art. 13)

### **Commission's Guidelines on :**

- a) the calculation of the share of European works in the catalogues of on-demand providers
- b) the definition of 'low audience' and 'low turnover' for the purposes of exemptions to the obligations concerning the promotion of European works.

# Calculation of the share of European works (1/2)





## Calculation of the share of European works (2/2)

- What constitutes a **title** ?
  - Feature and TV films : **one film** = one title
  - Series: **one season** = one title
- Calculated on **what**?
  - **National catalogue**
- Calculated **when** ?
  - **At every point time or**
  - **On average over a pre-determined period**

# Exemption for low audience and low turnover (1/2)

## ■ Low turnover

**Threshold of annual turnover**

< EUR 2 million

**Determination of the turnover**

- Recommendation 2003/361/EC concerning the definition of micro, small and medium sized enterprises
- Size of the audiovisual market (< 1% of the overall revenue)

## Determination of low audience for VOD (2/2)

- SVOD ➤ active paying subscribers
- TVOD ➤ unique customers/unique accounts
- AVOD ➤ unique visitors

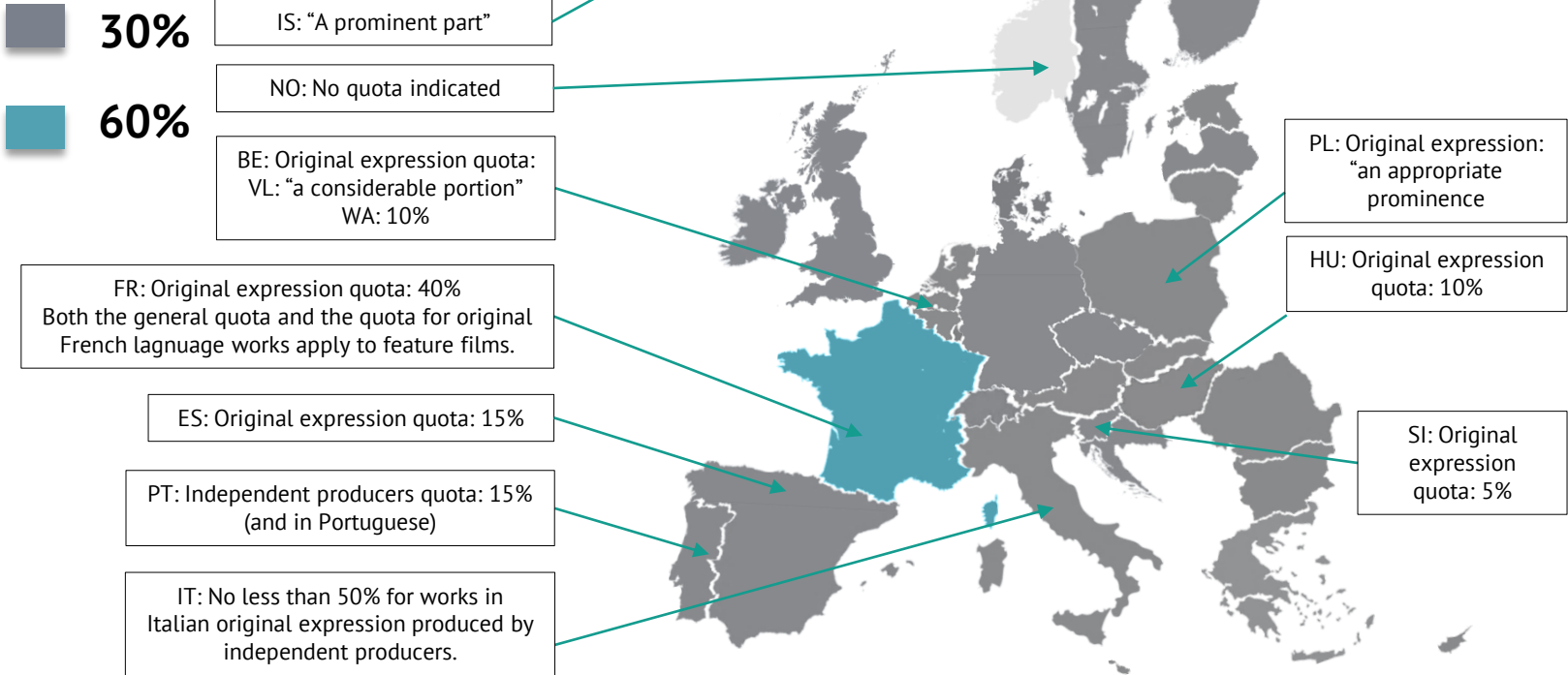
### Calculation

**Share:**  $\text{Nbr of user} / \text{Total nbr of users of similar VOD services} \times 100$

**Threshold:** Less than 1% in a given Member State

# State of implementation of the AVMSD 2018/1808

## Quota obligation on VOD services



# State of implementation of the AVMSD 2018/1808

## Prominence obligation on VOD services

-  Legislation specifying prominence tools
-  No obligation
-  See focus box

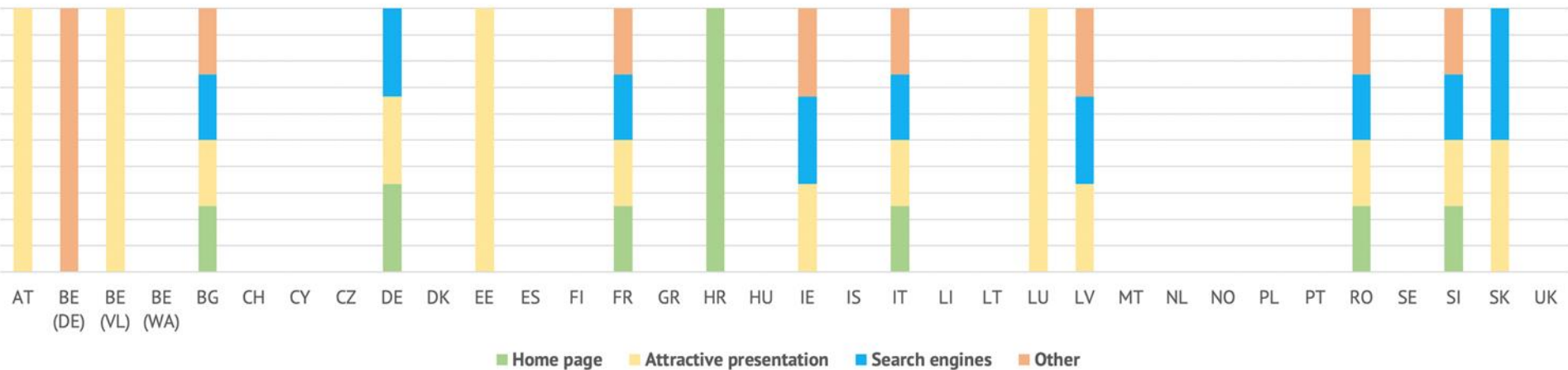
BE:  
Legislation specifies prominence tools (DE, VL)  
No specific tool (WA)



# State of implementation of the AVMSD 2018/1808

## Prominence measures for VOD services

VOD services: Tools for promoting European works



Source: European Audiovisual Observatory

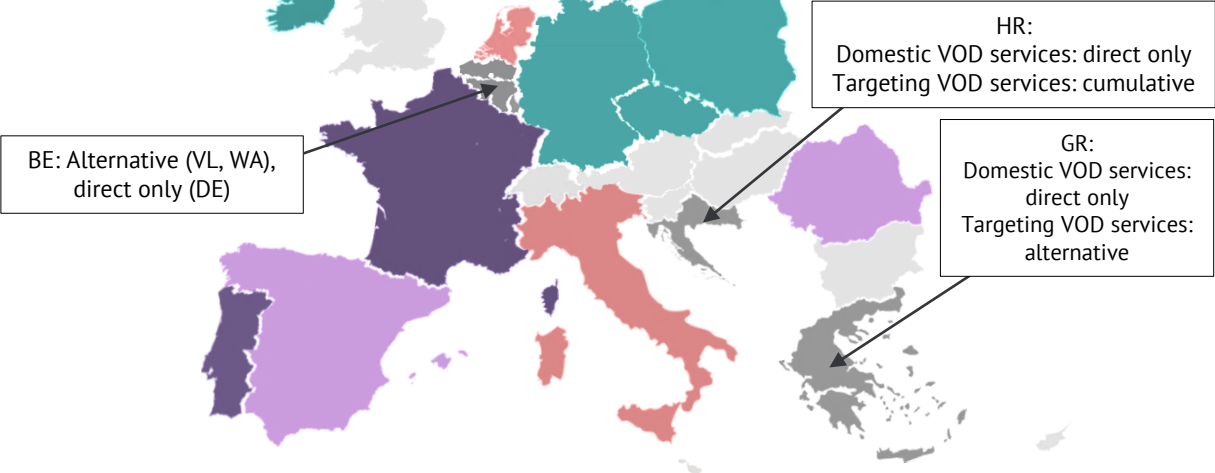
# State of implementation of the AVMSD 2018/1808

## Financial contribution

*Production, acquisition of rights, levies*

- Direct only
- Levies only
- Alternative
- Cumulative
- No obligation
- See focus box

**VOLUNTARY**



# THE “UNCLASSIFIABLE”

Belgium, Greece, Croatia



# BELGIUM

German Community



## Direct investment

| Rate  | Base  |
|---|---|
| The government shall specify further rules. | The revenue generated in the German-speaking Community. |

# BELGIUM

Flemish Community



## Direct investment / levies

| Rate | Base   |
|------|--|
| 2,0% | Turnover achieved in the Dutch-speaking region in the second year preceding the year of the compulsory contribution. |

# BELGIUM

French Community



## Direct investment / levies

| Rate | Base                              |
|------|-----------------------------------|
| 2,2% | Turnover<br>above EUR 20 million; |
| 2%   | btw EUR 15-20 million;            |
| 1,8% | btw EUR 10-15 million;            |
| 1,6% | btw EUR 5-10 million;             |
| 1,4% | btw EUR 300 000 and 5 million;    |
| 0%   | btw EUR 0 and 300,000.            |

# GREECE



## Direct investment

| Rate                             | Base   |
|----------------------------------|--|
| <b>National services</b><br>1,5% | Turnover associated with<br>AVMS operations in Greece. |

# GREECE



## Direct investment / levies

| Rate  | Base  |
|---|---|
| <p data-bbox="755 388 1025 426"><b>Targeting services</b></p> <p data-bbox="755 473 832 512">1,5%</p> | <p data-bbox="1248 441 1624 517">Turnover relating to their activity in Greece, either:</p> <ul data-bbox="1248 541 1707 899" style="list-style-type: none"><li data-bbox="1248 541 1707 618">• to the production of Greek audiovisual works, or</li><li data-bbox="1248 639 1707 760">• to the purchase of rights to Greek audiovisual works (unreleased), or</li><li data-bbox="1248 781 1707 899">• to the National Centre for Audiovisual Media and Communication</li></ul> |

# CROATIA



## Direct investment

| Rate                                 | Base   |
|--------------------------------------|--|
| <b>National services</b><br><br>2,0% | Total annual gross revenue.<br><br>The investment may be cumulated over a period of two years. |

# CROATIA



## Direct investment + levies

| Rate  | Base  |
|---|---|
| <p><b>Targeting services</b></p> <p>2,0%</p> <p>Financial contribution to the implementation of the National Program for Promoting Audiovisual Creativity Works in accordance with the law governing audiovisual activity</p> | <p>Total annual gross revenue.</p> <p>The investment may be cumulated over a period of two years.</p> |

# **CUMULATIVE OBLIGATIONS**

**France, Portugal**



# FRANCE



## Direct investment

| Rate  | Base   |
|---|--|
| <p><b>SVOD services:</b></p> <p>25% if they offer at least one feature film per year within a period of less than 12 months after its theatrical release in France</p> <p>20% in other cases (other quotas shall apply to pay-per-view services and free-of-charge.</p> | <p>Net annual turnover for the previous financial year generated in France</p> |

# FRANCE



## Direct investment

| Rate  | Base   |
|---|--|
| <p><b>Other VOD services:</b><br/>15% of the annual turnover which arises from exploitation of cinematographic works</p> <p>15% of the annual turnover which arises from exploitation of audiovisual works.</p> <p><b>Catch-up TV (cinema contribution):</b><br/>applicable proportions to their TV service</p> | <p>Net annual turnover for the previous financial year generated in France</p> |

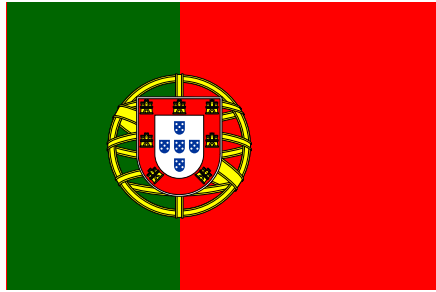
# FRANCE



## Indirect investment (levies)

| Rate  | Base   |
|-------|--|
| 5,15% | The net annual turnover for the previous financial year. |

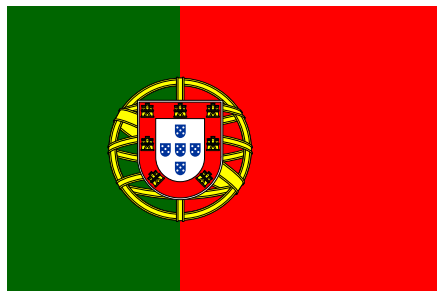
# PORTUGAL



## Direct investment

| Rate  | Base   |
|---|--|
| 0,5 % or EUR 0.50 per subscriber or EUR 10 000. | Relevant income<br>Between EUR 200 000 and EUR 1 999 999 |
| 1 % or EUR 1 per subscriber or EUR 100 000.     | Between EUR 2 000 000 and EUR 9 999 999                  |
| 2 % or EUR 2 per subscriber or EUR 500 000      | Between EUR 10 000 000 and EUR 24 999 999                |
| 3 % or EUR 3 per subscriber or EUR 1 500 000    | Between EUR 25 000 000 and EUR 49 999 999                |
| 4 % or EUR 4 per subscriber or EUR 4 000 000    | EUR 50 000 000 or more                                   |

# PORTUGAL



## Indirect investment (levies)

| Rate                       | Base  |
|----------------------------|---|
| <b>Advertisers</b><br>4,0% | Audiovisual commercial communications included in on-demand audiovisual services are subject to a fee of the price paid by the advertiser |
| <b>SVoDs</b><br>1,0%       | Relevant income   |

# **ALTERNATIVE OBLIGATIONS**

**Spain, Switzerland, Romania**

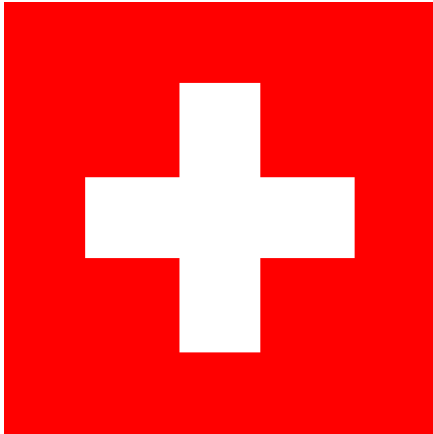
# SPAIN



## Direct investment / levies

| Rate | Base  |
|------|---|
| 5,0% | Eligible revenue equal to or greater than EU 50 million                         |
| 5,0% | Revenue is less than EUR 50 million and greater than or equal to EUR 10 million |

# SWITZERLAND



## Direct investment / levies

| Rate   | Base   |
|--|--|
| <p>4,0%</p> <p>A substitute levy shall be due if the investment obligation is not achieved on average over a period of four years.</p> | <p>Gross revenues earned in Switzerland.</p> |



# ROMANIA



## Direct investment / levies

| Rate   | Base  |
|--|---|
| <b>Levies</b><br><u>Purchase</u><br>3,0%                   | Price of films downloaded for remuneration        |
| <u>Rental or SVoD</u><br>4,0%                              | Revenue from single transactions or subscriptions |
| <b>Direct investment</b><br><u>Rental or SVoD</u><br>40,0% | of the amount due to the Film Fund.               |

# **DIRECT INVESTMENT**

**Italy, Netherlands**

# ITALY



## Direct investment

| Rate                       | Base                          |
|----------------------------|-------------------------------|
| 17% until 31 December 2022 | Annual net revenues in Italy. |
| 18% from 1 January 2023    |                               |
| 20% from 1 January 2024    |                               |

# NETHERLANDS



## Direct investment

| Rate | Base                                     |
|------|--|
| 4,5% | Annual turnover of more than €30 million |

**Draft!!!**

# LEVIES

**Ireland, Denmark, Czech Republic, Germany, Poland**

# IRELAND

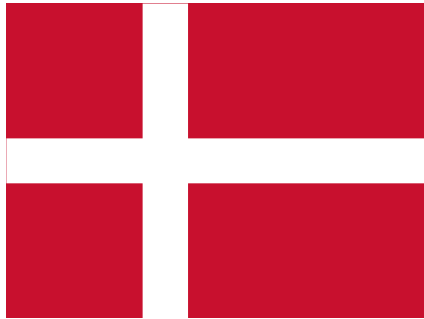


## Indirect investment (levies)

| Rate          | Base  |
|---------------|---|
| To be defined | The method of calculation of a levy shall be based on the revenue earned by the provider in the State from any audiovisual media service which it provides there. |

**Draft!!!**

# DENMARK



## Indirect investment (levies)

| Rate | Base   |
|------|--|
| 6,0% | Annual turnover in Denmark if exceeds DKK 15 million |

**Draft!!!**

# CZECH REPUBLIC



## Indirect investment (levies)

| Rate | Base  |
|------|---|
| 0,5% | The price paid by the end-user for the provision of a single service. |



# GERMANY



## Indirect investment (levies)

| Rate | Base                                     |
|------|--|
| 2,5% | Annual turnover over EUR 20 000 000;     |
| 1,8% | Annual turnover of up to EUR 20 000 000. |

# POLAND



## Indirect investment (levies)

| Rate | Base   |
|------|--|
| 1,5% | Revenue generated by the fees for access to on-demand audiovisual media services made available to the public or revenue generated by the broadcast of commercial communications, if that revenue is higher in the relevant accounting period. |



## Investing in European works: the obligations on VOD providers

A publication  
of the European Audiovisual Observatory



### 3. Role and responsibilities of video-sharing platforms



# Definition – what is a **video-sharing platform**?

- Content **created by users**
- **VSP** provider has **no editorial responsibility**
- the **organisation of the stored content** is determined by the provider of the service
- by **automatic means** or **algorithms**
- Including by **displaying, tagging** and **sequencing**

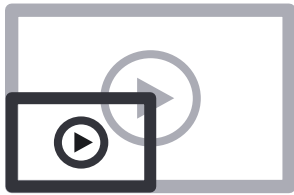


Video-sharing platforms

# Categories of video-sharing platforms

- (1) Services **whose principal purpose** is to provide programmes, user-generated videos, or both, to the general public;
- (2) Services of a **wider nature** offering, amongst other elements, a **dissociable section whose principal purpose** is to provide programmes, user-generated videos, or both, to the general public;
- (3) Services for which **an essential functionality** is devoted to the provision of programmes, user-generated videos, or both, to the general public.

# Definition – what is an essential functionality?



- From the **platform's** point of view: the **nature and specific role** that user-generated videos and programmes play in the service offered by the platform

- From the **users'** point of view: the **degree of exposure** to AV content



## Essential functionality – Categories of indicators

- 1 The relationship between the audiovisual content and the main economic activity or activities of the service;
- 2 Quantitative and qualitative relevance of the audiovisual content available on the service;
- 3 Monetisation of, or revenue generation from, the audiovisual content
- 4 The availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content.



# Establishment and jurisdiction over VSPs

A VSP is under the jurisdiction of the Member State where it is:



- effectively **established** on its territory, **Art. 28a(1)**, or
- deemed to be established, by having a **parent** or a **subsidiary** undertaking or **part of a group with an undertaking established** on its territory, **Art. 28a(2)**.

Member States shall keep a list of VSP providers established on their territory, **Art. 28a (6)**.

# Obligations of VSPs (1/2)

VSPs shall take appropriate measures for the protection of:



## Minors – Art. 28b(1)(a)

- Content which may impair their physical, mental or moral development



## The public – Art. 28b(1)(b)-(c)

- Content inciting to violence or hatred
- Content which constitutes a criminal offence under EU law

## Obligations of VSPs (2/2)



### VSPs and commercial communications – Art. 28b(2)

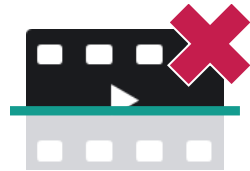
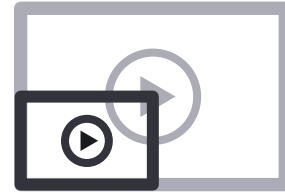
Commercial communications marketed, sold or arranged:

- by VSP providers → take appropriate measures to comply with Article 9(1)
- by users → take appropriate measures considering VSPs **limited control** over content

Fulfilling these obligation should be accomplished by using appropriate measures...

## VSPs limited liability

Such measures shall take into account the **size** of the VSP and the **nature** of the service, and ...



... “shall not lead to any **ex-ante control** measures or **upload-filtering** of content”...

... in accordance with Art. 15 of the **e-commerce Directive**.

## Appropriate measures to be implemented by VSPs include:



**Terms and conditions**



**Indication of commercial communications in UGC**



**Reporting or flagging content**



**Feedback and transparency**



**Age-verification systems**



**Content rating**



**Parental control**



**Complaint resolution**



**Media literacy**



**Protection of minors' data**

## 4. Media Literacy Measures



# The AVMSD introduced legal obligations for:

- **Member states**, to promote and take measures for the development of media literacy skills **Art. 33a**



- **Video sharing platforms**, to put in place effective media literacy measures and tools and to raise users' awareness of those measures and tools **Art. 28b (3) (j)**

# General obligation to take and promote media literacy measures **Art. 33a**

*Entrusted to :*

- National regulatory authorities
- Governmental entities (Ministry of Culture, of Education, etc)
- Media service providers (Broadcasters and/or VSPs)
- Specific entity created for this purpose



# Next steps

- Reporting 2 years after the implementation and then every 3 years
- Evaluation 19 December 2026

# Thank you!

Questions?

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COUNCIL OF EUROPE



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