



Investing in European works: the obligations on VOD providers

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Investing in European works: the obligations on VOD providers

Francisco Javier Cabrera Blázquez, Maja Cappello, Julio Talavera Milla,
Sophie Valais



Foreword

Online services are cross-border per nature, at least from a technical standpoint. As such, VOD services can reach virtually any country on the planet, with no natural barriers or frequency shortage to prevent this. That is, if the law of the land allows it.

The regulation of VOD in Europe, although based on an EU Directive (the Audiovisual Media Services Directive - AVMSD), is done at national level. An example of this is the possibility for member states to introduce financial obligations to promote the production of European works. Article 13(2) AVMSD leaves plenty of leeway for member states to introduce (or not!) such obligations on VOD services, and accordingly, there are important regulatory differences from country to country. In theory, this could mean that big SVOD services established in one EU country would have to abide by the financial obligations of that country alone. But the AVMSD clarifies that, “given the direct link between financial obligations and Member States’ different cultural policies, a Member State is also allowed to impose such financial obligations on media service providers established in another Member State that target its territory”.

This new report by the European Audiovisual Observatory describes the rules concerning financial obligations for VOD services in the EU. We ask the following questions:

- What is the current legal framework for promoting the production of European works in the EU?
- What are the resulting obligations on VOD services operating at national and cross-border level?
- What form do these financial obligations take (investment in production, acquisition of rights, levies etc.)?

Our report includes a country-by-country analysis of the 14 countries that have decided so far to introduce this kind of obligation and a chapter on the work of ERGA (the European Regulators Group for Audiovisual Media Services), and dives into recent case law. As a bonus, we are also publishing a detailed overview table with information about the national transposition in the EU27, EFTA countries and the UK of the obligations to promote European works included in Articles 13, 16 and 17 of the AVMSD.

This extensive kind of analysis would not have been possible without the precious collaboration of the national members of the European Film Agency Directors association (EFAD) and of the European Platform of Regulatory Authorities (EPRA): my warmest thanks go to each and every one of them for their very valuable feedback.

Strasbourg, September 2022

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

European Audiovisual Observatory

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1. Setting the scene¹

1.1. Audiovisual production in Europe: Film, TV series and TV films

1.1.1. Production volume, episodes and length

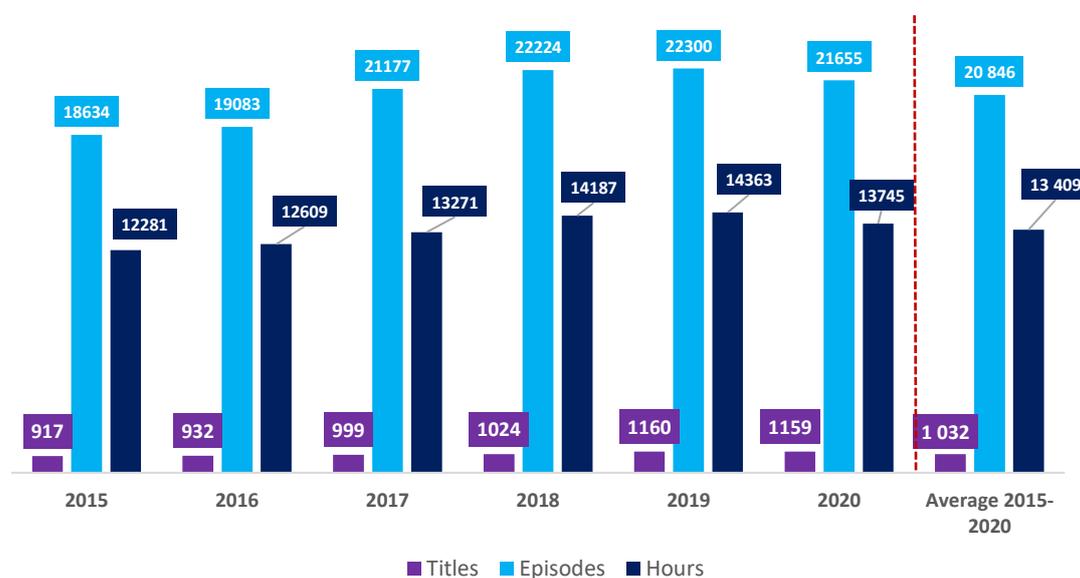
Over the period 2015-2020, a yearly average of 1 032 titles² (including TV films and TV series commissioned by television channels or on-demand audiovisual services) were produced in the European Union, accounting for an average of 20 846 episodes and 13 409 hours.³ With the exception of the year 2020, figures for the three indicators grew over time.

¹ This chapter is mainly based on the most recent reports on market trends in audiovisual production, audiovisual media services in Europe and, particularly, on the VOD sector, by the Department for Market Information of the European Audiovisual Observatory. Special thanks to two of their authors, Christian Grece and Agnes Schneeberger, for peer-reading it before publication.

² The term “title” refers to either a TV film or a TV season. Each different season of a series is counted as one title. See European Commission’s Guidelines on the revised Audiovisual Media Services Directive, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_20_1208/OANDA_20_1208_EN.pdf.

³ Fontaine, G., 2022, “Audiovisual fiction production in Europe. 2020 figures”, European Audiovisual Observatory, <https://rm.coe.int/audiovisual-fiction-production-in-europe-2020-figures/1680a5d715>.

Figure 1. Volume of AV fiction produced in Europe (2015-2020)



Source: European Audiovisual Observatory analysis of The European Metadata Group data.

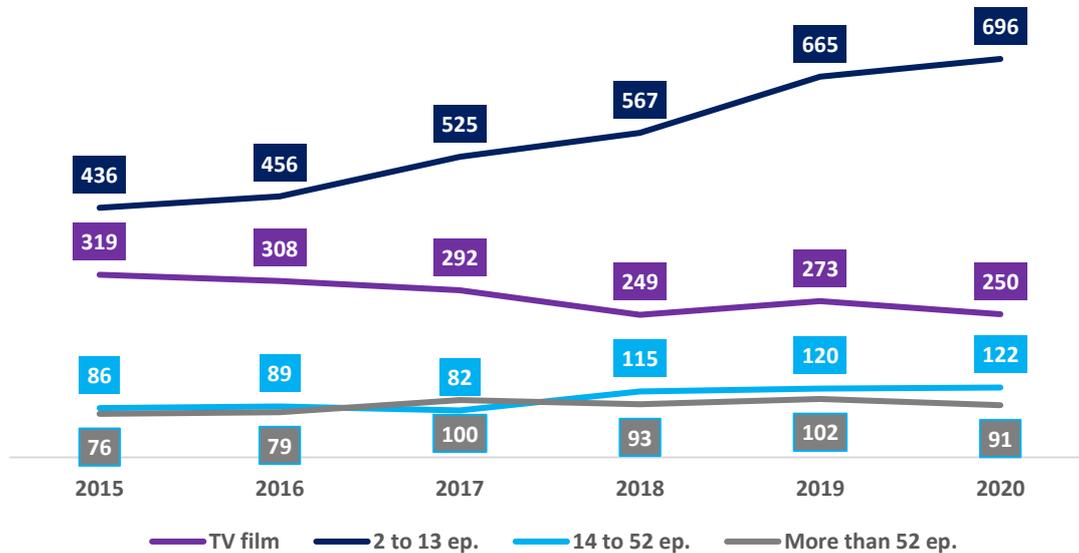
This increase does not appear to have been at the expense of the production of theatrical films. Just before the COVID pandemic, the production of feature theatrical films in the European Union surpassed the landmark figure of 2 000 films in 2019 (2 007 films produced, split into 1 225 fiction films and 782 documentaries), up from 1 827 films in 2016. Even in 2020, in spite of the impact of COVID, 1 400 feature films were produced in the European Union. Over that same period, the number of admissions remained stable within the EU, at around 1 000 million admissions (growing from 992 million in 2016 to 1 007 million in 2019).⁴

The most remarkable trend, when it comes to TV and on-demand production, is a clear shift towards short TV series (those with between 2 and 13 episodes, which can be used as a proxy for high-end, premium TV series) at the expense of TV films, the production of which decreased by 21.6% (down to 250 in 2020) while short TV series grew by 59.6% over the same period from 2015 to 2020. In turn, TV series with more episodes (between 14 and 52 episodes, as well as those with more than 52 episodes – mostly soap operas) saw very mild growth over this period. The most common works produced were TV series with between 2 and 13 episodes per season, accounting for 54% of the titles and 24% of the hours produced over the five-year period analysed.⁵

⁴ Kanzler, M., Simone, P., 2020, "Film Market Trends", European Audiovisual Observatory, <https://rm.coe.int/focus2020/1680a32252>.

⁵ Fontaine, G., 2022, "Audiovisual fiction production in Europe. 2020 figures.", European Audiovisual Observatory, <https://rm.coe.int/audiovisual-fiction-production-in-europe-2020-figures/1680a5d715>.

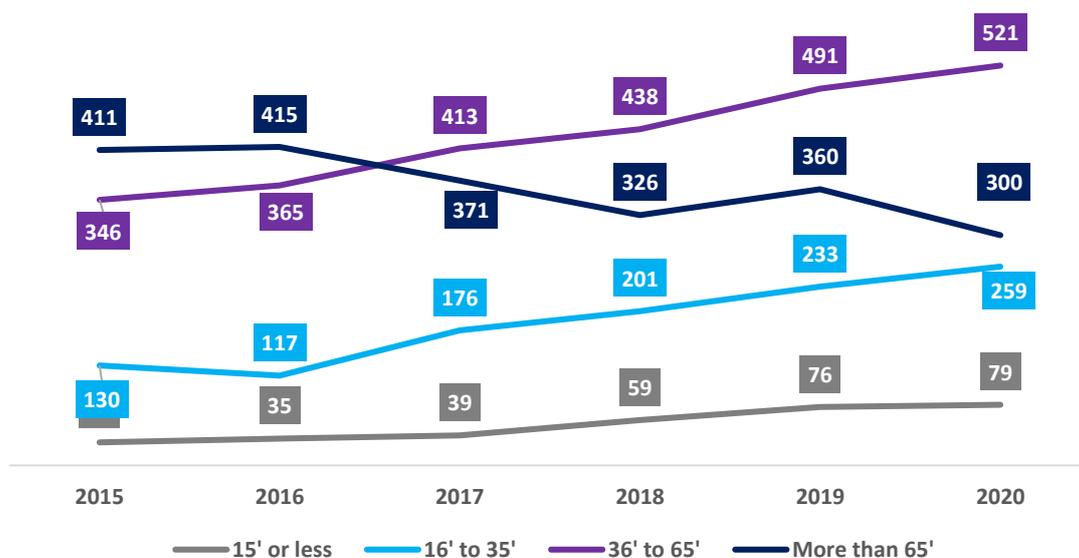
Figure 2. Number of AV fiction titles produced by format (2015-2020)



Source: European Audiovisual Observatory analysis of The European Metadata Group data.

In turn, this shift has had an impact on the length of TV works, with very long works – mainly TV films (those with a duration longer than 65 minutes) – going down, while all other categories saw an increase over the period 2015-2020. Although the category which experienced the highest increase was that of 2-to-13-episode titles, those with a length of between 36 and 65 minutes ranked at the top by number of titles produced in 2020.

Figure 3. Number of fiction titles by duration of episodes (2015-2020)



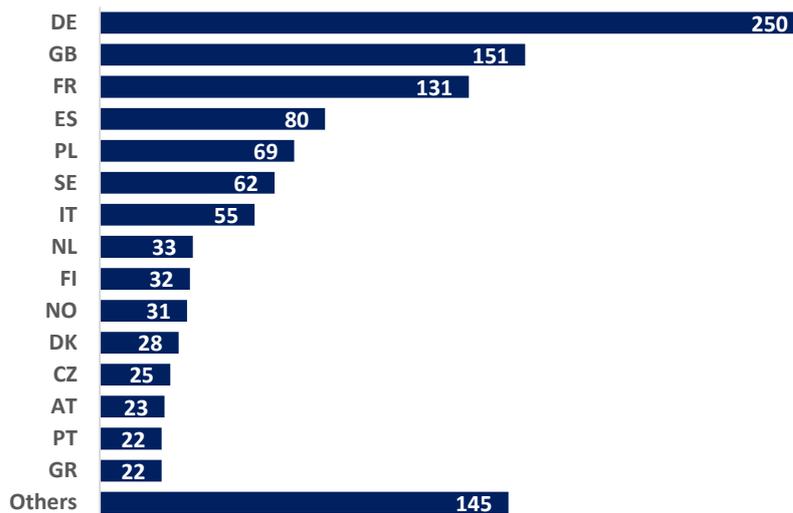
Source: European Audiovisual Observatory analysis of The European Metadata Group data.

Furthermore, first seasons (45% of the TV series) and subsequent seasons (55% of the TV series) were approximately evenly split over the covered period, with the share of first seasons even higher (54%) for solely 2-to-13-episode series.⁶

1.1.2. Origin of audiovisual fiction works

Germany (250 titles produced in 2020) is the leading producer of TV series in Europe, followed at a distance by the UK, France and Spain, with most titles produced by public service media (PSM). When it comes to hours produced, Greece (1 770 hours produced in 2020) is at the top of the list, followed by Spain, Germany, Poland and Portugal. The high production figures in Spain, Greece, Portugal, Poland, Hungary and the Czech Republic, are mostly due to prolific production of soap operas.⁷

Figure 4. Top fiction-producing countries in number of seasons (2020)

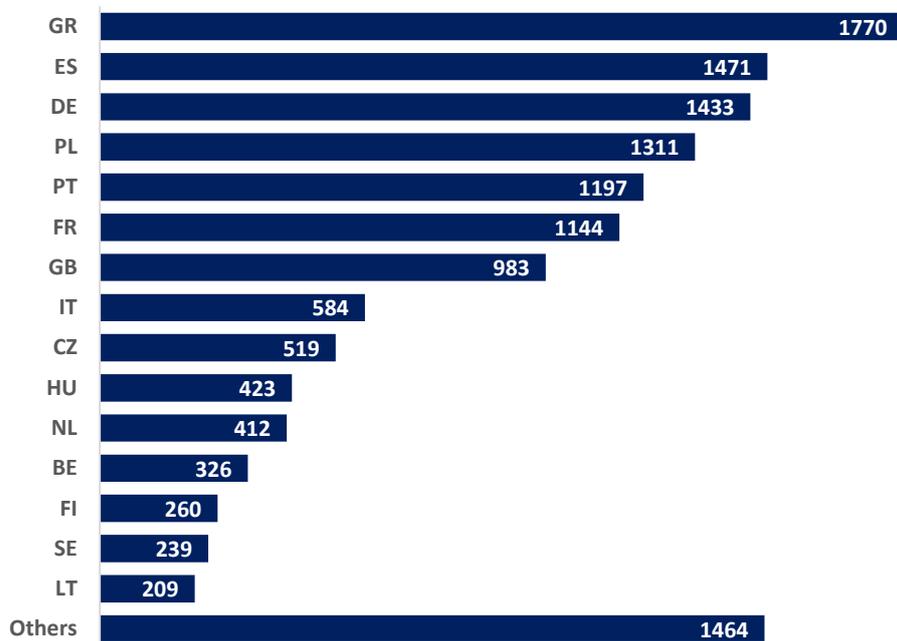


Source: European Audiovisual Observatory analysis of The European Metadata Group data.

⁶ Idem.

⁷ Idem.

Figure 5. Top fiction-producing countries in number of hours (2020)



Source: European Audiovisual Observatory analysis of The European Metadata Group data.

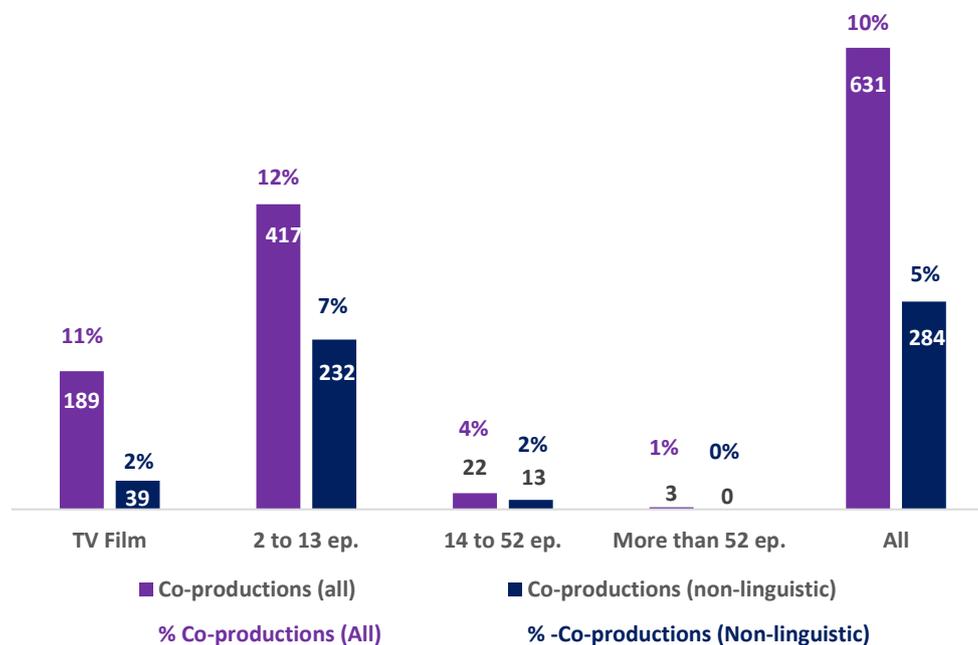
Nevertheless, when it comes to the production of 2-to-13-episode series – the most frequent number of episodes – it is the UK at the top of the ranking, both in terms of titles and hours, with 124 titles and 550 hours produced in 2020. In fact, the UK, as most other European countries, concentrates most of its production of series on this category of series (88% of its overall audiovisual fiction production for TV and on-demand services). Italy, France and the United Kingdom have a specific interest in 2-to-13-episode series, while Germany and France place a higher-than-average emphasis on TV films.⁸

1.1.3. Co-production

Co-production represents only a meagre 10% of all the production of fiction series in the EU over the period 2015-2020; even less (5%) if we exclude co-productions between countries with a shared language. In either case, co-productions mainly took place for 2-to-13-episode series and TV films. France, Belgium and Germany account for the majority of co-productions in Europe, followed at a distance by the UK and Austria. However, when excluding cooperation between countries sharing the same language, the leaders are the United Kingdom, Germany, the United States (as minority co-producer), France and Sweden.

⁸ Idem.

Figure 6. Number and share of co-productions by format (total 2015-2020)



Source: European Audiovisual Observatory analysis of The European Metadata Group data.

The main minority co-producing countries outside the EU were the United States and Canada.⁹ The co-production levels in fiction series are significantly lower than those for the co-production of theatrical films, accounting for 22% of overall production in the European Union over the period 2007-2016.¹⁰

1.1.4. Producers and commissioners of European fiction

Most of the commissioning of European fiction series by audiovisual media services is by public services, accounting for most of the titles (57% of the total), but private services, in turn, represent 64% of the hours produced.

The top 20 producers accounted for 38% of overall production of European fiction and 57% of all hours produced in 2020. When it comes to 2-to-13-episode series, the BBC

⁹ Idem.

¹⁰ Talavera, J., 2017, "Film production in Europe – Production volume, co-production and worldwide circulation", European Audiovisual Observatory (Council of Europe), <https://rm.coe.int/filmproductionineurope-2017-j-talavera-pdf/1680788952>.

led by number of titles (61 titles produced in 2020) followed at a distance by Netflix (49), ARD (34), ZDF (32) and France Télévisions (30).¹¹

When it comes to independent productions, these account for the lion's share of audiovisual fiction production in general (66% of the titles and 58% of the hours in 2020), as well as of the production of 2-to-13-episode fiction series (67% of the titles and 65% of the hours in 2020).¹²

1.2. Audiovisual media services in Europe

At the end of 2020, there were 13 638 audiovisual media services available in Europe (11 823 of them established in Europe), 10 839 TV channels (with circa half of the services offered against payment), and 2 799 on-demand services (42% of them pay on-demand services, out of which two thirds were subscription services).¹³ By 2020, the supply of pay on-demand services was more concentrated than that of TV channels – 10 countries were home to 80% of all pay on-demand services and 65% of TV services. The UK was the market with the greatest supply of national and international TV channels, closely followed by the Russian Federation and the Netherlands – all three had more than 500 services each. With over 100 services originating from their territories, the main countries supplying pay on-demand services were Ireland, France, the UK and Spain.¹⁴

Figure 7. Breakdown of TV channels available in Europe¹⁵ by type of access and transmissions in 2020 – in %



Source: European Audiovisual Observatory's MAVISE database.

¹¹ Fontaine, G., 2022, "Audiovisual fiction production in Europe. 2020 figures.", European Audiovisual Observatory, <https://rm.coe.int/audiovisual-fiction-production-in-europe-2020-figures/1680a5d715>.

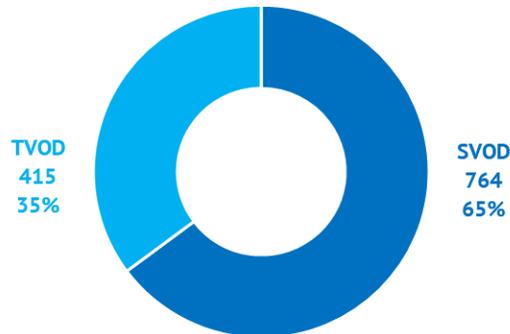
¹² Idem.

¹³ Schneeberger, A., 2021, "Audiovisual media services in Europe", European Audiovisual Observatory, <https://rm.coe.int/audiovisual-media-services-in-europe-2020/1680a2fc29>.

¹⁴ Fontaine, G. (Ed.), 2022. Yearbook 2021/2022 Key Trends, European Audiovisual Observatory. <https://rm.coe.int/yearbook-key-trends-2021-2022-en/1680a5d46b>.

¹⁵ Europe includes the 41 countries covered by MAVISE (<https://mavise.obs.coe.int/>) and Morocco.

Figure 8. Breakdown of pay on-demand services available in Europe¹⁶ by business model in 2020 – in number of services and %



Source: European Audiovisual Observatory's MAVISE database

If we exclude local channels, most TV channels (90%) are private; the figure is even higher if we look at VOD, with 97% of the services privately owned. In addition, most TV channel suppliers (excluding local channels) in Europe are based in the UK (586 channels in 2020), Russia (524), the Netherlands (515), Turkey (385), Spain (380) and Germany (362). As for pay video-on-demand services, 80% of the services were concentrated in only 11 countries, with most services established in Ireland (188 services in 2020), France (141), UK (140), Spain (104) and Germany (96).¹⁷

Between 2016 and 2020, the revenues of the traditional players more or less stagnated, while the growth of the top 100 players was largely driven by the new SVOD players. Pure SVOD players – namely Netflix, Amazon and DAZN – accounted cumulatively for more than 75% of the revenue growth registered during this period, at the top 100 level. Furthermore, the top 20 European audiovisual groups by revenue in 2020 accounted for 69% of the market. American Sky topped the list (13.5%), followed by the German public service media ARD (5.3%) and Netflix (Europe) (5%). SVOD and pay TV stand out as the most concentrated audiovisual market segments in Europe. A total of 94% of SVOD subscriptions are cumulatively accounted for by top 20 OTT platforms, while 72% of pay TV subscriptions are attributable to top 20 pay TV operators.¹⁸

¹⁶ “Europe” includes the 41 countries covered by MAVISE (<https://mavise.obs.coe.int/>) and Morocco.

¹⁷ Schneeberger, A., 2021, “Audiovisual media services in Europe”, European Audiovisual Observatory, <https://rm.coe.int/audiovisual-media-services-in-europe-2020/1680a2fc29>.

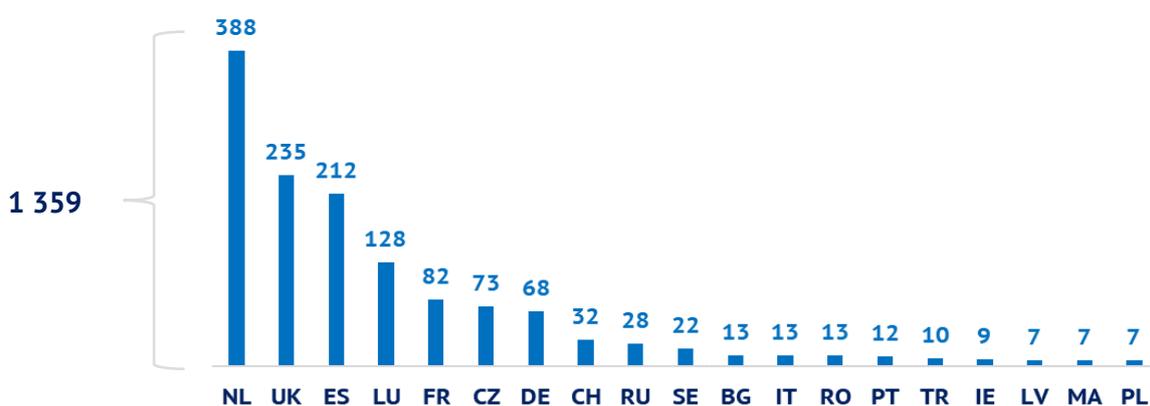
¹⁸ Idem.

1.2.1. Localised audiovisual media services in Europe

There is a trend within the European Union whereby an increasing number of audiovisual media services are adapted to the different national markets, either as broadcasters in different linguistic versions or on-demand services with local-language user interfaces. These services aimed at non-domestic markets (or localised services) tend to be predominantly owned by large US media corporations. In addition, the business model is built on the maximisation of scale in terms of catalogues and geographical coverage.¹⁹ By the end of 2020, 24% of all TV channels broadcasting from Europe were aimed at non-domestic markets; the share is even higher when it comes to pay on-demand services (53%).²⁰

A total of 91% of TV channels aimed at non-domestic markets were based in just 10 countries, with the Netherlands (388 channels in 2020), the UK (235) and Spain (212) topping the list. The concentration level is even higher when it comes to VOD, with services aimed at non-national markets accounting for 96% of the total. In this case, the ranking is topped by Ireland (180 services in 2020), the UK (106) and Spain (81).²¹

Figure 9. Countries with 7 to 388 TV services aimed at non-domestic markets in 2020 – in number of services



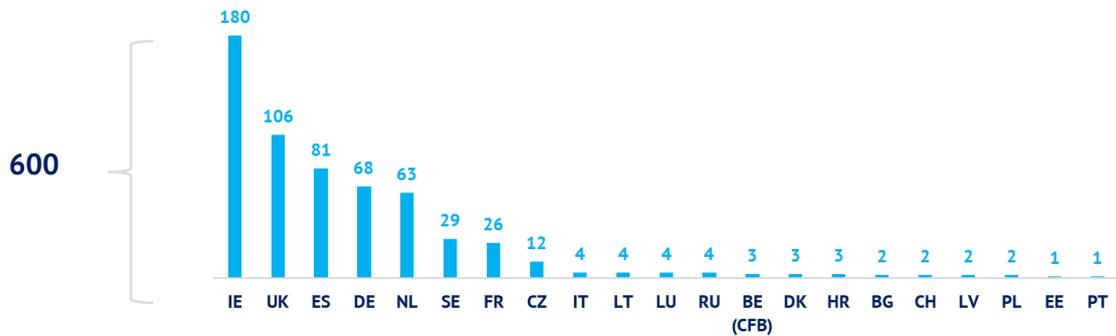
Source: European Audiovisual Observatory's MAVISE database.

¹⁹ Schneeberger, A., 2021, "Audiovisual media services in Europe", European Audiovisual Observatory, <https://rm.coe.int/audiovisual-media-services-in-europe-2020/1680a2fc29>.

²⁰ Idem.

²¹ Idem.

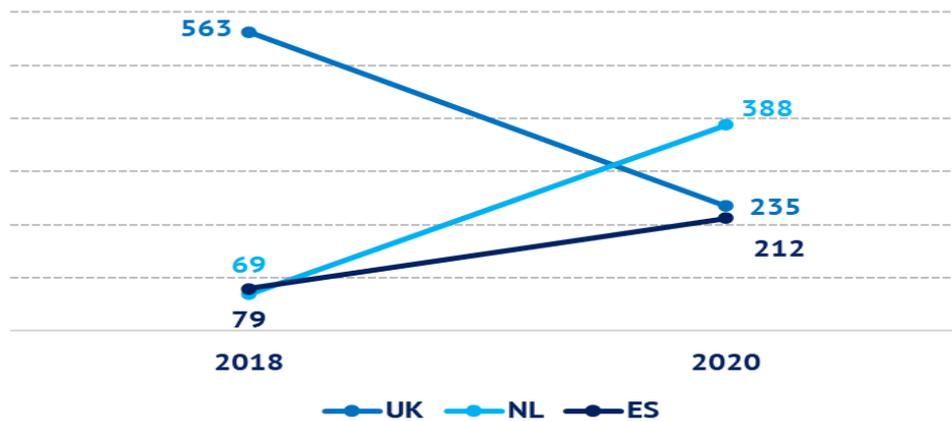
Figure 10. Countries with pay on-demand services aimed at non-domestic markets in 2020 – in number of services



Source: European Audiovisual Observatory's MAVISE database.

Moreover, around 60% of the localised audiovisual media services were established in just three countries: the Netherlands, UK and Spain. After Brexit, a flight of localised TV channels from the UK has taken place, with most of them relocating to the Netherlands and Spain. In turn, 61% of localised pay on-demand services were based in Ireland, the UK and Spain over the same period.²²

Figure 11. TV channels aimed at non-domestic markets before and after Brexit, 2018 and 2020 – in number of services



Source: European Audiovisual Observatory's MAVISE database.

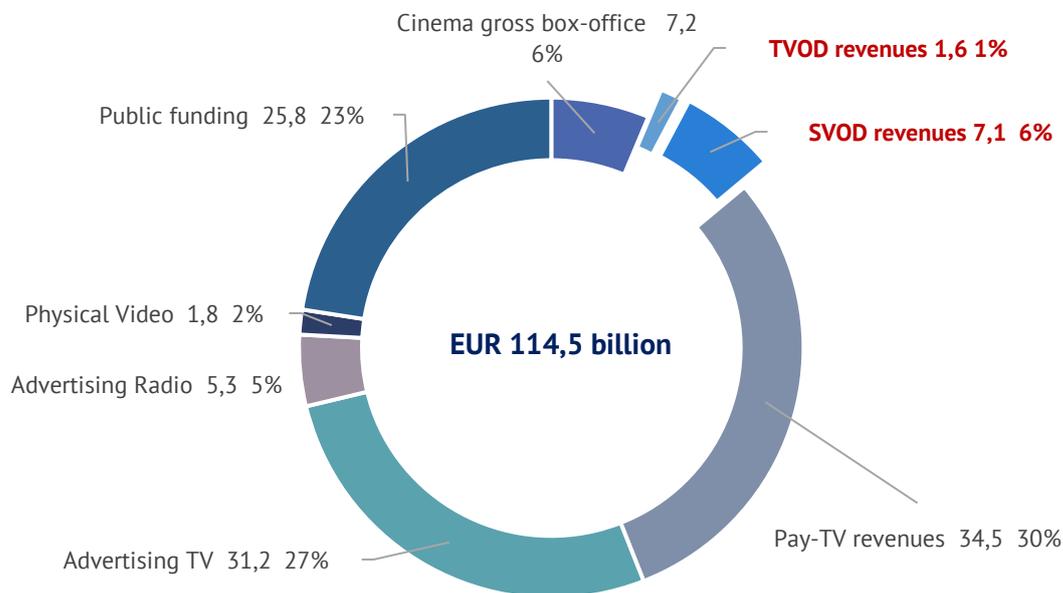
²² Idem.



1.2.2. Revenues and subscribers of VOD services in Europe

The VOD market has experienced a gigantic leap over the last decade with EU28 revenues going from EUR 388.9 million in 2010 to EUR 11.6 billion in 2020, mainly thanks to the hike of SVOD, which in 2020 accounted for 84% of the VOD market revenues. In spite of this, VOD still represents a meagre slice of the audiovisual pie in Europe, which amounts to EUR 114,5 billion – with SVOD accounting for 6% of the market revenues, and an additional 1% from TVOD revenues in 2019.²³

Figure 12. EU28 Audiovisual market revenues by segment 2019 – in EUR billion and as a %

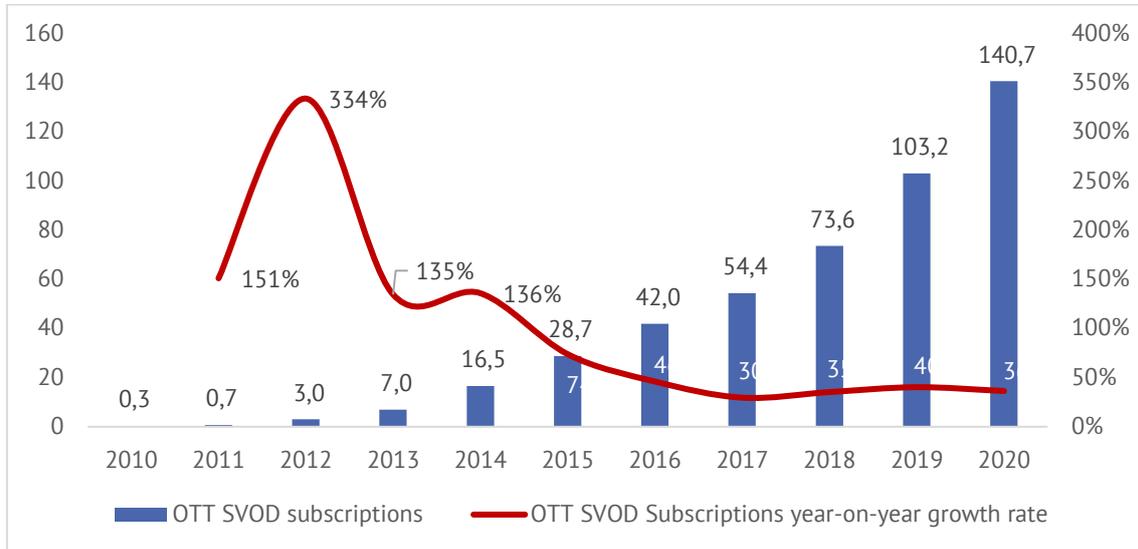


Source: European Audiovisual Observatory, Ampere Analysis, Warc, EBU/MIS, company/public reports

It is true that confinement due to the COVID pandemic has increased the number of subscriptions to SVOD services. However, the trend was already quite remarkable. In 2020, the figure of 140.7 million subscriptions in the EU28 (36% year-on-year growth, up from 103.2 million subscriptions in 2019) was reached. The launch of Netflix and other services during 2011 and 2012 in many European countries accelerated subscription figures, which went from 3 million subscriptions in 2012 to 7 million subscriptions in 2013; the launch of direct-to-consumer streaming services by some pay TV, commercial TV, and telecom companies, as well as tech players, has boosted these figures. The current y-o-y growth figures appear to confirm that, as SVOD becomes mainstream, the market will continue to grow in the years to come.

²³ Grece, C. 2021. VOD Trends in Europe. European Audiovisual Observatory. <https://rm.coe.int/grece-trends-on-the-eu-vod-market-9-12-2021-kipa-summit-warsaw/1680a4d1c7>.

Figure 13. EU28 Subscriptions to OTT SVOD 2010-2020 – in subscription million and % of subscriptions, y-o-y growth



Source: Ampere Analysis

2. European legal framework

2.1. The AVMSD rules

The EU's Audiovisual Media Services Directive (AVMSD)²⁴ governs EU-wide coordination of national legislation with regard to all audiovisual media. These include all kinds of services, from TV broadcasts to on-demand services and, since revision of the Directive in 2018, also video-sharing platforms. The AVMSD regulates a wide array of issues, such as incitement to hatred, accessibility for people with disabilities, jurisdiction, major events, advertising, protection of minors, and the promotion and distribution of European works. The directive is of EEA relevance, which implies its transposition also in Norway, Iceland and Liechtenstein. These countries are therefore covered in this report. Moreover, since Switzerland has chosen to introduce rules inspired by the AVMSD in the field of financial obligations, the report covers this country as well. On the other hand, the UK has chosen to transpose the AVMSD, but without introducing financial obligations, and is therefore included in the maps for the sake of completeness.

The EU promotes European works on TV and VOD through the quota and financing provisions of the AVMSD, notably through its articles 13, 16 and 17. For TV broadcasting, they envisage the following:

- At least 50% of the broadcasting time must be dedicated to European works (Article 16 AVMSD).
- A minimum of 10% of broadcasting time, or, alternatively, at least 10% of the broadcaster's programming budget has to be dedicated to works of independent European producers (Article 17 AVMSD).

These rules are in force since they were originally introduced by the predecessor to the AVMSD, the Television without Frontiers Directive (TwFD) of 1989.²⁵ At the time, no obligations were introduced for on-demand AVMS for the simple reason that these services did not exist at the time. Such rules were introduced in the revision of the TwFD

²⁴ Consolidated text (as modified by Directive (EU) 2018/1808): 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) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010L0013-20181218>.

²⁵ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31989L0552>.

in 2007²⁶ (later codified into the 2010 version of the AVMSD),²⁷ but were of a rather general nature: EU member states had to ensure that on-demand AVMS promoted, “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”.

At the time, it was considered that the early stage of development of on-demand AVMS required a light legislative touch, hence the relatively flexible rules introduced in 2007. Ten years later, the growing importance of VOD services led the EU to introduce a more stringent set of rules:²⁸

- Article 13(1) AVMSD sets a 30% share of European works and a prominence obligation with regard to those works (Article 13(1) AVMSD).
- Article 13(2) provides that member states may also require AVMS providers (both broadcasters and on-demand AVMS) under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds. If member states decide to introduce financing obligations, they may also require AVMS providers targeting audiences in their territories, but established in other member states, to make such financial contributions, which shall be proportionate and non-discriminatory. When targeting audiences are included in the scope, 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 such a financial contribution, it shall take into account and deduct any financial contributions imposed by targeted member states.

The purpose of the AVMSD in this regard is to “promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity.” (Recital 69 AVMSD 2010). The final objective is cultural diversity, and this is achieved through promotion AND distribution.

The quota obligations of Article 13(1) AVMSD (a 30% share of European works, and sufficient prominence) concern distribution, or access to content. Concerning the promotion of production, it can be argued that promoting the distribution of European works indirectly helps their production. Increased demand (from broadcasters) will

²⁶ The rules were originally introduced by Directive 2007/65/EC, which amended the TwFD, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2007.332.01.0027.01.ENG&toc=OJ%3AL%3A2007%3A332%3ATOC.

²⁷ 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) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32010L0013>.

²⁸ The obligations contained in Article 13(1) and (2) AVMSD do not apply to media service providers with a low turnover or a low audience. Member States may also waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services in question (Article 13(6) AVMSD). See section 2.3.1. of this publication.



promote supply (from producers). And yet, the EU legislator seems to think that promoting demand via quota obligations is not enough, since it does not impose but nevertheless allows the promotion of the supply side via the introduction of financial obligations. Recital 36 AVMSD 2018 states: “In order to ensure adequate levels of investment in European works, Member States should be able to impose financial obligations on media service providers established on their territory.” Actually, the Directive goes as far as listing the ways in which this promotion may be achieved: According to the same Recital, “Those obligations can take the form of direct contributions to the production of and acquisition of rights in European works. The Member States can also impose levies payable to a fund, on the basis of the revenues generated by audiovisual media services that are provided in and targeted towards their territory.” Moreover, the Directive clarifies that, “given the direct link between financial obligations and Member States’ different cultural policies, a Member State is also allowed to impose such financial obligations on media service providers established in another Member State that target its territory”. It adds: “In that case, financial obligations should only be charged on the revenues generated through the audience in the targeted Member State.” This is a clear departure from the country-of-origin (COO) principle, which is the basis upon which the whole architecture of the AVMSD is built.²⁹

Why has the EU allowed the introduction of financial obligations for broadcasters and on-demand AVMS? Is promoting demand not enough? Actually, European states already promote the production of cinema films and other audiovisual works through state aid, that is, direct funding or tax incentives. According to the European Commission’s cinema communication of 2013,³⁰ “state aid is important to sustain European audiovisual production”. The communication adds: “It is difficult for film producers to obtain a sufficient level of upfront commercial backing to put together a financial package so that production projects can proceed. The high risk associated with their businesses and projects, together with the perceived lack of profitability of the sector, make it dependent on state aid.”

Having said this, it is necessary to highlight here that financial obligations are not state aid. And this is important, since this means that imposing financing obligations on broadcasters and on-demand AVMS becomes an additional way of facilitating the financing of European works without the corset of the EU state aid rules that are included in the treaties. Said otherwise, financial obligations are added to state aid to increase the funding possibilities of film and audiovisual producers.

²⁹ See section 2.2. of this publication.

³⁰ Communication from the Commission on State aid for films and other audiovisual works; Text with EEA relevance, OJ C 332, 15.11.2013, p. 1–11, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52013XC1115%2801%29>.



2.2. Financial obligations and the country-of-origin principle

The country-of-origin principle has been a cornerstone of the AVMSD since the inception in 1989 of the TwFD.³¹ In its Recitals 33 and 34, the 2010 version of the AVMSD³² explained the rationale for the introduction of this principle (emphasis added):

*(33) The **country of origin principle** should be regarded as **the core of this Directive**, as it is **essential for the creation of an internal market**. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also **essential in order to ensure the free flow of information and audiovisual programmes** in the internal market.*

*(34) In order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the Union, **only one Member State should have jurisdiction over an audiovisual media service provider** and pluralism of information should be a fundamental principle of the Union.*

The AVMSD was revised in 2018³³ and, while it maintained the country-of-origin principle intact, it introduced a derogation thereto regarding the promotion of EU works on on-demand services.

Article 13(1) AVMSD requires that providers of on-demand audiovisual media services should promote the production and distribution of European works by ensuring that their catalogues contain a 30% share of European works and that they are given sufficient prominence.³⁴ With regard to the principle of the country of origin, the European Commission has clarified³⁵ that “it is for the country of origin to ensure that on-demand providers under its jurisdiction comply with the obligation to ensure the share of European works in their catalogues”. And further: “If a VOD provider falling under the jurisdiction of a Member State offers different national catalogues in other Member

³¹ For more information on the Television without Frontiers Directive see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A124101>.

³² 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) (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32010L0013>.

³³ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities, <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

³⁴ This obligation does not apply, however, to media service providers with a low turnover or a low audience. Member States may also waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services in question (Article 13(6) AVMSD).

³⁵ Communication from the Commission Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover 2020/C 223/03 C/2020/4291, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.223.01.0010.01.ENG&toc=OJ:C:2020:223:TOC.



States, it is the responsibility of the Member State of jurisdiction (i.e. the country of origin) to enforce the obligation related to the share of European works with regard to all the various national catalogues.”

As mentioned above, the AVMSD allows a member state to impose financial obligations not only on media service providers (linear and non-linear) established on their territory but also (and here comes the exception to the country-of-origin principle) on media service providers established in another member state that target its territory. Such financial obligations must be proportionate and non-discriminatory, and according to Article 13(3) AVMSD they must be based only on the revenues earned in the targeted member states. Moreover, if the member state where the provider is established imposes such a financial contribution, it must take into account any financial contributions imposed by targeted member states. Any financial contribution must also comply with Union law, in particular with state aid rules.³⁶

The rationale for this exception is explained in Recital 36 of the revised AVMSD (emphasis added):

*(36) In order to ensure adequate levels of investment in European works, Member States should be able to impose financial obligations on media service providers established on their territory. Those obligations can take the form of direct contributions to the production of and acquisition of rights in European works. The Member States could also impose levies payable to a fund, on the basis of the revenues generated by audiovisual media services that are provided in and targeted towards their territory. This Directive clarifies that, **given the direct link between financial obligations and Member States' different cultural policies, a Member State is also allowed to impose such financial obligations on media service providers established in another Member State that target its territory.** In that case, financial obligations should only be charged on the revenues generated through the audience in the targeted Member State. Media service providers that are required to contribute to film funding schemes in a targeted Member State should be able to benefit in a non-discriminatory way, even in the absence of an establishment in that Member State, from the aid available under respective film funding schemes to media service providers.*

Despite the letter of the AVMSD and the clarification introduced by the Commission in its Guidelines,³⁷ there was some political wrangling about the application of the country-of-origin principle regarding Article 13(1) AVMSD. In Spain, a regional party wanted the future law implementing the revised AVMSD to include reference to a quota of films made in the Catalan language that would apply to SVOD services not under Spanish jurisdiction, which in the view of the government was not possible since Netflix does not fall under Spanish jurisdiction. The regional party in question mentioned France and Italy as

³⁶ The obligations contained in Article 13(1) and (2) AVMSD do not apply to media service providers with a low turnover or a low audience. Member States may also waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services in question (Article 13(6) AVMSD).

³⁷ See section 2.3.1.2. of this publication.



examples of the contrary situation.³⁸ However, France does not apply any catalogue quota to services outside its jurisdiction.³⁹ In the case of Italy, the draft Decree originally presented by the government set a quota of at least 30% European works, of which at least 50% must be original Italian works produced by independent producers, which applied to targeting services as well.⁴⁰ However, both the Italian media regulator Agcom⁴¹ and the *Consiglio di Stato*⁴² requested that this provision be modified, as the possible derogation from the country-of-origin principle is allowed by the Directive only with respect to the obligation to make a financial contribution as per Article 13(2). Moreover, the *Camera dei Deputati* (lower house of the Italian Parliament) made the same request.⁴³ Accordingly, the adopted *Decreto legislativo*,⁴⁴ in its Article 55(3), clarifies that only the financing obligations apply to targeting services that are not under Italian jurisdiction (see *infra*), while the quota and prominence obligations apply only to services under Italian jurisdiction.

³⁸ See e.g. <https://www.elmundo.es/cataluna/2021/12/02/61a899a8fc6c83cf5b8b45af.html>.

³⁹ See Article 27 of the AVMS Decree. See also Le Roy M., “Tout ce que vous avez toujours voulu savoir sur le nouveau décret SMAD... sans jamais oser le demander”, *Légipresse* #396, October 2021.

⁴⁰ See Article 55(3) of the *Atto di Governo n. 288 - Schema di decreto legislativo recante attuazione della direttiva (UE) 2018/1808 recante modifica della direttiva 2010/13/UE, relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti la fornitura di servizi di media audiovisivi, in considerazione dell'evoluzione delle realtà del mercato*, <http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0288.pdf&leg=XVIII#pagemode=none>.

⁴¹ Agcom, *Parere relativo allo schema di decreto legislativo recante attuazione della Direttiva (UE) 2018/1808 del Parlamento europeo e del Consiglio, del 14 novembre 2018, recante modifica della direttiva 2010/13/UE, relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti la fornitura di servizi di media audiovisivi (direttiva sui servizi di media audiovisivi), in considerazione dell'evoluzione delle realtà del mercato*, <https://www.agcom.it/documents/10179/24308804/Comunicazione+14-09-2021/18da7ce0-d6a6-4d1d-ba00-07b8edd30307?version=1.0>.

⁴² *Consiglio di Stato, Sezione Consultiva per gli Atti Normativi, Adunanza di Sezione del 21 settembre 2021, numero affare 00944/2021*, <http://www.dirittodeiservizi pubblici.it/sentenze/sentenza.asp?sezione=dettsentenza&id=7004>.

⁴³ *Camera dei Deputati, Parere delle Commissioni riunite VII (Cultura, scienza e istruzione) e IX (Trasporti, poste e telecomunicazioni)*, 21 October 2021, <https://www.camera.it/leg18/824?tipo=A&anno=2021&mese=10&giorno=21&view=&commissione=0709#data.20211021.com0709.allegati.all00010>.

⁴⁴ *Decreto Legislativo 8 novembre 2021, n. 208 Attuazione della direttiva (UE) 2018/1808 del Parlamento europeo e del Consiglio, del 14 novembre 2018, recante modifica della direttiva 2010/13/UE, relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri, concernente il testo unico per la fornitura di servizi di media audiovisivi in considerazione dell'evoluzione delle realtà del mercato. (21G00231) (GU Serie Generale n.293 del 10-12-2021 - Suppl. Ordinario n. 44)*, https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2021-12-10&atto.codiceRedazionale=21G00231&elenco30giorni=true.

2.3. Definitional issues

2.3.1. Low audience and low turnover

2.3.1.1. The rationale for the exemption

Article 13(6) AVMSD excludes media service providers with a low turnover or a low audience from the quota and prominence obligations under Article 13(1) AVMSD, as well as from financial obligations imposed under Article 13(2) AVMSD. Recital 40 of the revised AVMSD provides an explanation for this exemption (emphasis added):

*In order to ensure that obligations relating to the promotion of European works **do not undermine market development and in order to allow for the entry of new players in the market**, providers with **no significant presence on the market** should not be subject to such requirements. This is particularly the case for **providers with a low turnover or low audience**.*

Recital 40 further provides ways in which a low audience or a low turnover can be determined (emphasis added):

*A **low audience** can be determined, for example, on the basis of a **viewing time or sales**, depending on the nature of the service, while the determination of **low turnover should take into account the different sizes of audiovisual markets in Member States**. It might also be inappropriate to impose such requirements in cases where, given the nature or theme of the audiovisual media services, they would be impracticable or unjustified.*

2.3.1.2. The Commission's Guidelines

Pursuant to Article 13(7) of the AVMSD, the European Commission has provided Guidelines⁴⁵ regarding the calculation of the share of European works in the catalogues of on-demand providers and the definition of low audience and low turnover.⁴⁶

⁴⁵ Communication from the Commission Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover 2020/C 223/03 C/2020/4291, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.223.01.0010.01.ENG&toc=OJ:C:2020:223:TOC.

⁴⁶ See Chapter 4 of this publication for more information about co-operation between NRAs for the application of these guidelines.

2.3.1.2.1. Distinction between exemptions established by Union and national law

The aim of the exemptions provided for in Article 13(6) AVMSD is not to replace the exemptions established at the national level, which define the scope of the contribution obligations, but to provide safeguards for cross-border providers. If a member state has in place or introduces obligations for media service providers to contribute financially to the production of European works and these obligations are limited to providers established in that member state, the guidelines do not apply.

Member states applying the financial contribution obligations to providers established in other member states need to respect the principle of non-discrimination. Therefore, if they have exemptions in place or introduce exemptions at national level applicable to providers established in their territory, these exemptions also need to be applied in a non-discriminatory manner to cross-border providers, even if the thresholds are higher than the ones indicated in these guidelines.

2.3.1.2.2. Low turnover

The threshold for low turnover could be identified by reference to the concept of micro enterprise developed in the Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises,⁴⁷ specifically based on the turnover threshold used in the definition of micro enterprise (i.e. enterprises with a total annual turnover not exceeding EUR 2 million). The annual turnover of the enterprise should be determined in accordance with the provisions of the Recommendation 2003/361/EC, thus taking into account also the turnover of partner and linked enterprises.⁴⁸

⁴⁷ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003H0361>.

⁴⁸ According to Article 3(3) of the Recommendation, "Linked enterprises" are "enterprises which have any of the following relationships with each other:

- (a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;
- (b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
- (c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;
- (d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise."

According to Article 3(2), 2. "Partner enterprises" are "all enterprises which are not classified as linked enterprises within the meaning of paragraph 3 and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of paragraph 3, 25 % or more of the capital or voting rights of another enterprise (downstream enterprise).

However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if this 25 % threshold is reached or exceeded by the following investors, provided that those investors are not linked, within the meaning of paragraph 3, either individually or jointly to the enterprise in question:

- (a) public investment corporations, venture capital companies, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses ("business

At the same time, Recital 40 of the AVMSD provides that “the determination of low turnover should take into account the different sizes of audiovisual markets in Member States”. Therefore, the Commission considers that member states with smaller national audiovisual markets should be able to determine lower turnover thresholds. Based on the overall market characteristics, such lower thresholds could be justified and proportionate, provided they exempt enterprises that have a share of less than 1% of the overall revenues in the national audiovisual markets concerned.

2.3.1.2.3. Low audience

The concept of audience for VOD services is not an established one and no standardised industry measurements are available across member states. Therefore, the Commission considers that the most appropriate method for measuring audience in the VOD sector is the sales of the services, which will be determined depending on the type of VOD service.⁴⁹

- Subscription Video on Demand (SVOD): number of active users of a particular service, e.g. the number of paying subscribers. In case of subscribers that pay for bundled services which include also a VOD account, the audience of the VOD services might not be accurately represented by the number of paying subscribers of those bundled services as a whole, as some might not be VOD users. In such cases, national authorities may apply a measurement based on users who have in fact accessed the video content of the service within a defined time period. In all these cases, the period taken into consideration should be appropriate and meaningful (i.e. not too short), set in advance, and not burdensome in terms of implementation.
- Transactional Video on Demand (TVOD): number of unique customers/unique accounts used for acquisition of works. Active users could refer, for example, to users that have acquired at least one title in the catalogue over a defined time period.
- Advertising Video on Demand (AVOD): number of unique visitors. The audience could be determined as an average of active users for a defined time period.

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

angels”), provided the total investment of those business angels in the same enterprise is less than EUR 1250000;

(b) universities or non-profit research centres;

(c) institutional investors, including regional development funds;

(d) autonomous local authorities with an annual budget of less than EUR 10 million and fewer than 5000 inhabitants.”

⁴⁹ See also Recital 40 AVMSD 2018. Member States may, however, use alternative criteria.



number of active users would have no significant presence in the market, thus justifying the application of the Article 13(6) AVMSD exemption.

The main SVOD providers in Europe tend to have a share that goes well beyond 1% in the national markets where they are present.⁵⁰ The Commission considers it appropriate, in principle, to exempt from the obligations under Article 13 AVMSD those providers that have an audience share of less than 1% in the member state concerned. With regard to Article 13(2), this means that these providers are exempted by the targeted member state from the obligation to contribute financially to the production of European works.

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

When determining the appropriate thresholds, the different impacts of the two possible types of obligations on cross-border providers should be considered. Direct contributions to production and acquisition of rights imply a higher entrepreneurial effort than the payment of a levy to a fund, and depend on the availability of European works, including production projects in which a provider may invest with the available resources.

In some member states, depending in particular on the size and structure of the audiovisual market, it may be considered important to apply financial contribution obligations also to on-demand services with a turnover lower than EUR 2 million or with an audience share of less than 1% as well as cross-border linear services with an audience share below 2%, in particular pay TV services, as their presence on the national markets may still be deemed important. In such cases, member states may decide to apply lower thresholds, in duly justified cases and in line with their cultural policy objectives, including the objective to ensure the sustainability of national audiovisual and film funding systems. These thresholds and the financial contributions imposed should consider the financial capacity of the service, should respect the principles of non-discrimination and proportionality, should not undermine market development, and should allow for the entry of new players on the market.

As regards cross-border direct investment obligations, the Commission invites member states, in particular those with larger audiovisual markets, to consider also exempting enterprises having a total turnover above EUR 2 million, by setting a higher threshold, or at least making them subject to less onerous investment obligations – taking account, in particular, of the possible difficulties associated with finding audiovisual productions to invest in with the available resources in the member states concerned.

⁵⁰ The Commission quotes here “Main OTT SVOD groups in Europe by estimated number of subscribers” (December 2018), published as part of the European Audiovisual Observatory Yearbook 2019, <https://yearbook.obs.coe.int>.



2.3.2. Targeting services

Article 13 AVMSD does not provide a definition of what “targeting audiences in the territory of a member state” are. The only helping tool available is Recital 38 AVMSD 2018 (emphasis added):

*A Member State, when assessing, on a case-by-case basis, whether an on-demand audiovisual media service established in another Member State is targeting audiences in its territory, should refer to **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.***

Similar indicators can be found in Recital 42 of the 2010 version of the AVMSD concerning broadcasts directed at the territory of a member state by a media service provider established in another member state (emphasis added):

*A Member State, when assessing on a case-by-case basis whether a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, may refer to **indicators such as the origin of the television advertising and/or subscription revenues, the main language of the service or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received.***

In both cases, the main criterion is commercial gain at the target destination. Accordingly, the rationale of the obligation is that providers should invest back some of the income obtained in that territory into production or into payment to a fund.⁵¹

⁵¹ See e.g. Cole M.D., “Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD – Criteria for exempting certain providers from obligations concerning European Works”, pp. 17-18, <https://emr-sb.de/wp-content/uploads/2019/05/Study-AVMSD-guidelines-Art-13.pdf>.

3. National

3.1. Types of financial obligations

According to Recital 36 AVMSD 2018, financial obligations can take the form of direct contributions to the production of, and acquisition of rights in, European works. The member states could also impose levies payable to a fund, based on the revenues generated by audiovisual media services that are provided in or targeted towards their territory.

One important difference between the two types is that whereas direct investment obligations can be recouped by exploiting the relevant economic rights, levies payable to national funds do not provide any direct benefit in return, even if the services may benefit from public funding provided by the beneficiaries of the levies. In that sense, levies may have a parafiscal character,⁵² and given that Article 13(2) introduces an exception to the country-of-origin principle, the levy has a cross-border element.

Another important issue is that since the AVMSD is a minimum harmonisation directive, member states remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules, provided that such rules comply with EU law (Article 4 AVMSD).

3.2. National transposition

Article 13(2) AVMSD leaves much room for member states to introduce financial obligations on VOD services. And the different choices made by individual member states regarding transposition of the AVMSD are associated with policy choices made by each state. The first choice to be made is whether to introduce financial obligations or not.

⁵² For an in-depth discussion of tax-related issues regarding financial obligations see Buriak S. and Weber D., “Financial obligations on media service providers to promote European film culture - an analysis from an EU law and international tax law perspective” (forthcoming). The authors refer to Advocate General Tizzano’s Opinion in Joined Cases C-393/04 and C-41/05, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CC0393>, in particular paragraph 66: “[...] in the case of aid funded by means of so-called parafiscal taxes, that is to say where the State aid consists in the grant, in the form of subsidies which benefit certain persons, of resources acquired on the basis of a tax introduced specifically for that purpose (that is to say, a parafiscal tax).

Among the member states that have chosen to introduce financial obligations, a further choice must be made between the different types of obligations available: direct investment (production and/or rights acquisition) or paying a levy to a support fund. Most member states have opted to introduce direct investment obligations, as the sole option, as an alternative to levies, or as a cumulation of both options. Only five member states (Denmark,⁵³ Czech Republic, Germany, Ireland⁵⁴ and Poland) have introduced levies without any direct investment obligation.

Moreover, the fact that Article 13(2) AVMSD allows introduction of financial obligations also for targeting services adds another decisional layer. The obligations for targeting services match the ones imposed on domestic services except in the case of Croatia, where targeting services are required to make a supplementary financial contribution to the implementation of the National Program for Promoting Audiovisual Creativity Works on top of the direct investment obligation that both domestic and targeting services abide by. The rules in Greece make a distinction between domestic (direct investment only) and targeting services (choice between direct investment and levies).

Having made the abovementioned choices, each member state must establish the base to which the financial obligation applies, which is done according to the service's annual turnover. A rate (that is, a percentage) is applied to this base, and the result of this operation will be the actual amount that the VOD service in question will have to invest in production/rights acquisition or pay as a levy. In some countries, the rate differs depending on the turnover: in Germany, for example, for the calculation of the levy a rate of 1,8% is applied to services with a turnover up to EUR 20 000 000, whereas in the case of those with a turnover over that figure a 2,5% rate will apply.

As can be observed in the following tables, the differences in rate are quite significant, with France and Italy having introduced much higher obligations than the other member states.

With regard to direct investment obligations – i.e. production and acquisition of rights – the situation as per 22 September 2022 is as follows:

Table 1. Direct investment obligations – rates and bases

Countries	Rate	Base
BE DE	The government shall specify further rules.	The revenue generated in the German-speaking Community.
BE VL	2,0%	Turnover achieved in the Dutch-speaking region in the second year preceding the year of the compulsory contribution. If the on-

⁵³ Not adopted at the time of writing, see the subchapter concerning Denmark below.

⁵⁴ Not adopted at the time of writing, see the subchapter concerning Ireland below.



		demand AVMS has been active for less than 12 months in the second year preceding the year of the obligation to pay contributions, the annual turnover in the Dutch-language area shall be calculated by multiplying the average monthly turnover of the second year preceding the year of the obligation to pay contributions by 12.
BE WA	2,2% 2% 1,8% 1,6% 1,4% 0%	Turnover above EUR 20 million; Turnover between EUR 15 and 20 million; Turnover between EUR 10 and 15 million; Turnover between EUR 5 and 10 million; Turnover between EUR 300 000 and 5 million; Turnover between EUR 0 and 300,000.
CH	4,0%	Gross revenues earned in Switzerland.
ES	5,0%	Of annual income.
FR	<p>SVOD services: 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 20% in other cases (other quotas shall apply to pay-per-view services and free-of-charge services: see Article 20 of 22 June 2021 Decree).</p> <p>Other VOD services: 15% of the annual turnover which arises from exploitation of cinematographic works 15% of the annual turnover which arises from exploitation of audiovisual works.</p> <p>Catch-up TV (cinematographic contribution): applicable proportions to the television service from which they originated.</p>	Of their net annual turnover for the previous financial year generated in France
GR	1,5%	Turnover associated with AVMS operations in Greece.



		Targeting services: turnover relating to their activity in Greece, either: to the production of Greek audiovisual works, or to the purchase of rights to Greek audiovisual works (unreleased), or to the National Centre for Audiovisual Media and Communication
HR	2,0%	Total annual gross revenue. The investment may be cumulated over a period of two years.
IT	17,0%	Up to a percentage of their annual net revenues in Italy.
NL	4.5%	Annual turnover in the Netherlands of more than EUR 30 million (DRAFT)
PT	0,5 % or EUR 0.50 per subscriber or EUR 10 000. 1 % or EUR 1 per subscriber or EUR 100 000. 2 % or EUR 2 per subscriber or EUR 500 000. 3 % or EUR 3 per subscriber or EUR 1 500 000. 4 % or EUR 4 per subscriber or EUR 4 000 000.	Between EUR 200 000 and EUR 1 999 999 Between EUR 2 000 000 and EUR 9 999 999 Between EUR 10 000 000 and EUR 24 999 999 Between EUR 25 000 000 and EUR 49 999 999 EUR 50 000 000 or more
RO	40,0%	Up to 40% of the amount due to the Film Fund.

Source: European Audiovisual Observatory

With regard to indirect investment obligations – i.e. contributions to funds – the situation as per 22 September 2022 is as follows:

Table 2. Indirect investment (levies) – rates and bases

Countries	Rate	Base
BE VL	2,0%	Turnover achieved in the Dutch-speaking region in the second year preceding the year of the compulsory contribution. If the on-demand AVMS has been active for less than 12 months in the second year preceding the year of the obligation to pay contributions, the annual turnover in the Dutch-language area shall be calculated by multiplying the average monthly turnover of the second year preceding the year of the obligation to pay contributions by 12.
BE WA	2,2% 2% 1,8% 1,6% 1,4% 0%	Turnover above EUR 20 million; Turnover between EUR 15 and 20 million; Turnover between EUR 10 and 15 million; Turnover between EUR 5 and 10 million; Turnover between EUR 300 000 and 5 million; Turnover between EUR 0 and 300,000.
CH	A substitute levy shall be due if the investment obligation is not achieved on average over a period of four years.	Gross revenues earned in Switzerland.
CZ	0,5%	Of the price paid by the end-user to the on-demand AVMS for the provision of a single service which includes the making available of a cinematographic work or for on-demand audiovisual media services provided otherwise than by the making available of a single work, irrespective of their technological nature, including also all forms of subscription fees where the service includes the making available of at least one cinematographic work.



DE	2,5% or 1,8%	Annual turnover over EUR 20 000 000; Annual turnover of up to EUR 20 000 000. The turnover of the previous year shall be used to determine which of the annual turnover levels has been reached. If the turnover was generated during only part of the previous year, the annual turnover shall be calculated by multiplying the average monthly turnover of the previous year by the figure 12. In the absence of turnover in the previous year, the turnover level may be determined on the basis of the monthly turnover in the year of the tax.
DK	6,0%	Annual turnover in Denmark if exceeds DKK 15 million (DRAFT)
ES	5,0%	Of annual income.
FR	5,15%	The net annual turnover for the previous financial year.
GR	1,5%	Targeting services: turnover relating to their activity in Greece, either: to the production of Greek audiovisual works, or to the purchase of rights to Greek audiovisual works (unreleased), or to the National Centre for Audiovisual Media and Communication
HR	Financial contribution to the implementation of the National Program for Promoting Audiovisual Creativity Works in accordance with the law governing audiovisual	

	activity	
IE	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.
PL	1,5%	Of the 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.
PT	Advertisers 4,0% SVODs 1,0%	Audiovisual commercial communication included in on-demand audiovisual services are subject to a fee of the price paid Relevant income
RO	Purchase 3,0% Rental or SVOD 4,0%	Price of films downloaded for remuneration Revenue from single transactions or subscriptions

Source: European Audiovisual Observatory

The following subchapters explain which member states have introduced financial obligations in their national legislation and how their systems function in more detail.

3.2.1. BE - Belgium

3.2.1.1. German-speaking Community⁵⁵

According to Art. 30 of the Decree of 1 March 2021 on Media Services and Cinema Screenings,⁵⁶ on-demand AVMS provided by registered providers must promote the

⁵⁵ The case study on the German-speaking Community of Belgium incorporates the kind feedback received from Juergen Braumeier (Medienrat of the German speaking Community of Belgium /Medienrat der Deutschsprachigen Gemeinschaft Belgiens) during the checking round with the competent national media regulator within the EPRA network.



production of and access to European works. This promotion may also relate, *inter alia*, to the financial contribution of such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue offered by on-demand AVMS services the target groups of which are in the German-speaking Community but which are established in another member state or another community – they may also be required to make financial contributions which are proportionate and non-discriminatory. The financial contribution must be based only on the revenue generated in the German-speaking Community and must be in accordance with Union law, in particular the rules on state aid.

The Government must lay down more detailed arrangements and may determine other adequate forms of promotion.

3.2.1.2. French-speaking Community⁵⁷

According to Article 6.1.1-1. § 1er. of the Decree on Audiovisual Media Services and Video Sharing Services,⁵⁸ every linear and on-demand AVMS, established in the French-speaking Community or targeting its audience from abroad, must contribute to the production of audiovisual works. This contribution must be made either in the form of co-production of audiovisual works or pre-purchase of broadcasting rights or in the form of a payment to the *Centre du cinéma et de l'audiovisuel* (CFWB).⁵⁹ The choice is made by the service provider every year and, in the absence of a choice, the contribution in the form of a payment to the CFWB applies.

The modalities of these two forms of contribution are to be set by the government.

The government provides for the constitution of Support Committees in charge of issuing an opinion on abidance by the contribution obligation. Each Support Committee is made up of representatives of the AVMS, the government and professional organisations representing independent producers in the French Community as well as audiovisual authors and performers in the French Community.

The government provides, also under the conditions it sets, that:

- the AVMS may entrust, under its sole responsibility, all or part of its obligation to a third company
- the financial commitments in co-production or pre-purchase made by each AVMS in audiovisual works generate, for an equivalent amount, economic spin-offs in

⁵⁶ *Dekret über die Mediendienste und die Kinovorstellungen*, <http://medienrat.be/files/Mediendekret%202021-BS-120421.pdf>.

⁵⁷ The case study on the French-speaking Community of Belgium incorporates the kind feedback received from Anahi Vila (Conseil Supérieur de l'Audiovisuel) during the checking round with the competent national media regulator within the EPRA network.

⁵⁸ *Décret du 4 février 2021 relatif aux services de médias audiovisuels et aux services de partage de vidéos*, <http://www.ejustice.just.fgov.be/eli/decret/2021/02/04/2021020568/moniteur>.

⁵⁹ <https://audiovisuel.cfwb.be/>.

the French-speaking Region or in the bilingual Region of Brussels-Capital, except in the case of derogation provided for by it.

The Support Committees referred to in the previous paragraph must submit an annual evaluation report to the CSA.

Service providers must commit the amount of their contribution to production projects which have been approved by the government as audiovisual works. The government must determine the terms of this approval.

Agreements may be concluded between each service provider, the Government and the professional organisations representing the independent producers of the French Community as well as the audiovisual authors and performers of the French Community, in order to direct the obligation of the service publisher towards a particular type of audiovisual work. These agreements may also determine a contribution in the form of co-production or pre-purchase in excess of the amounts mentioned below, or any other additional commitment that the service publisher may be required to make.

Any co-production or pre-purchase participation made pursuant to any other legal obligation or benefiting from any legal advantage may not be counted as part of the contribution referred to in this Article.

The amount of the contribution must be at least:⁶⁰

- 0% of its turnover if it is between EUR 0 and EUR 300 000
- 1.4% of its turnover if it is between EUR 300 000 and EUR 5 million
- 1.6% of its turnover if it is between EUR 5 and 10 million
- 1.8% of its turnover if it is between EUR 10 and 15 million
- 2% of its turnover if it is between EUR 15 and 20 million
- 2.2% of its turnover if it is more than EUR 20 million

In the absence of a declaration of turnover in accordance with the procedures determined by the government or of evidence enabling it to be determined, the AVMS contribution is presumed to amount to EUR 3 million. This presumption can, however, be reversed, and the television service provider remains free to rebut the presumption before the courts on the basis of proof of its turnover. It should be noted that this provision does not prevent the *Conseil supérieur de l'audiovisuel* from imposing a sanction in the event of non-compliance with the provision.⁶¹

Turnover shall mean the amount of gross receipts invoiced, without deduction of commissions and surcharges, by the service provider's agency or, failing that, by the service provider itself. Such gross revenues shall include gross revenues from the

⁶⁰ The amounts may be adjusted annually on the basis of the index 01.01.2004 = 100 according to the evolution of the ordinary consumer price index as defined by the law of 2 August 1971, https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=09-02-20&numac=2009000070.

⁶¹ See CSA, "Analyse du décret du 4 février 2021 relatif aux services de médias audiovisuels et aux services de partage de vidéos", <https://www.csa.be/wp-content/uploads/2021/10/Note-danalyse-du-nouveau-decret-SMA-du-4-fevrier-2021.pdf>.



insertion of advertising and sponsorship in the publisher's television services and all other gross revenues, without any deductions, derived from the making available of the television services by the AVMS in return for payment, including gross revenues derived from any service distributor or third party for the provision of the television services and gross revenues derived from the content of the programmes in those services.

Where the AVMS itself carries out the activity of service distributor, the turnover shall include the gross receipts, without any deductions, resulting from its activity as service distributor.

For foreign AVMS (*Editeur de services télévisuels extérieur*),⁶² only the gross revenues from the French Community market will be considered.

For television service providers under the jurisdiction of the French Community, all gross revenues will be taken into account without distinction of markets, less, where appropriate, revenues from a member state of the European Union which the service provider is targeting and in which it is subject to a system of financial contributions for the production of European works.

The AVMS must submit annually to the government and the College of Authorisation and Control evidence enabling the amount of its gross turnover to be determined.

3.2.1.3. Flemish-speaking Community⁶³

According to Article 157 of the Flemish Media Decree,⁶⁴ private on-demand AVMS must participate in the production of Flemish audiovisual works, either in the form of a financial contribution to the production or co-production of Flemish audiovisual works, or in the form of an equivalent financial contribution to the *Vlaams Audiovisueel Fonds* (VAF).⁶⁵ These provisions also apply to on-demand AVMS established in a member state of the European Union and that offer non-linear media services that are aimed at the Dutch-speaking region. The contribution will be spent by the VAF on Flemish high-quality independent co-productions in series form. On-demand AVMS can acquire rights with regard to productions realised with the financial contribution to the VAF. In case of co-productions, they have to acquire the rights for transmission in Flanders separately.

⁶² According to Article 1.3-1. 14° of the decree, an “External television service provider” is “the provider of linear or non-linear television services which falls within the jurisdiction of a Member State of the European Union or a party to the Agreement on the European Economic Area or a party to the Council of Europe Convention on Transfrontier Television and which targets the public in the French-speaking region or the French-speaking public in the bilingual region of Brussels-Capital with a view to deriving revenue from commercial communications or revenue from users in this market. Such a publisher is subject in particular to the provisions of Articles 6.1.1-1, 9.2.3-2 and 9.2.3-3.”

⁶³ The case study on the Flemish-speaking Community of Belgium incorporates the kind feedback received from Dirk Peereman (Flemish Regulatory Authority for the Media/*Vlaamse Regulator voor de Media*).

⁶⁴ *Decreet betreffende radio-omroep en televisie*,

https://www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=nl&nm=2009035356&la=N

⁶⁵ <https://www.vaf.be/>.

The Decision of 1 February 2019 of the Flemish Government⁶⁶ determines the criteria, conditions and procedures for the participation of private on-demand AVMS in the production of Flemish audiovisual works, including the basis, the rate or the amount and any exemptions or reductions of the financial contribution.

The amount of the participation amounts to 2% of the turnover in the Dutch language area of the second year preceding the year of the obligation to pay a contribution. If the on-demand AVMS has been active for less than 12 months in the second year preceding the year of the obligation to pay contributions, the annual turnover in the Dutch-language area shall be calculated by multiplying the average monthly turnover of the second year preceding the year of the obligation to pay contributions by 12.

Regarding the scope of the obligations, the Decision does not apply to on-demand AVMS whose turnover is less than EUR 500 000.⁶⁷ Turnover is understood to mean the income, exclusive of VAT, earned in the Dutch-language region from:

- the supply of on-demand AVMS based solely on non-linear television rights to the end-user, including but not limited to payment by the consumer
- agreements with service distributors
- data valorisation
- audiovisual commercial communication

In the case of on-demand AVMS established in another member state of the European Union and that offer their services aimed at the Dutch-speaking region, the turnover is obtained by offering services to residents in the Dutch-speaking region.

Every on-demand AVMS must inform VAF, the Flemish Media Regulator⁶⁸ and the Flemish government by registered letter before 15 February about the chosen form of participation in the production of Flemish audiovisual works, and the amount of the participation, or must provide the VRM with evidence to prove that the non-linear television broadcaster does not fall within the scope of the rules of the Decree on the basis of the exceptions mentioned above. In order to prove that the non-linear television broadcaster does not fall within the scope of the rules in the Decree, the non-linear television broadcaster must refer to the data from the second year preceding the year of the obligation to pay contributions. In the absence of a registered letter or in the absence of the documents referred to, the non-linear television broadcaster is deemed to have opted for participation in the VAF via a flat-rate financial contribution. The lump-sum contribution amounts to EUR 3 000 000 per year.⁶⁹

⁶⁶ *Besluit van de Vlaamse Regering betreffende de deelname van de particuliere niet-lineaire televisieomroeporganisaties aan de productie van Vlaamse audiovisuele werken*, <https://www.ejustice.just.fgov.be/eli/bsluit/2019/02/01/2019011088/staatsblad>.

⁶⁷ Additional exemptions apply to television broadcasters (Articles 154, 155, 156) under certain circumstances; and service distributors who are subject to other incentive schemes under 184/1 of the Flemish Media Decree.

⁶⁸ <https://www.vlaamseregulatormedia.be/>.

⁶⁹ The amount of the lump-sum contribution will be indexed annually from 1 January 2020 on the basis of the price index as referred to in Article 2 of the Royal Decree of 24 December 1993 implementing the Act of 6

3.2.2. CH - Switzerland⁷⁰

The Federal Act of 1 October 2021⁷¹ amending the Federal Act on Film Culture and Production⁷² introduced a new Chapter 3a with a.o. an obligation for companies which offer films in Switzerland in their programming or via electronic on-demand or subscription services to annually allocate at least 4% of their gross revenues to independent Swiss film creation or pay a corresponding replacement fee. The obligation also applies to companies that are based abroad and target a Swiss audience. It does not, however, apply to the Swiss Broadcasting Corporation (SRG SSR), who is already subject to an investment obligation in its license.⁷³ Because of a referendum the Act was submitted to a vote of the People on 15 May 2022, in which around 58% of voters backed the bill. The Act will therefore be effective starting 1 January 2024.

Expenditure shall only be deemed to be cash payments made to independent third parties based or domiciled in Switzerland for the acquisition, production or co-production of Swiss films and recognised co-productions between Switzerland and entities abroad. Expenditures are eligible for the following:

- the acquisition of the exploitation rights of the rightsholders and the payment of the remuneration due to the management companies approved for the use of films in accordance with the Copyright Act of 9 October 1992
- the production of commissioned films by independent Swiss production companies with the participation of independent filmmakers
- the co-production of films within the framework of a co-production agreement with an independent Swiss production company with the participation of independent filmmakers

Any subsidies for culture and the film industry granted by the Confederation, the cantons or the municipalities as well as by institutions that are essentially dependent on them or financed by public fees must be deducted from the expenses.

Gross receipts are the income which the undertaking earns from the films in connection with its programme or film offering, in particular:

January 1989 on the safeguarding of national competitiveness (*Koninklijk besluit ter uitvoering van de wet van 6 januari 1989 tot vrijwaring van 's lands concurrentievermogen*),
https://www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=nl&nm=1993021424&la=N.

⁷⁰ The case study on Switzerland incorporates the kind feedback received from Matthias Bürcher (Federal Office of Culture/*Bundesamt für Kultur*) in accordance with the Federal Office of Communications/*Bundesamt für Kommunikation*, during the checking round with the competent national media regulator within the EPRA network.

⁷¹ *Loi fédérale sur la culture et la production cinématographiques (Loi sur le cinéma, LCin) Modification du 1er octobre 2021*, <https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/fga/2021/2326/fr/pdf-a/fedlex-data-admin-ch-eli-fga-2021-2326-fr-pdf-a.pdf>.

⁷² *Loi fédérale sur la culture et la production cinématographiques (Loi sur le cinéma, LCin)*,
<https://www.fedlex.admin.ch/eli/cc/2002/283/fr>.

⁷³ <https://www.bakom.admin.ch/bakom/fr/page-daccueil/medias-electroniques/informations-concernant-les-diffuseurs-de-programmes/srg-ssr/octroi-de-concession-et-technique-srg-ssr.html>.



- remuneration for the use or acquisition of the films offered
- income from advertising and sponsorship
- fees for the use of data

In the case of companies based abroad, only the gross revenues earned in Switzerland are relevant.

The Federal Council shall regulate the procedure for the determination and collection of the replacement fee and the cooperation with foreign authorities. It shall take account of the legitimate interest of enterprises in the protection of their business secrets.

The Federal Council may exempt undertakings from the obligation to promote independent Swiss film production if:

- they do not achieve a certain minimum turnover
- they offer films only occasionally, or
- the obligation appears disproportionate or compliance with it is impossible, in particular because of the nature of the films offered, the thematic orientation of the offering or the limited scope of the television programme or because a third party's programme or offering is offered without being changed.

3.2.3. CZ - Czech Republic⁷⁴

According to Article 27 of Act No. 496/2012 on Audiovisual Works and Support for Cinematography,⁷⁵ providers of on-demand audiovisual media services must pay a levy to the Czech Film Fund.⁷⁶ The amount shall be 0.5% of the price paid by the end-user to the on-demand AVMS for the provision of a single service which includes the making available of a cinematographic work or for on-demand audiovisual media services provided otherwise than by the making available of a single work, irrespective of their technological nature, including also all forms of subscription fees where the service includes the making available of at least one cinematographic work. The on-demand AVMS must include the levy in the price paid by the end-user for those services. The service provider must keep all data relating to the levy obligation, in particular data on the number of persons to whom the on-demand audiovisual media service is provided and the amount of the price paid by them for the provision of the on-demand audiovisual media service.

⁷⁴ The case study on Czech Republic incorporates the kind feedback received from Kateřina Lojtková (Council for Radio and TV Broadcasting/Rada pro rozhlasové a televizní vysílání) during the checking round with the competent national media regulator within the EPRA network.

⁷⁵ *Zákon č. 496/2012 Sb. Zákon o audiovizuálních dílech a podpoře kinematografie a o změně některých zákonů (zákon o audiovizí)*, <https://www.zakonyprolidi.cz/cs/2012-496>.

⁷⁶ <https://filmcommission.cz/en/about/czech-film-fund/>.

3.2.4. DE - Germany⁷⁷

According to Article 153 of the Film Funding Act (FFG),⁷⁸ on-demand AVMS with a registered office or branch in Germany that exploit cinematographic works produced for commercial purposes by means of paid or advertising-financed video-on-demand services must pay a film levy to the German Federal Film Board (*Filmförderungsanstalt* - FFA) on the net turnover generated in Germany from the exploitation of cinematographic works if this exceeds EUR 500 000 per year.⁷⁹ The obligation also applies to on-demand AVMS providing offerings of German-language video-on-demand services in relation to turnover generated in Germany. However, the levy obligation does not apply if the corresponding sales at the place of the company's registered office are used to make a comparable financial contribution to the promotion of cinematographic works by a film promotion institution.

The film levy amounts to:

- 1.8 % for annual turnover of up to EUR 20 million
- 2.5 % in the case of annual turnover of more than EUR 20 million

The turnover limits are determined by the turnover of the previous year.. If the turnover was only achieved during part of the previous year, annual turnover is calculated by multiplying the average monthly turnover of the previous year by the number 12. If turnover figures for the previous year are not available, the turnover limits may be calculated on the basis of the monthly turnover in the year of delivery. In the case of video-on-demand services for a flat fee, the net turnover subject to the levy must correspond to the cinema film share of the total net turnover from subscription contracts with end-consumers in Germany. The cinema film share corresponds to the share of cinema films of actual viewing time across total offerings in Germany.

On-demand AVMS must provide the FFA with the information required for the implementation of the FFG and submit relevant documents (Article 164 FFG). This also applies a.o. to persons who are not required to pay a film levy solely because the turnover limits have not been reached, as well as for persons in respect of whom the existence of the other conditions for a duty to pay can only be ascertained if appropriate information is provided.⁸⁰

⁷⁷ The case study on Germany incorporates the kind feedback received from Peter Matzneller (Directors Conference of the Media Authorities/*Direktorenkonferenz der Landesmedienanstalten*) during the checking round with the competent national media regulator within the EPRA network.

⁷⁸ *Gesetz über Maßnahmen zur Förderung des deutschen Films (Filmförderungsgesetz - FFG)*, https://www.gesetze-im-internet.de/ffg_2017/BJNR341300016.html.

⁷⁹ See also chapter 5 of this publication.

⁸⁰ See Chapter 12 FFG for more information on obligations to provide information and use of data.

3.2.5. DK - Denmark

In Denmark, there is a tradition of concluding multi-year political agreements on the framework for media policy.⁸¹ These agreements are concluded between the government and one or more parties in the Danish Parliament (*Folketing*). The latest media policy agreement was concluded on 29 June 2018 between the government (the Left Party, the Liberal Alliance and the Conservative People's Party) and the Danish People's Party, and covers the period 2019-2023.⁸² It provides that on-demand AVMS are required to invest 2% of their turnover in Denmark in the form of direct investment in new Danish-language content. The obligation applies to all on-demand AVMS on the Danish market, including foreign services targeting Denmark. A threshold is set so that companies with a turnover of less than DKK 375 000 in Denmark are exempt from the obligation. The details of the scheme and its implementation were to be agreed in autumn 2018 between the political parties behind the Media Agreement 2019-2023. However, it was never implemented. There is a report from Deloitte⁸³ from November 2019 (updated in August 2020) with a mapping of the Danish streaming market and proposals for the implementation of a possible streaming obligation.⁸⁴

In its proposal of February 2022 regarding a new Media Agreement,⁸⁵ the Danish Ministry of Culture proposed to introduce a cultural contribution for streaming services of 5% of the services' turnover in Denmark, to be used for the production of Danish quality content. The contribution would go to a larger public service pool and increase subsidies for Danish films. The scheme is designed as a tiered model. Streaming services that invest heavily in productions with Danish content will pay a smaller cultural contribution than services that do not.

On 15 August 2022, the Danish Ministry of Culture published a bill for a Danish Act on Cultural Contribution for consultation with a deadline of 12 September 2022 to submit responses.⁸⁶ If adopted, it will introduce an obligation for on-demand media service providers (including targeting services) whose annual turnover exceeds DKK 15 million to pay a cultural contribution to promote Danish-language content, including the production of Danish-language films, fiction series and documentaries. This annual contribution will amount to 6% of their turnover in Denmark subject to the contribution.

⁸¹ <https://kum.dk/kulturomraader/medier/medieaftaler>.

⁸² *Medieaftale for 2019 – 2023*, https://kum.dk/fileadmin/_kum/2_Kulturomraader/Medier/medieaftaler/2019-2023/Medieaftale_2019-2023.pdf.

⁸³ Deloitte, “Forpligtelse for streamingtjenester - Forslag til udmøntning af en forpligtelse for streamingtjenester til at bidrage til dansk indholdsproduktion”, report updated in August 2020, https://kum.dk/fileadmin/_kum/1_Nyheder_og_presse/2020/Forpligtelse_for_streamingtjenester_August_2020.pdf.

⁸⁴ See *Gennemførelse af Medieaftale 2019-2023 – status*, 3 March 2020, <https://www.ft.dk/samling/20191/almdele/kuu/spm/134/svar/1642541/2163333.pdf>.

⁸⁵ *Kulturministeriet, Udspil til ny medieaftale - Den demokratiske samtale skal styrkes- Demokratisk kontrol med tech-giganter, mere dansk indhold og stærkere lokale og regionale medier*, February 2022, https://kum.dk/fileadmin/_kum/1_Nyheder_og_presse/2022/Medieudspil_0302_.pdf.

⁸⁶ *Forslag til Lov om visse medietjenesteudbyderes bidrag til fremme af dansksproget indhold*, (Kulturbidragsloven), <https://hoeringsportalen.dk/Hearing/Details/66689>.



The Agency for Culture and Palaces shall collect the contribution annually in arrears on the basis of the media service providers' statements of turnover in Denmark for the previous financial year. The Minister of Culture may, after consultation with the Minister of Taxation, lay down detailed rules on the collection of the contribution, including rules on the reminder procedure for payment, on interest and on the time limit for payment. The proceeds of the cultural contribution shall be distributed, after deduction of the costs associated with the administration of the scheme, with 50 per cent for a public service pool and 50 per cent for the support of Danish-language film.

The cultural contribution scheme does not apply to on-demand audiovisual media services from DR, the regional TV 2 enterprises, or TV 2 DANMARK A/S, as they are provided as a part of public service activities in accordance with the rules in Chapters 4, 6, and 6a of the Broadcasting Act.⁸⁷The Act is foreseen to enter into force on 1 January 2023. However, a national election is scheduled to be held on 1 November 2022⁸⁸ and, as such, it is uncertain whether the bill may be passed.⁸⁹

3.2.6. ES - Spain⁹⁰

The revised General Audiovisual Act⁹¹ introduces a financial contribution obligation applicable to both domestic and targeting services. Its Article 117 provides that the obligation may be fulfilled through direct participation in the production of the works, through the acquisition of the exploitation rights thereof and/or by contributing to the *Fondo de Protección a la Cinematografía* (Film Protection Fund), which is managed by the *Instituto de la Cinematografía y de las Artes Audiovisuales*, or by contributing to the *Fondo de fomento de la cinematografía y el audiovisual en lenguas cooficiales distintas al castellano* (Fund for the promotion of cinematography and audiovisual works in co-official languages other than Spanish).⁹²

The amount of the obligatory advance financing of European audiovisual works is determined on the basis of the revenue accrued in the previous financial year, according to their operating accounts, for the provision of television audiovisual media services in the Spanish audiovisual market.

In co-productions, the contribution of the independent producer is not taken into account for the purposes of compliance with the financing obligation.

⁸⁷ Lov om radio- og fjernsynsvirksomhed m.v. (consolidated version), <https://www.elov.dk/radio-og-fjernsynsloven/>.

⁸⁸ <https://www.thedanishparliament.dk/en/news/2022/general-election-2022>.

⁸⁹ See Foged T., “[DK] Draft bill for a Danish Act on Cultural Contribution with 6% revenue payment from VOD services”, IRIS 2022-08, <https://merlin.obs.coe.int/article/9571>.

⁹⁰ The case study on Spain incorporates the kind feedback received from Jorge Clavería Palacian (Spanish National Markets and Competition Commission/*Comisión Nacional de los Mercados y la Competencia*) during the checking round with the competent national media regulator within the EPRA network.

⁹¹ *Ley 13/2022, de 7 de julio, General de Comunicación Audiovisual*, <https://www.boe.es/buscar/act.php?id=BOE-A-2022-11311>.

⁹² <https://www.culturaydeporte.gob.es/cultura/areas/cine/inicio.html>.



The production or purchase of film rights that are eligible for an X-rating (violent or pornographic) is not counted for the purposes of compliance with the obligation of advance financing of European audiovisual works.

The financial contribution obligation mentioned above shall not apply to providers with a low turnover, to audiovisual media services with a low audience or in those cases in which the obligation is impracticable or unjustified due to the nature or subject matter of the audiovisual media service, under the terms to be determined by regulation. Providers whose VOD services only have local reach and are not part of a larger national network are exempted from the obligation.

According to Article 119, the obligation to pre-finance European audiovisual works shall be modulated in accordance with the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.⁹³ On-demand AVMS, whose eligible revenue is equal to or greater than EU 50 million, must earmark 5% of this revenue each year for the financing of European audiovisual works, the purchase of exploitation rights for European audiovisual works already completed and/or the contribution to the Film Protection Fund or the Fund for the promotion of cinematography and audiovisual works in co-official languages other than Spanish. The total of the provider's financing obligation must meet the following two conditions:

- At least 70% must be allocated to audiovisual works by independent producers, produced on their own initiative or on commission, in the official language of the Spanish State or in one of the official languages of the Autonomous Communities. Of this sub-quota, the provider of the television audiovisual communication service, whether linear or on demand, shall in any case set aside:
 - A minimum of 15% to audiovisual works in the official languages of the Autonomous Communities, taking into account their population weight and reserving at least ten percent for each of them.
 - A minimum of 30% for audiovisual works directed or created exclusively by women.
- At least 40% must be allocated to cinematographic films by independent producers, produced on their own initiative or on commission, of any genre in the official language of the Spanish State or in one of the official languages of the Autonomous Communities.

Providers whose income is less than EUR 50 million and greater than or equal to EUR 10 million, must allocate 5% percent of this income annually to the financing of European audiovisual works, to the purchase of exploitation rights for finished European audiovisual works or to the contribution to the Fund for the Protection of Cinematography. Out of the total of the provider's obligatory financing, a minimum of 70% must be earmarked for audiovisual works by independent producers, produced on their own initiative or on commission, in the official language of the Spanish State or in one of the official languages of the Autonomous Communities.

⁹³ See Chapter 2 of this publication.

Providers whose computable revenue, in accordance with the provisions of Article 117.3, is less than EUR 10 million are exempt from the obligation.

3.2.7. FR - France⁹⁴

According to Article 10 of the non-linear AVMS Decree,⁹⁵ the obligation to contribute to the development of cinematographic and audiovisual works is applicable to on-demand audiovisual media services, including those not established in France and not falling within the jurisdiction of France within the meaning of Article 43-2 of the Act of 30 September 1986 (Léotard Act),⁹⁶ but aimed at French territory, which meet the following conditions:

- Services allowing the viewing, for a limited period of time, of programmes broadcast on a television service (catch-up TV) ; the non-linear AVMS decree is only applicable regarding the cinematographic contribution for those services;
- Other on-demand audiovisual media services if they have an annual net turnover of more than EUR 5 million and if their audience is greater than 0.5% of the total audience in France of the category of on-demand audiovisual media services to which they belong

For the purposes of assessing audience share, a distinction must be made among the on-demand audiovisual media services referred to in 2° between the following categories: subscription video-on-demand services (SVOD), transactional video-on-demand services (TVOD) and other services.

Article 11 provides exclusions for:

- services which offer less than 10 feature films per year
- catch-up television services established in France (for the audiovisual contribution only)
- other on-demand services whose offering is mainly devoted to works of a pornographic nature, or inciting to violence, or which offer fewer than 10 audiovisual works per year other than those aforementioned.

SVOD services must devote at least 20% of the net annual turnover they generate in France to the funding of European or French cinematographic and audiovisual production. The proportion increases to 25% for services that offer at least one film less than 12

⁹⁴ The case study on France incorporates the kind feedback received from Raphaël Honoré (Regulatory Authority for Audiovisual and Digital Communication/*Autorité de régulation de la communication audiovisuelle et numérique*) during the checking round with the competent national media regulator within the EPRA network.

⁹⁵ *Décret n° 2021-793 du 22 juin 2021 relatif aux services de médias audiovisuels à la demande*, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043688681>.

⁹⁶ *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)*, <https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006068930/>.

months after its release in France. The ratio between cinematographic and audiovisual works is being laid down in an agreement⁹⁷ to be concluded with the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – Arcom)⁹⁸. Each category cannot represent less than 20% of the total contribution.

Other on-demand services must devote at least 15% of the net annual turnover to the funding of European production, of which at least 12% to original French language productions.

For catch-up television services, the proportions of the cinematographic contribution are identical to those applicable to the television service from which they originate.

A significant portion of this contribution (three quarters for film production, two thirds for audiovisual production) will support independent production of European works, which is defined according to criteria aimed at guaranteeing the preservation and development of local intangible heritage in France and the distribution of works. To be considered independent production in France, service provider may not have any direct or indirect financial interests in production companies and the rights must not exceed a certain duration particularly where they have been acquired on an exclusive basis, while coproduction shares, income rights, distribution mandates and secondary rights are not permitted. Clauses must also be included to determine specific obligations in independent production regarding audiovisual genres which are significant in the service offer. Finally, diversity clauses for subscription services only must also be included in order to prevent the contribution being focused on big-budget films or certain genres (e.g. fiction or animation).

Chapter III of the decree requires at least 60% of the works in non-linear AVMS catalogues to be European, and at least 40% of these to be original French language productions. It also contains rules on promoting these works via visuals, trailers and specific sections on the homepage, and on recommending content to users through programme searches or promotional campaigns. Such conditions will be clarified in the agreement with Arcom at the same time as the reference period to calculate the obligations.

A 5.15% levy on the yearly turnover (increased to 15% when the transaction concerns pornographic or violent works) is payable for making available services to the French public which give them access to cinematographic or audiovisual works, upon individual request, and by means of an electronic communication process, whether or not the VOD provider is established in France.⁹⁹

⁹⁷ French-based service providers with a net annual turnover greater than EUR 1 million are required to sign such an agreement, which should particularly set out their contribution obligations as well as their duty to offer and showcase these works and to provide rightsholders with access to exploitation data concerning their works. Those that fall outside French jurisdiction but aiming at French territory can choose whether or not to sign such an agreement.

⁹⁸ <https://www.arcom.fr/>.

⁹⁹ *Code général des impôts*, Article 1609 sexdecies B, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041472728/.

3.2.8. GR - Greece¹⁰⁰

According to Article 8(6) of Act 3905/2010 on support for, and development of, the art of cinema,¹⁰¹ telecommunication services and new technology companies are obliged to allocate each year 1.5% of their annual turnover resulting from the provision of audiovisual media services via Internet or mobile telephony (IPTV, VOD) to the production of Greek cinematographic works. These are defined as cinematographic works that fulfil a number of artistic and technical criteria (Article 4 of Act 3905/2010) and two of the following three criteria (Article 3 of Act 3905/2010):

- the original version must be at least 51% in the Greek language
- at least 51% of the filming must have taken place in the Greek territory
- at least 51% of the budgetary costs must have been demonstrably spent in the Greek territory

With regard to targeting services, according to Article 17(2) of Act 4779/2021,¹⁰² providers of on-demand media services established in another member state, if they are specifically addressed to the public in Greece, must contribute financially each year an amount equal to 1.5% of their turnover relating to their activity in Greece, either:

- to the production of Greek audiovisual works, or
- to the purchase of rights to Greek audiovisual works that have not yet been released, or
- to a special account of the National Centre for Audiovisual Media and Communication A. E. (E.K.O.M.E.), established by Law No. 4339/2015¹⁰³ for the support of Greek producers.

These providers are considered to be specifically addressed to the Greek audience, in particular if they advertise to it, if the main language of their service is Greek, even with subtitles, and if the services provided contain programmes or commercial communications addressed to the Greek audience or specifically related to it. The concept of a Greek audiovisual work includes “autonomous” audiovisual works, as referred to in Article 20(2) of Act No. 4487/2017.¹⁰⁴ For the characterization of an audiovisual work as Greek, the provisions of paragraphs. 1, 2 and 3 of Article 3 of Act 3905/2010 apply.

¹⁰⁰ The case study on Greece incorporates the kind feedback received from Persa Lampropoulou (National Council for Radio and Television/Εθνικό Συμβούλιο Ραδιοτηλεόρασης) during the checking round with the competent national media regulator within the EPRA network.

¹⁰¹ ΝΟΜΟΣ ΥΠ’ ΑΡΙΘΜ. 3905 ΦΕΚ Α’ 219/23.12.2010,
<https://www.kodiko.gr/nomothesia/document/129347/nomos-3905-2010>.

¹⁰² ΝΟΜΟΣ ΥΠ’ ΑΡΙΘΜ. 4779 ΦΕΚ Α 27/20.2.2021,
<https://www.kodiko.gr/nomothesia/document/672722/nomos-4779-2021>.

¹⁰³ ΝΟΜΟΣ ΥΠ’ ΑΡΙΘ. 4339 ΦΕΚ Α 133/29.10.2015,
<https://www.kodiko.gr/nomothesia/document/127264/nomos-4339-2015>.

¹⁰⁴ ΝΟΜΟΣ ΥΠ’ ΑΡΙΘΜ. 4487 ΦΕΚ Α’ 116/09.08.2017,
<https://www.kodiko.gr/nomothesia/document/275774/nomos-4487-2017>, Article 20(2): “an autonomous audiovisual work: an episode or parts of episodes or a season of episodes of a mini television series, a television or a cinematographic film or a part thereof, irrespective of its duration, a digital game. The content



Article 51(3) of Law 4779/2021 provides for Ministerial Decisions that will complement the provisions of Article 17, although at the time of writing these lines (September 2022), these decisions had not yet been issued.

3.2.9. HR - Croatia¹⁰⁵

According to Article 27(2) of the new Electronic Media Act,¹⁰⁶ providers of on-demand AVMS are obliged to invest 2% of the total annual gross income in the production of Croatian audiovisual works by independent producers or to purchase produced Croatian audiovisual works by independent producers.

According to Article 28 of the new Electronic Media Act, on-demand AVMS targeting Croatia, including services established in other EU member states, are required to:

- make a financial contribution to the implementation of the National Program for Promoting Audiovisual Creativity Works in accordance with the law governing audiovisual activity
- invest 2% of total annual gross income in the production of Croatian audiovisual works by independent producers, or purchase produced Croatian audiovisual works by independent producers; this investment may be cumulated over two years

These obligations relate to revenues generated by the media service provider by performing activities in the Republic of Croatia. Data on advertising and subscription revenues should be provided by media service providers on request in the form of financial statements certified by independent audit firms. For on-demand media service providers established in the Republic of Croatia, which are aimed at audiences in other EU member states that have introduced a financial contribution, the amount of the paid contribution in other countries is considered in the calculation.

of the above may be fiction, creative documentary (documentary), animation, as well as a digital game, cultural or educational. The aforementioned self-contained audiovisual works are produced for the user experience in linear or non-linear format, with or without interactive applications and with the possibility of being distributed on multiple platforms, such as free-to-air terrestrial television, pay-TV, IPTV, on-demand services, cinema screens, websites for the distribution and display of TV and film works, social media, in whole or as part of applications and programmes for computers, tablets, PCs, PCs, mobile phones, mobile phones and other devices.”

¹⁰⁵ The case study on Croatia incorporates the kind feedback received from Sanja Pančić (Agency for Electronic Media of the Republic of Croatia/*Agencija za elektroničke medije*) during the checking round with the competent national media regulator within the EPRA network.

¹⁰⁶ *Zakon o elektroničkim medijima, NN 111/21*,
https://narodne-novine.nn.hr/clanci/sluzbeni/2021_10_111_1942.html.

3.2.10. IE - Ireland

At the time of writing (September 2022), Ireland had not yet transposed the revised AVMSD. The Online Safety and Media Regulation Bill 2022¹⁰⁷ will a.o. amend the Broadcasting Act 2009,¹⁰⁸ in order to provide for the establishment of a new regulator and a multi-person Commission (*Coimisiún na Meán*), to dissolve the existing regulator, the Broadcasting Authority of Ireland,¹⁰⁹ and to provide for the implementation of the revised AVMSD.¹¹⁰

A new Part 10A of the Broadcasting Act 2009 will provide for the imposition of a European works levy and making of a European works scheme out of which funds from the levy may be granted by the *Coimisiún na Meán*.

Section 159E of the Broadcasting Act 2009 will provide that the *Coimisiún na Meán* may impose a levy (the “European works levy”) on media service providers under the jurisdiction of Ireland, or those under the jurisdiction of another member state, and targeting audiences in Ireland. Service with low audiences or turnover will be exempted, and the rules will not apply in cases where the *Coimisiún na Meán* will consider it impracticable or unjustified by reason of the nature of a service to impose the corresponding obligations on it. A levy order may provide for the collection, payment and administration of a levy, including:

- the method of calculation of the levy
- the period in respect of which the levy is imposed
- the times at which payment is to be made and the form of payment
- the records which a provider must keep and make available to the Commission
- exemptions from the levy, deferrals of payment of the levy or refunds of the levy
- the consideration of applications by providers for review of decisions under the order

In the case of a media service provider that is under the jurisdiction of Ireland and targets audiences in another member state, the method of calculation of a levy must take into account any financial contribution imposed on the provider by that member state.

In the case of a media service provider which targets audiences in Ireland and is established in another member state, 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, and the levy shall be proportionate and non-discriminatory.

According to Section 159F, the *Coimisiún na Meán* may create a scheme (the “European works scheme”) out of which funds from the European works levy may be

¹⁰⁷ Online Safety and Media Regulation Bill 2022, <https://data.oireachtas.ie/ie/oireachtas/bill/2022/6/eng/initiated/b0622s.pdf>.

¹⁰⁸ Broadcasting Act 2009, <https://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/html>.

¹⁰⁹ <https://www.bai.ie/>.

¹¹⁰ See Explanatory and Financial Memorandum of the Online Safety and Media Regulation Bill 2022, <https://data.oireachtas.ie/ie/oireachtas/bill/2022/6/eng/memo/b0622s-memo.pdf>.

granted to provide support for the production of European works to media service providers which are under the jurisdiction of Ireland, or target audiences in Ireland and are established in another member state. The section specifies the type of programming that may be supported, which includes programmes relating to Irish culture, history, heritage, society and sport, or new audiovisual programmes to improve adult literacy or improve media literacy. The section also provides that at least 25% of the annual funds under this scheme be granted to certain programmes in the Irish language.

3.2.11. IT - Italy¹¹¹

Article 55 of the recently adopted *Decreto Legislativo*¹¹² provides that on-demand audiovisual media service providers under Italian jurisdiction must comply with an obligation to invest in European audiovisual works produced by independent producers to an extent equal to a percentage share of their annual net revenues in Italy, as provided for by a forthcoming Agcom regulation, defined as follows:

- 17% until 31 December 2022
- 18% from 1 January 2023
- 20% from 1 January 2024

These investment obligations apply also to providers of on-demand audiovisual media services having editorial responsibility for offerings addressed to consumers in Italy, even if they operate in another member state.

A share of not less than 50% of the abovementioned percentages provided for European works is reserved for original Italian works produced in the last five years by independent producers. The regulation(s) referred to in article 57 of the *Decreto Legislativo* will provide that a percentage equal to at least 20% of this sub-investment quota is reserved for cinematographic works of Italian origin, produced anywhere within the last five years by independent producers.

A regulation issued by Agcom will set threshold criteria regarding media service providers with a low turnover or audience. Derogation from these requirements will also apply in cases where compliance is impracticable or unjustified due to the nature or subject matter of the audiovisual media services. This regulation will also provide for the

¹¹¹ The case study on Italy incorporates the kind feedback received from Francesca Pellicanò (Italian Communications Authority/*Autorità per le garanzie nelle comunicazioni*) during the checking round with the competent national media regulator within the EPRA network.

¹¹² *Decreto Legislativo 8 novembre 2021, n. 208 Attuazione della direttiva (UE) 2018/1808 del Parlamento europeo e del Consiglio, del 14 novembre 2018, recante modifica della direttiva 2010/13/UE, relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri, concernente il testo unico per la fornitura di servizi di media audiovisivi in considerazione dell'evoluzione delle realtà del mercato*, https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2021-12-10&atto.codiceRedazionale=21G00231&elenco30giorni=true

means by which the audiovisual media service provider will define the quantification of the obligations with regard to European works produced by independent producers.

Audiovisual media service providers that generate at least 80% of their annual net revenues from linear broadcasting and that also provide on-demand media services will have to abide by the provisions of Articles 53 and 54 of the *Decreto Legislativo* concerning investment obligations for broadcasters, and not those of Article 55.

According to Article 67(2)(d) of the *Decreto Legislativo*, failure to comply with the rules on the protection of European and independent audiovisual production may be sanctioned with a fine from EUR 100 000 to EUR 5 000 000, or up to 1% of annual turnover, when the value of such a percentage is higher than EUR 5,000,000. If the infringement is particularly serious or repeated the Authority may order the service provider to suspend activity for a period not exceeding six months, or in the most serious cases of non-compliance with the orders and warnings of the same Authority, the revocation of the concession or of the authorisation (Article 67(11) of the *Decreto Legislativo*).

3.2.12. NL – Netherlands

On 18 July 2022, the State Secretary for Culture and Media (Staatssecretaris Cultuur en Media) introduced a new Bill to the Lower House of Parliament (Tweede Kamer), which will amend the Media Act (Mediawet) 2008.¹¹³ The bill requires streaming services with an annual turnover in the Netherlands of more than EUR 30 million to invest 4.5% of their turnover in Dutch films, series and documentaries. That investment includes, for example, (co)producing a Dutch title themselves, or buying and offering an existing, recent Dutch production. Part of the investment should benefit independent producers to ensure a diverse supply.¹¹⁴

¹¹³ *Voorstel van wet tot wijziging van de Mediawet 2008 in verband met het invoeren van een investeringsverplichting ten behoeve van Nederlands cultureel audiovisueel product, 15 juli 2022*, <https://www.rijksoverheid.nl/regering/bewindspersonen/gunay-uslu/documenten/kamerstukken/2022/07/15/wetsvoorstel-wijziging-mediawet-2008>.

¹¹⁴ See press release of the Dutch State Secretary for Culture and Media, “Grote streamingdiensten moeten meer investeren in Nederlandse producties”, 18 juli 2022, <https://www.rijksoverheid.nl/regering/bewindspersonen/gunay-uslu/nieuws/2022/07/18/grote-streamingdiensten-moeten-meer-investeren-in-nederlandse-producties>. See also Ó Fathaigh R., “[NL] New bill requiring major streaming platforms to invest in Dutch productions”, IRIS 2022-8:1/16, <https://merlin.obs.coe.int/article/9566>.



3.2.13. PL - Poland¹¹⁵

According to Article 19(6a) of the Cinematography Act,¹¹⁶ on-demand audiovisual media services under Polish jurisdiction must make a payment to the Polish Film Institute (PISF)¹¹⁷ equal to 1.5% of the revenue derived from fees for access to on-demand audiovisual media services made available to the public or of the revenue derived from the broadcasting of commercial communications if that revenue is greater in the relevant accounting period. Services which have their registered office in another member state of the European Union are subject to the same obligation, which will be determined based on the revenue generated on the territory of the Republic of Poland (Article 19(6b) of the Cinematography Act).

This obligation does not apply to service providers¹¹⁸:

- that are a micro-entrepreneur within the meaning of Art. 7 (1) (1) of the Entrepreneurs Act¹¹⁹ or
- whose number of users of all audiovisual media services on demand in the year preceding the year in which the obligation to pay the contribution to the Institute is established, did not exceed 1% of the subscribers of data transmission services providing broadband access to the Internet; the number of users of data transmission services providing broadband access to the Internet shall be determined on the basis of data from the inventory referred to in Article 29 of the Act on supporting the development of telecommunications services and networks.¹²⁰

3.2.14. PT - Portugal¹²¹

The Film Act¹²² imposes three different financial obligations on VOD providers (including foreign providers targeting Portugal) in the form of two levies for the film fund ICA¹²³ and

¹¹⁵ The case study on Poland incorporates the kind feedback received from Małgorzata Pek (Polish Broadcasting Council/*Krajowa Rada Radiofonii I Telewizji*) during the checking round with the competent national media regulator within the EPRA network.

¹¹⁶ *Ustawa z dnia 30 czerwca 2005 r. o kinematografii* (t.j. Dz. U. z 2021 r. poz. 257 z późn. zm.), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20051321111/U/D20051111Lj.pdf>.

¹¹⁷ <https://pisf.pl/>.

¹¹⁸ *Ibidem*, art. 19(6c).

¹¹⁹ *Ustawa z dnia 6 marca 2018 r. - Prawo przedsiębiorców*, (t.j. Dz. U. z 2021 r. poz. 162 z późn. zm.), <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000646>.

¹²⁰ *Ustawa z dnia 7 maja 2010 r. o wspieraniu rozwoju usług i sieci telekomunikacyjnych*, (t.j. Dz. U. z 2022 r. poz. 884), <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20101060675>.

¹²¹ The case study on Portugal incorporates the kind feedback received from Joana Duarte (Portuguese Regulatory Authority for the Media/*Entidade reguladora para a comunicação social*) during the checking round with the competent national media regulator within the EPRA network.

¹²² *Lei n.º 55/2012*, <https://dre.pt/dre/legislacao-consolidada/lei/2012-74931963>.

¹²³ <https://www.ica-ip.pt/>.

direct investment obligations. According to Article 45(4) of the Television Act 27/2007¹²⁴ these obligations are applicable to on-demand audiovisual service operators that are under the jurisdiction of another member state but target audiences located in Portuguese territory, in relation to the revenues they obtain in Portugal.

According to Article 14a of the Film Act, operators of on-demand AVMS are required to allocate a portion of their investment expenses to the development, production and promotion of European and Portuguese language works and works of independent production. This obligation is not applicable to on-demand AVMS with a low turnover or low audience in the national market, under the following terms:

- Annual revenues in the national market of less than EUR 200 000
- Services with a share in the respective market segment of less than 1%

The amounts to be invested are as follows:¹²⁵

- Less than EUR 200 000: exempted
- Between EUR 200 000 and EUR 1 999 999: 0,5 % of the relevant income or EUR 0.50 per subscriber or a flat rate of EUR 10 000.
- Between EUR 2 000 000 and EUR 9 999 999: 1 % of the relevant income or EUR 1 per subscriber or a flat rate of EUR 100 000.
- Between EUR 10 000 000 and EUR 24 999 999: 2 % of the relevant income or EUR 2 per subscriber or a flat rate of EUR 500 000
- Between EUR 25 000 000 and EUR 49 999 999: 3 % of the relevant income or EUR 3 per subscriber or a flat rate of EUR 1 500 000
- EUR 50 000 000 or more: 4 % of the relevant income or EUR 4 per subscriber or a flat rate of EUR 4 000 000

Relevant income is deemed to be that resulting from the following services provided in the year prior to the year of the obligation:

- audiovisual commercial communications
- subscriptions or one-off transactions

The obligations apply to on-demand AVMS under the jurisdiction of another member state, whenever these operators target audiences or make commercial offers to the public in the national territory and apply only to income made in the national market.

The obligations apply only to those that include in the programming of any of their programme services or in their catalogues feature films, short films, telefilms, creative or creative documentaries for television, and series, including fiction, documentary and animation, and do not apply to those whose programme services or catalogues include only works of a pornographic nature. In the case of generalist programme services or where the relevant types of content constitute less than 50% of

¹²⁴ Lei n.º 27/2007, <https://dre.pt/dre/legislacao-consolidada/lei/2007-34561375>.

¹²⁵ See Annex to the Film Act: <https://files.dre.pt/1s/2020/11/22600/0000400034.pdf>.

the respective programming, measured in number of hours, the investment values are reduced by 50%.

The decree-law that regulates the Film Act specifies procedures and mechanisms to promote the diversification of partners and the non-concentration of investments, as well as to ensure the application of copyright rules that contribute to the sustainability and development of the independent creative and entrepreneurial fabric.¹²⁶

According to Article 16 of the Film Act, investment of on-demand AVMS in the production of European cinematographic and audiovisual creative works of independent production, originally in Portuguese, may take the following forms:

- Financing of writing and project development work for European cinematographic and audiovisual creative works of independent production, originally in the Portuguese language, the Portuguese language requirement not applying in the case of co-productions with national participation under the applicable treaties, of any of the types referred to in Article 14a(8)(a).
- Participation in the financing of the production of cinematographic and audiovisual creative works of European independent production, originally in Portuguese, the Portuguese language requirement not applying in the case of co-productions with national participation under the applicable treaties, of any of the types referred to in point a) of no. 8 of Article 14.A, through:
 - i) Acquisition of exploitation rights in the project phase
 - ii) Co-production
 - iii) Association with production, without co-ownership
- Acquisition of exploitation rights of cinematographic and audiovisual creative works of European independent production, originally in Portuguese, the Portuguese language requirement not applying in the case of co-productions with national participation under the applicable treaties.
- Restoration and mastering of films, and of supported works and other European works in Portuguese, provided that two copies in accordance with the technical standards defined by this entity are delivered to the Cinemateca, I. P.
- Promotion of European cinematographic and audiovisual works.
- In-house production or production by associated companies, the acquisition of commissioned works or investment in other European creative works.

At least 30% of the compulsory investment is carried out in financing of writing and project development work and participation in the financing of production.

In the case of SVOD services, the works in the last bullet point (in-house production or production by associated companies, the acquisition of commissioned works or investment in other European creative works) must be works originally in Portuguese, and the Portuguese language requirement does not apply in the case of co-productions with national participation under the applicable treaties.

¹²⁶ *Decreto-Lei n.º 74/2021*, <https://dre.pt/dre/detalhe/decreto-lei/74-2021-170175411>.

The participation of on-demand AVMS may also be ensured through the creation of an area in their respective catalogues dedicated to the promotion of European and Portuguese language works, under terms to be specified in the decree-law that regulates this law.

The amounts of investment due that, at the end of each cycle of two consecutive years, are not allocated to direct investment under the terms of paragraph 1 are delivered by each television operator to the ICA, in January of the following year.

According to Article 16A of the Film Act, where it is not possible to ascertain the value of the relevant income of on-demand AVMS, the annual value of the investment is set at EUR 4 000 000. It is considered that it is not possible to calculate the value of the relevant income of the operators in the following situations:

- The income does not have to be declared in Portugal, but in other member states, and the information made available in those countries does not differentiate income by geographical origin, making it impossible to calculate the part of the income obtained in Portugal.
- Failure to deliver the legal documents that allow the value of the relevant income to be calculated.

The Film Act foresees two levies:

- Audiovisual commercial communication included in on-demand audiovisual services are subject to a fee, called an exhibition fee, which is charged to the advertiser, of 4% of the price paid (Article 10(1)).
- Providers of on-demand AVMS by subscription (SVODs) are subject to payment of an annual charge corresponding to 1% of the amount of the relevant income of such operators (Article 10(5)).

3.2.15. RO - Romania¹²⁷

The Act No 190 of 28 June 2022¹²⁸ amended both the Audiovisual Act¹²⁹ and the Government Ordinance No 39/2005 on cinematography.¹³⁰

¹²⁷ The case study on Romania incorporates the kind feedback received from Ruxandra Minea-Cristea (Romanian Audiovisual Council/*Consiliul Național al Audiovizualului*) during the checking round with the competent national media regulator within the EPRA network.

¹²⁸ *Lege nr. 190 din 28 iunie 2022 pentru modificarea și completarea Legii audiovizualului nr. 504/2002, pentru modificarea și completarea Ordonanței Guvernului nr. 39/2005 privind cinematografia, precum și pentru modificarea Legii nr. 41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune*, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/256901>.

¹²⁹ *Lege nr. 504 din 11 iulie 2002 - Legea audiovizualului*, <https://legislatie.just.ro/Public/DetaliiDocument/37503>.

¹³⁰ *Ordonanță nr. 39 din 14 iulie 2005 privind cinematografia*, <https://legislatie.just.ro/Public/DetaliiDocument/63969>.



The Ordinance as amended by the Act foresees that the *Fondul cinematografic* (Cinema Fund) be funded a.o. through the following sources:

- the monthly collection of a contribution of 3% of the price of films downloaded for remuneration by means of data transmission services, including via the internet or telephony, through providers of VOD services, as well as the obligation to pay the contribution falling to the legal entities that realize these incomes (Article 13(1)(h) of the Ordinance);
- 4% of revenue from single transactions or subscriptions, by VOD providers, for the viewing of audiovisual works through internet or telephony data transmission services (Article 13(1)(h¹) of the Ordinance).

In the case of the providers established in another member state of the European Union, the revenues on which the contribution is imposed shall be those obtained in Romania. The abovementioned provisions of the Ordinance do not apply to providers whose income, for the last fiscal year, did not exceed the equivalent in lei, at the exchange rate communicated by the National Bank of Romania, of the amount EUR of 65,000 or whose audience level is less than 1%, in relation to the number of subscribers at national level, or to data transmission services providing broadband Internet access (Article 13(1¹) and (1²) of the Ordinance).

The VOD providers referred to in Article 13(1)(h¹) may opt for direct financing of a cinematographic production, up to 40% of the amount owed to the Cinematographic Fund, at the request of film producers and after prior notification to the National Cinematography Centre (Article 16(2¹) of the Ordinance).



4. Cooperation mechanisms¹³¹

The cross-border application of the financial contribution obligations introduced under Article 13(2) of the AVMS Directive will pose many challenges in practice for member states, and primarily for national media regulators. The regulators, meeting within the European Regulators Group for Audiovisual Media Services (ERGA), worked already before the adoption of the Directive on identifying these challenges and how best to meet them. In practice, this means adopting a common approach to the main concepts at stake, and creating new cooperation mechanisms to facilitate the exchange of information and best practices. This chapter examines the issues identified by national regulatory authorities (NRAs) in this context, the role of ERGA in addressing these issues, and the framework put in place within ERGA through the Memorandum of Understanding adopted in December 2020.

4.1. Main challenges for national regulatory authorities

As described in Chapter 2 of this publication, Article 13(2) of the AVMS Directive recognises the possibility for any member state to impose financial contribution obligations on (linear and non-linear) audiovisual media service providers established in another member state and targeting audiences in its territory.¹³² Although, unlike the obligations relating to the share and prominence of European works, the measures on financial contributions are not mandatory for member states, their implementation at cross-border level may nevertheless pose several challenges. One important challenge is that, as discussed in Chapter 3 of this publication, those member states which have chosen to implement such a financial obligation have done so in very different ways. Some have opted for a direct contribution to production or rights acquisition, either mandatory or voluntary; others apply a mandatory tax or levy payable to a film fund, either through a contribution to production or rights acquisition, in some cases in addition to a production investment obligation. Moreover, where it exists, this financial

¹³¹ Chapter 4 incorporates the kind feedback received from Kateřina Lojíková (Chair of ERGA Action group on the implementation of the Memorandum of Understanding) and Anahi Vila (*Conseil Supérieur de l'Audiotvisuel*).

¹³² The AVMS Directive sets out that such a contribution must only be based on the revenues earned in the targeted member states and needs to comply with the principles of non-discrimination and proportionality. In addition, it provides that direct contributions already made by broadcasters should be taken into account by the targeted member state (Recital 37). If the member state where the service provider is established imposes a financial contribution, it shall take into account any financial contribution imposed by targeted member states (Recital 39).



contribution is calculated differently from one member state to another. It may be a share of the total annual revenues generated by the service provider, or a proportion of specific revenues, such as advertising or licence fee incomes. Finally, the proportion of financing to be allocated to the promotion of European works varies significantly between member states.

In all cases, it is understood that the implementation of Article 13(2) AVMSD, in particular in cross-border cases where another member state's financial contribution scheme is applicable to service providers under their jurisdiction, will require that the relevant national authorities be informed about the economic data relating to foreign service providers. National Regulatory Authorities (NRAs) are generally best placed to obtain such information from audiovisual media service providers, although there may be cases where the relevant data will be collected by other bodies, such as a ministry or state agency, including national film funds. NRAs are generally responsible for collecting information on direct investment in content (with some exceptions), while contributions are made to and collected by national film funds.

The collection and verification of the economic data relating to these services, which are needed for calculation of the financial contribution they are required to pay on the basis of the revenues they generate in the targeted member state, may also raise specific challenges for NRAs in practice. These challenges have been analysed and discussed by ERGA in a paper aimed at contributing to the consistent implementation of the revised AVMSD.¹³³

Firstly, ERGA outlines a challenge in terms of powers, as some NRAs do not currently have adequate powers to request all the relevant information that NRAs in the targeted country would need.

Secondly, ERGA points out that the concept of "targeting" a service has not been defined in the AVMS Directive, and that interpretations of this term may differ at national level or even come into conflict. Furthermore, ERGA notes that there appears to be no legal definition of the term in national legislations, meaning that there is no existing national practice on which NRAs could base their analysis of the term. ERGA considers that it is important to have a common interpretation and understanding of this concept at cross-border level for several reasons: on the one hand, in order for a receiving member state to determine if it is appropriate to impose a financial obligation; on the other hand, for the member state having jurisdiction over a service provider to identify any financial obligation already imposed by targeted member states. The same type of challenge exists in relation to the categorisation of the relevant service, which may also differ from country to country.

Thirdly, with regard to the procedures and enforcement tools available, ERGA points out that Article 13 AVMSD does not deal with sanctions, and therefore, it is up to member states to decide, in compliance with EU law, what type of sanction can be

¹³³ "ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive", <https://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf>.

applied in the event that a particular service provider does not comply with the financial obligations imposed by a targeted member state. In this regard, ERGA stresses that, at national level, NRAs usually request additional information from service providers in cases of established non-compliance, as a first step before launching sanction proceedings. The range of possible sanctions is rather broad, to reflect different levels of severity: warning letter or reprimand, obligation to publish a press release, restrictions on advertising revenues, fines, restriction of access to the service and termination of the service. One of the challenges in applying Article 13(2) according to ERGA will be to determine which NRA will be responsible for enforcement where member states make use of the possibility to impose financial obligations on service providers under the jurisdiction of another member state.

4.2. The role of ERGA

4.2.1. Cooperation between national regulatory authorities

While cooperation between NRAs was already covered in Article 30 of the 2010 AVMSD, whereby member states (through their regulatory authorities) were required to take appropriate measures to provide each other and the European Commission with the information necessary for the application of the Directive, the revised AVMSD has taken cooperation between NRAs a step further. In fact, the newly introduced Article 30a emphasises the importance of cooperation between NRAs (rather than between member states) and brings more clarity as to the process of cooperation and the exchange of information between NRAs. More specifically, Article 30a(1), refers to the exchange of information necessary for the application of the Directive (in particular Articles 2 to 4 of the Directive), while the exchange of information in more specific situations is addressed in paragraph 2 and 3 of the same Article. Thus, Article 30a(2) refers to the situation where an NRA receives information from a service provider under its jurisdiction that it will provide a service “wholly or mostly directed at the audience of another Member State”. In such a case, the NRA having jurisdiction over the service provider shall provide the NRAs in the targeted country with *ex ante* information about this service.¹³⁴

More relevant for the application of financial obligations on a cross-border level, Article 30a(3) addresses expressly the requests for information about “targeting” services. The new provision establishes that if the NRA of a member state, whose territory is

¹³⁴ According to ERGA, this duty to inform could provide the NRAs in the targeted territory with *ex ante* information about services directed wholly or mostly at their audiences and therefore possibly help in identifying circumvention strategies. However, ERGA considers that this provision relates merely to the provision of information once a request has been received and does not foresee further involvement of the NRA of the targeted member state. For further information, please see “ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive”, p. 34, *op.cit.*



targeted by a service provider under the jurisdiction of another member state, sends a “request concerning the activities” of that provider to the NRA of the member state having jurisdiction over it, the latter NRA shall do its utmost to address the request within two months, “without prejudice to stricter time limits applicable pursuant to this Directive”. It should also be noted that, when requested, the NRA of the targeted member state (i.e. the one sending the request) has an obligation to provide to the NRA of the member state having jurisdiction any necessary information that may assist it in addressing the request.

The need for cooperation between NRAs is not only based on Article 30a of the Directive. It has also been specifically called for by the European Commission with regard to the implementation of measures to promote European works. In particular, in the Guidelines published in July 2020 on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover, the Commission expressly encourages national authorities to cooperate actively with their counterparts in other member states, in particular with regard to the exemption of specific categories of service providers.¹³⁵ The Commission points out that such cooperation might be warranted especially with a view to gathering relevant data or information and to limit the risks of divergent interpretations by national authorities. The Commission further indicates that ERGA could be an appropriate forum for facilitation of such cooperation. In this regard, the NRAs are invited to exchange information, data, and best practices within ERGA and to discuss any issues faced in the application of these guidelines.

4.2.2. The formal recognition and reinforcement of the role of ERGA

Reflecting this growing trend towards cooperation between NRAs, the AVMS Directive also formalised the existence and strengthened the role of ERGA. In particular, Article 30b AVMSD specifies the main missions of ERGA, namely: the provision of technical expertise to the European Commission; the promotion of the exchange of good practices on the application of the provisions of the Directive; the fostering of cooperation and the exchange of information necessary for the application of the Directive. In terms of cooperation, Article 30b also provides that ERGA has a role to play in facilitating the exchange of regulators’ experiences and practices in the application of the regulatory framework applicable to audiovisual media services.

In practice, upon adoption of the AVMS Directive and even before the publication of the European Commission’s 2020 implementation guidelines, ERGA had started working on how to address the various challenges raised by the implementation of the AVMSD, including with respect to the cross-border application of the financial contribution obligations. Among the options considered, cooperation between NRAs regarding the exchange of information and the sharing of best practices was at the

¹³⁵ For more details, please refer to Chapter 3 of this publication.



forefront of the discussions and extended beyond the specific issue of implementation of exemptions.

In particular, ERGA highlighted the underlying need for NRAs to be empowered, on a national basis, to collect and share all relevant economic data they need, in order to facilitate the application of cross-border financial contributions (as well as all relevant information on targeting services). In addition, ERGA stressed at an early stage the importance of NRAs defining and agreeing on a common cooperation scheme for the collection and exchange of information in relation to the implementation of the financial contribution at cross-border level. According to ERGA, such a scheme would include a regular exchange of best practices between NRAs, reporting on internal procedures regarding verification of the accuracy of economic data provided by service providers, and, in the longer term, the possible development of standardised declaration forms. Furthermore, ERGA highlighted the need to strengthen the exchanges between NRAs and national film funds through the European Film Agencies Directors (EFAD) network so they may benefit from the pooling of resources and knowledge.

On a more general level, ERGA proposed that member states discuss with the European Commission possible common approaches to addressing cases of non-compliance with the obligation to contribute financially to the production of content on a cross-border basis early in the transposition period, in order to work towards a common approach to the application of Article 13(2). Similarly, ERGA proposed that NRAs define and agree on a common approach on how to address cases of non-compliance with cross-border financial contributions (possibly based on Article 30a(3) AVMSD).

4.2.3. Memorandum of Understanding between NRAs that are members of ERGA

In line with this preliminary work on the organisation of cooperation on a practical level and in light of the specific roles for the NRAs envisaged by the revised AVMS Directive, the NRAs that are part of ERGA adopted in December 2020 a Memorandum of Understanding (MoU).¹³⁶ This MoU aims at setting out a framework for collaboration and information exchange between the NRAs within ERGA in order to resolve practical issues arising from the implementation of the Directive in a consistent manner. It fixes clear objectives for collaboration,¹³⁷ as well as common interests among the participants to the

¹³⁶ Memorandum of Understanding between the National Regulatory Authority Members of the European Regulators Group for Audiovisual Media Services, 3 December 2020, https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_L.pdf.

¹³⁷ The key objectives of the MoU include: strengthening cooperation between NRAs with a view to consistent and effective implementation of the revised AVMSD; setting out a framework for cooperation and collaboration; addressing the challenges relating to the cross-border enforcement of certain provisions; facilitating information-sharing by NRAs, etc. (MoU, Article 1.2.).



MoU¹³⁸ and principles that should be used by NRAs as a guide to assess their responsibilities with regard to other NRAs in the day-to-day operation of the framework of cooperation envisaged by the MoU.¹³⁹

Among the areas of cooperation envisaged, the MoU addresses cooperation issues related to the possibility for member states to impose a financial obligation on services established outside their national jurisdiction, pursuant to Article 13(2) (Section 2.2.2. of the MoU). In particular, the NRAs undertake, through this MoU, to reach a common understanding of certain issues arising under Article 13(2), a common recognition of some of the implications of that Article for cooperation, and the delivery of specific cooperation mechanisms in respect of that Article.

4.2.3.1. A common understanding of issues related to Article 13(2)

Through the MoU, NRAs commit to a common understanding that the financial contributions allowed under Article 13(2) AVMSD may apply to service providers established outside their territory but targeting audiences in their territory and that they may take multiple forms (direct investments, levies payable to a fund, acquisition of rights in European works).

They agree that any member state wishing to apply such a financial contribution to a targeting service must be able to demonstrate that audiences in its territory are targeted by that service, on the basis of the indicators referred to in Recital 38 AVMSD (such as advertising specifically aimed at customers in its territory, the main language of the service or the existence of content or commercial communications specifically aimed at the audience in the receiving member state).

The participants to the MoU understand that any such financial contribution must be proportionate, non-discriminatory, and calculated solely on the basis of revenues generated in the targeted member state; they agree that any targeted member state that makes use of the possibility provided for in Article 13(2) is competent to determine, in accordance with EU law, the modalities of implementation and enforcement of these national rules by an NRA in respect of a foreign-based targeting service.

¹³⁸ The common interests of NRA participants to the MoU include: implementing the revised AVMSD; ensuring media pluralism, cultural diversity, the protection of audiences (and especially minors), the promotion of freedom of expression, the proper functioning of the internal market and the promotion of fair competition; ensuring a high level of consumer protection; respecting and protecting human dignity and tackling audiovisual content inciting to violence or hatred; exchanging experience and best practices; ensuring the independence of NRAs; cooperating and exchanging information (MoU, Article 1.1.).

¹³⁹ The principles of cooperation between participants to the MoU are the following commitments: (1) promoting the values of the AVMSD; (2) recognising NRA interests; (3) acting transparently and in good faith; (4) cooperating effectively and efficiently; (5) promoting and respecting the rule of law; (6) recognising the limitations to cooperation; (7) recognising the country-of-origin principle; (8) implementing and improving progressively; (9) acting reasonably (MoU, Article 1.3.).



4.2.3.2. A common recognition of implications of Article 13(2) for cooperation

The participants to the MoU recognise that all NRAs have a common interest in being aware of the financial obligations that services under their jurisdiction may be subject to in other member states. They recognise that the implementation of such financial contributions raises specific challenges for NRAs and service providers alike as the latter might have to comply with the rules of several EU member states at the same time, depending on their location and on which countries their services are targeting. Further, financial schemes applicable to service providers may vary between member states.

They recognise that having readily accessible and accurate information about a service provider's activities, including about whether it is targeting audiences in another territory and the revenue it generates in that territory, is a prerequisite for effective implementation of such financial contributions by targeted member states.

They agree that the NRA in the targeted member state is the one responsible for the administration of the financial contributions applied to the targeting service and that the NRA in the member state of establishment may be able to provide assistance given the insight and experience it has accumulated in engaging with the services under its jurisdiction and as the authority responsible for enforcing different obligations provided for by the AVMS Directive.

NRA members to the MoU recognise that, without prejudice to the competence of the NRA in the targeted member state to engage with foreign-based service providers directly, appropriate information-sharing and cooperation arrangements between NRAs have therefore the potential to alleviate the burden, for some service providers, of having to declare their revenues, investments, and levies paid in multiple countries.

4.2.3.3. Specific cooperation arrangements in respect of Article 13(2)

In this context, the participants to the MoU have agreed to make specific cooperation arrangements in respect of Article 13(2), where this is both (i) justified having regard to the common interests of the participants to the MoU and the objectives of the MoU; and (ii) consistent with the principles of cooperation of the MoU.

More specifically, specific cooperation arrangements are likely to be justified in the following scenarios (sub-section 2.2.2.3. of the MoU):

- In order for the NRA in the targeted member state to determine whether a foreign-based service provider may be subject to financial obligations based on knowledge of the revenues it generates by targeting audiences in the territory of its member state.
- Where appropriate, in order for the NRA in the targeted member state to calculate the level of financial contribution based on the sole revenues generated by foreign-based service providers in the territory of its member state and therefore to avoid the risk of double imposition.
- In order for the NRA in the targeted member state to ensure that the financial contribution imposed on foreign-based service providers is not discriminatory and

disproportionate when compared to the rules with which domestic service providers have to comply.

- In order for both NRAs to be able to check whether the information declared by a given service provider about the investments made in European works, as well as the levies paid to national funds, are in line with its obligations in the respective member states.

Where it is consistent with the MoU's cooperation principles, including by having regard to any genuine limitations to cooperation that may be relevant in the context of the exchange of information (such as statutory duties of the NRA), the participants to the MoU commit to the following:

- They will share the details of financial contribution schemes applicable to service providers established in their territory and those targeting their audiences while established in another member state's territory, within a centralised register.
- Where appropriate and justified, NRAs in the member states where the service provider is established, upon request from the NRAs in the targeted member states, agree to collect and store information about the revenues that these services generate in the EU, and/or the investments they make in European works and the levies they pay to national funds in their country of establishment.
- In accordance with a procedure for "Requests for Information" laid down in the MoU (sub-section 2.1.2), NRAs in the member states where the targeting service provider is established agree to share with the requesting NRA the accounting information they have collected directly, or indirectly through assistance of another regulatory authority or body, which is relevant to the country of the requesting NRA.
- When such information is shared with the requesting NRA, confidentiality must be ensured at all stages through an appropriate protocol. In case the initial information provided was not accurate or complete, NRAs in the member states where the service provider is established shall undertake best efforts to respond to the request of the requesting NRA.
- NRAs in the targeted member states agree to share their legal and economic assessments of how a service established outside of their jurisdiction is deemed liable to pay financial contributions to the funding of European works. The information should be transmitted to the NRA in the member state where the service provider is established and should provide for a minimum set of information (such as a brief account of the applicable rules; the level of the financial contribution imposed; and where appropriate, an account of how the financial obligations imposed in the member state of establishment have been taken into account).
- They will share with the NRA in the member state where the service provider is established any assessment according to which a service has failed to comply with its financial obligations pursuant to the national law of the targeted member state and, where relevant, what regulatory actions might be taken, including any sanction it may be exposed to as a result.



- They will work together to develop a common declaration form for service providers within their jurisdiction laying down the accounting information which service providers are required to share with national regulatory authorities in order to determine the annual turnover of relevant service providers. In developing such a form, NRAs should aim to ensure the collection of information that might be required by other NRAs to enforce the relevant levies on the service, drawing reference from the central register. The form should require service providers to break down their overall revenues per country and be accompanied by a statement from a chartered accountant certifying that the information is accurate.
- NRAs will endeavour, to the maximum extent possible, to align the cycle of any funding schemes, in particular for the purpose of checking service providers' compliance with their investment obligations.

This MoU shows that cooperation between regulators within the EU is taking on a new dimension in practice, commensurate with the role that these bodies are expected to play in the successful implementation of financial contribution obligations at the transnational level. Although these obligations still exist in a relatively small number of countries, the lessons learned from their implementation will certainly constitute a 'before and after' for regulators in terms of cross-border and even, in some cases, inter-institutional cooperation at the national level.

4.2.4. Next steps

Strengthening cooperation in cross-border cases remains one of ERGA's key strategic priorities for 2022. As a follow-up to the adoption of the MoU, an Action Group was created within ERGA in 2022, aimed at securing immediate application and administration of the MoU via concrete work on implementation of the tasks foreseen in the MoU. The work of the Action Group will aim at ensuring fluid and close cooperation as regards cross-border cases, with due respect to the country of origin principle.

As stated in the ERGA Work Programme 2022, the Action Group will follow up on, and supervise closely, the enforcement of measures foreseen by the MoU with an eye on emerging cross-border cases, as well as on the potential need for improvement in cooperation. This will include potential updates to the register on national financial schemes under Article 13(2) of the AVMSD, established pursuant to the MoU.¹⁴⁰

The Action Group will specifically monitor the application of the MoU, as regards:

- Requests for information

¹⁴⁰ According to Art. 2.2.2.3.1. of the MoU, the participants commit to "share the details of financial contributions schemes applicable to audiovisual media service providers established in their territory and those targeting their audiences while established in another Member State's territory, within a centralised register."

- Requests for mutual assistance
- Requests for accelerated mutual assistance
- Cooperation in respect of Article 28b AVMSD
- Cooperation in respect of Article 13(2) AVMSD
- Use of the Standard form¹⁴¹

In doing so, the Action Group will gather and maintain the records of the steps that NRAs have taken to implement the MoU and maintain records of the nature and number of requests for cooperation according to the MoU.

4.3. Case study: France

4.3.1. Agreements between the CSA and the main foreign-based on-demand AVMS providers

Following on from the transposition of the AVMS Directive through the Ordinance of 21 December 2020,¹⁴² the On-Demand Audiovisual Media Services Decree of 22 June 2021¹⁴³ obliges foreign platforms to invest in the French and European film and audiovisual sector. Previously, only France-based service providers had been required to finance the film-making industry. The French national audiovisual regulator CSA (Conseil supérieur de l'audiovisuel – since 1 January 2022, the Autorité de régulation de la communication audiovisuelle et numérique, ARCOM) can adapt these obligations in the relevant agreements signed with the platforms (Article 8 of the Decree). It can also impose sanctions if they are not met (Article 43-7 of the Law of 30 September 1986), with fines of up to double the annual sum payable, or three times, in cases of recidivism.

On 9 December 2021, the CSA announced that it had signed agreements with the main on-demand AVMS providers based in other EU member states that provide film and audiovisual services in the French market, i.e. Netflix, Disney +, Amazon Prime Video for its subscription-based service, and Apple App – iTunes Store. It had also notified them in writing of their obligation to invest 20% of the turnover they generate from subscription-based services in France, with 80% of this sum going to audiovisual production and 20%

¹⁴¹ Among the tasks of the Action Group, the development of standard forms to be used by the participants in the MoU in the context of the general and specific cooperation framework envisioned in the MoU is foreseen.

¹⁴² Ordonnance n° 2020-1639 du 21 décembre 2020 portant mesures d'urgence en matière d'activité partielle (*Ordinance n° 2020-1639 of 21 December 2020 on emergency measures relating to partial activity*), <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042722461?msclkid=bae136b3ab8a11ec88c8e6ba24d1aca4>.

¹⁴³ Décret n° 2021-793 du 22 juin 2021 relatif aux services de médias audiovisuels à la demande (*Decree n° 2021-793 of 22 June 2021 relating to on-demand audiovisual media services*), <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043688681?msclkid=6ffc304eab8911ec85d006db69e5645b>.



to cinema production.¹⁴⁴ The total expected contribution to production is expected to be between EUR 250 and 300 million per year.¹⁴⁵

Under a decree of 4 February 2022,¹⁴⁶ a new agreement on the adjustment of media chronology to all the companies concerned completed the integration of these platforms into the financing system for French and European film-making.¹⁴⁷

4.3.2. Agreement between film organisations and Netflix

On 22 February 2022, the French film organisations Blic, Bloc and ARP announced that they had signed their first agreement with a subscription-based on-demand video service, Netflix.¹⁴⁸ The three-year agreement follows on from the Decree of 22 June 2021, which obliges foreign service providers to fund French and European film-making. Previously, only French providers had been under such an obligation.

As part of its obligation to invest 4% of its net turnover generated in France, Netflix has agreed to contribute at least EUR 30 million per year to French-language film production. The agreement also contains a diversity clause requiring Netflix to contribute at least 17% of its funding to French-language films with a budget of EUR 4 million or less, and stipulates that it should fund at least 10 films per year. In total, Netflix is expected to invest around EUR 40 million in French and European film production in 2022. In return for its investment, and pursuant to the Ordinance of 4 February 2022, Netflix will have exclusive rights to show the films for seven months, starting 15 months after their release in cinemas.¹⁴⁹

¹⁴⁴ CSA, press release of 9 December 2021, <https://www.csa.fr/Informer/Espace-presse/Communiqués-de-presse/Le-regulateur-integre-les-principaux-SMAD-internationaux-au-systeme-francais-de-financement-de-la-creation>.

¹⁴⁵ Blocman, A., “[FR] International on-demand audiovisual media service platforms reach agreement with CSA on their obligations towards French and European audiovisual and film production”, IRIS Legal Observations, IRIS 2022-1:1/5, European Audiovisual Observatory, Strasbourg, France, <http://merlin.obs.coe.int/article/9363>.

¹⁴⁶ Arrêté du 4 février 2022 portant extension de l'accord pour le réaménagement de la chronologie des médias du 24 janvier 2022 (Order of 4 February 2022 extending the agreement on the reorganisation of the media chronology of 24 January 2022), <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045141748?msclid=e72a228dab8f11ec84386b4a0b9ea76b>.

¹⁴⁷ For more details, please see: Blocman, A., “[FR] New media chronology completes audiovisual reforms”, IRIS Legal Observations, IRIS 2022-3:1/10, European Audiovisual Observatory, Strasbourg, France, <http://merlin.obs.coe.int/article/9423>.

¹⁴⁸ Media release of BLIC, BLOC and Netflix, 22 February 2022, <https://www.la-srf.fr/article/communiqu%C3%A9-blic-bloc-arp-netflix?msclid=9fb3cbe3ab8811ec88104f057e118e73>.

¹⁴⁹ Blocman, A., “Investment obligations for foreign providers: first agreement between French film industry and Netflix”, IRIS Legal Observations, IRIS 2022-3:1, European Audiovisual Observatory, Strasbourg, France, <http://merlin.obs.coe.int/article/9424>.

5. Case law: From an absolute to a relative country-of-origin principle

Few courts have yet had to rule on the extraterritorial application of financial obligations, under Article 13(2) AVMSD. Mainly, the countries that considered this aspect did so prior to the revision of the AVMS Directive, and the new wording of Article 13(2) has answered existing doubts about the possibility of applying financial obligations to services located outside the national territory. In this respect, it is interesting to analyse the reasoning followed by the European Commission on Germany's aid scheme for films, where everything started, and by the General Court of the EU in the subsequent Netflix case, which recognised the legal basis of this extraterritorial application.

Although the process of transposition at national level is still too recent to give rise to case-law on the cross-border application of financing obligations, two decisions deserve to be highlighted. The first concerns a question referred to the Court of Justice of the European Union (CJEU) by the Supreme Administrative Court of Portugal for a preliminary ruling on the compatibility of quotas for works in the national language with the principle of freedom to provide services. The second concerns the freedom to provide services, and access to national support funds financed by taxes for operators established abroad.

5.1. The European Commission's decision on Germany's aid scheme for films

The German Law on the funding of film production (*Gesetz über Maßnahmen zur Förderung des deutschen Films – "Filmförderungsgesetz"*) codifies an aid scheme for the funding of film production, distribution and exhibition, to be financed by a special levy imposed on undertakings in the cinema and video industry and the broadcasting sector.¹⁵⁰

In March 2014, Germany informed the European Commission of an amendment to the existing aid scheme, which extended liability for the levy to providers of video-on-demand services established outside Germany receiving revenue from customers in

¹⁵⁰ See also, European Commission, Commission decision of 3.12.2013 on the aid scheme SA.36753 (2013/N) - Germany Filmförderungsgesetz, C(2013) 8679 final, 3 December 2013, http://ec.europa.eu/competition/state_aid/cases/248820/248820_1491791_130_2.pdf.



Germany through a German-language Internet presence. The amendment was to apply from the date of its approval by the Commission until 31 December 2016, and if the Commission approved the scheme, the levy would be recovered retroactively as from the date of the entry into force of the amendment – namely, 1 January 2014.

On 1 September 2016, the European Commission issued its decision,¹⁵¹ and found that the measures were compatible with the Treaty on the Functioning of the European Union (TFEU), and did not infringe the Audiovisual Media Services Directive (2010/13/EU) (“AVMS 2010”).¹⁵²

The Commission’s decision first recalled that Article 107(3)(d) TFEU provides that “aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest” may be considered to be compatible with the internal market. The Commission noted that it had already found the current scheme compatible with Article 107 in its Decision SA.36753 (3 December 2013), and stated that “the extension of the range of possible beneficiaries to firms established elsewhere does not negatively affect the compatibility assessment under that Article”.

Next, the Commission considered whether the levy violated Article 110 TFEU, which provides that “no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products [or] any internal taxation of such a nature as to afford indirect protection to other products”. The Commission decided that the new tax did not infringe Article 110, as “foreign video-on-demand providers may benefit also in practical terms equally from the funding”, and “[the] scheme provides for effective means to allow the foreign VOD providers to apply for distribution aid in the same way as their German competitors”.

Finally, the Commission examined whether the measures violated the AVMSD (2010). In this regard, Article 2(2)(a) AVMSD (2010) contains the country-of-origin principle, and provides that “media service providers under the jurisdiction of a Member State are ... those established in that Member State in accordance with paragraph 3”. On the other hand, Article 13(1) AVMSD (2010) concerns the promotion of European works and provides that member states must “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”.

Two interested parties in the procedure argued that the tax would constitute a measure to promote access to European works, in violation of the country-of-origin principle. However, the Commission decided that the “validity of the application of the tax to certain VOD providers which provide their services from locations outside Germany” did

¹⁵¹ 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.

¹⁵² See also, Beckendorf, I., *Germany: Draft of a new film support act adopted*, IRIS Legal Observations, IRIS 2016-6:1/11, European Audiovisual Observatory, Strasbourg, France, <http://merlin.obs.coe.int/article/7600>.



not violate the AVMS Directive. The Commission stated that “an interpretation according to which the country-of-origin principle” applies to the tax at issue would lead “to situations in which providers active on the same market are not subject to the same obligations”.

Moreover, the Commission had regard to the proposed amendment to the AVMSD (2010) which clarified in particular that member states have the right to require providers of on-demand audiovisual media services targeting audiences in their territories but established in other member states, to make such financial contributions. The Commission decided that the proposal was “a clarification of what could already be possible under the Directive currently in force”.

5.2. The Netflix v. European Commission case

Following the Commission’s decision, Netflix International, an online video-streaming service established in the Netherlands that launched its service in Germany in 2014 and became subject to the levy, applied to the General Court of the European Union to have the Commission’s decision annulled. Netflix International, together with its parent Netflix Inc., argued that the Commission’s decision had been based on an incorrect interpretation of the AVMS Directive and infringed the TFEU.

On 16 May 2018, the General Court of the European Union delivered its judgment in *Netflix International BV v. European Commission*,¹⁵³ finding inadmissible Netflix’s application for the annulment of the European Commission’s 2016 decision on Germany’s aid scheme for the funding of film production and distribution.¹⁵⁴

Without addressing the substance of Netflix’s application, the General Court declared the application inadmissible. The Court stated that under Article 263 of the TFEU, an application for the annulment of a Commission decision is admissible only if the applicants are directly affected by the contested decision, the decision takes the form of a regulatory act that does not contain implementing measures, or the applicants are directly and individually affected by the contested decision. Netflix had argued that it had been “specifically targeted”, arguing that the explanatory memorandum to the FFG “explicitly refers to them in stating that ‘the market-leading company ... is far ahead of its competitors [and] is also established elsewhere in Europe’”, and that the German Film Board (*Filmförderungsanstalt*) had “contacted them immediately after the adoption of the contested decision in order to discuss payment of the levy and the provision of information”.

¹⁵³ Judgment of the General Court (Eighth Chamber) of 16 May 2018, Case T-818/16, *Netflix v Commission*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=202021&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=776368>.

¹⁵⁴ Ó Fathaigh, R., *European Commission: Decision on funding of film production and distribution in Germany*, <http://merlin.obs.coe.int/article/7685>.



The Court rejected Netflix's arguments, holding that it did not meet the cumulative conditions set out in the fourth paragraph of Article 263 TFEU, as it was affected by the contested decision only as a non-domestic video-on-demand distributor that provides services in the German language on German territory. The national legislation authorised by the contested decision therefore applies to Netflix only by reason of their objective legal and factual situation under a general rule. Lastly, as regards Netflix's argument that it is obliged to infringe the law in order to be able to claim the invalidity of the contested decision,¹⁵⁵ the Court noted that Netflix was entitled to access to a court without being obliged to infringe the law and that in proceedings before national courts it could plead the invalidity of the contested decision and ask those courts to request a preliminary ruling from the Court of Justice.

5.3. Freedom to provide service, and quotas for “national works”

Although the financial obligation in Article 13(2) of the AVMS Directive concerns the promotion of “European” works, on the basis of the definition of such works provided by the Directive, some member states have implemented it in their national law with the aim of reinvesting part of the revenue in “national” works. For example, some countries have provided for sub-quotas in their legislation to promote films and audiovisual works which must have been made in the national language (or “dialect”) as the original language of expression.¹⁵⁶

In a recent case, the Portuguese Film and Audiovisual Media Institute (*Instituto do Cinema e do Audiovisual, I.P.*) appealed against the judgment of 20 November 2018 given at first instance by the Administrative and Finance Court of Almada (*Tribunal Administrativo e Fiscal, TAF*), by which that court declared the subscription fee (levy) payable by operators of subscription television services to the Film and Audiovisual Media Institute for access to television programming services in the national territory, to be contrary to the freedom to provide services laid down in Article 56 TFEU.

On 10 March 2021, the Supreme Administrative Court of Portugal (*Supremo Tribunal Administrativo*) referred to the Court of Justice of the European Union (CJEU)¹⁵⁷ the question of whether the fact that this funding reduces the cost of national film and audiovisual productions and thus favours the purchase of such productions over

¹⁵⁵ Specifically, before a German court, Netflix is entitled to claim its rights in two types of situations: a situation in which they might be brought before a court following non-payment of specific tax notices, or following failure to cooperate in the context of a tax procedure. In such a case, Netflix argued that they would have been obliged to infringe the law in order to have access to a court.

¹⁵⁶ For more details on national schemes, please refer to Chapter 3 of this publication.

¹⁵⁷ Case C-411/21, Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal) lodged on 5 July 2021 – *Instituto do Cinema e do Audiovisual, I.P. v NOWO Communications, SA*. Case C-411/21, <https://curia.europa.eu/juris/document/document.jsf?docid=248684&doclang=EN&msclid=4cc87316b4f711ec973df15a308c0a03>.



productions from other member states, gives rise to indirect discrimination against the cross-border provision of such services, thereby infringing the freedom to provide services established in Article 56 TFEU.

More specifically, the referring court requested of the CJEU a preliminary ruling on whether the fee, if interpreted as meaning that it should be used exclusively to finance the promotion and dissemination of Portuguese films and audiovisual works, is liable to give rise to indirect discrimination against the provision of services between member states as compared with the corresponding national provision of services, inasmuch as it makes the provision of services between member states more difficult than the purely domestic provision of services within a member state, thus infringing Article 56 TFEU.

Secondly, the court sought clarification on the question of whether the fact that other member states had introduced identical or similar levy obligations in respect of domestic and non-domestic providers could impact the assessment of the Portuguese subscription fee at issue.

The conclusions of the CJEU, in this case, could have far-reaching implications for the various national film funding schemes financed by the levy obligation as well as for direct investment obligations, which go beyond the type of media service providers concerned (i.e. operators of subscription television services).

5.4. Freedom to provide services, and access to national film funds funded by levies

Indirect financial levies for the support of audiovisual and film productions are collected via special film funds of member states. According to Recital 36 of the AVMS Directive, “media service providers that are required to contribute to film funding schemes in a targeted member state should be able to benefit in a non-discriminatory way, even in the absence of an establishment in that member state from the aid available under respective film funding schemes to media service providers.” The Directive aims, through this provision, to ensure equal access to the resources of the fund for all service providers who have borne the burden of the levies. However, at national level, a certain asymmetry may remain between the obligation to pay a levy to a film fund which extends to non-domestic service providers targeting a local audience and their eligibility to receive financial support from the fund.

For example, in an Opinion issued on 17 March 2021 concerning the draft Decree on On-Demand Audiovisual Media Services, the French national regulatory authority, the former CSA (now ARCOM), expressed its views on the French system in this respect.¹⁵⁸ As

¹⁵⁸ Avis du 17 mars 2021 relatif au projet de décret relatif aux services de médias audiovisuels à la demande, (Opinion of 17 March 2021 relating to the draft Decree on audiovisual media services), <https://www.csa.fr/content/download/260153/807996/version/2/file/CSA%20-%20Avis%20d%C3%A9cret%20SMAD.pdf>.



detailed in Chapter 3 of this publication, the French system of support for film and audiovisual creation, which is mainly aimed at independent producers, is financed, *inter alia*, by taxes imposed by the General Tax Code, collected by the tax administration and allocated to the French film fund, the National Centre for Cinema and the Moving Image (*Centre national du cinéma et de l'image animée*, CNC). Cross-border streaming service providers established outside France but operating on French territory have been subject to the tax since 2018, initially at a rate of 2%, and was increased to 5.5% in 2020. However, the eligibility criteria that independent producers must meet in order to benefit from the fund's support amount to exclusion of producers pre-financed by a provider established outside France. Given that, since 2020, non-French providers offering their services in France are subject to the same tax obligation as domestic streamers, it is reasonable to ask whether retaining funding support for producers working with foreign streamers would not appear to be an asymmetrical discriminatory requirement that strengthens the competitiveness of domestic SVOD providers and could be considered as a restriction to the free movement of services.

In its Opinion issued before the publication of the Decree, the CSA drew the Government's attention to the need to preserve the overall coherence of the support system for audiovisual and cinematographic creation. The regulator, while recognising the serious budgetary constraints faced by the CNC due to the effects of the Covid-19 crisis, nevertheless considered that this system should be progressively extended to works financed by all SVOD services subject to the obligation to contribute to the financing of creation.

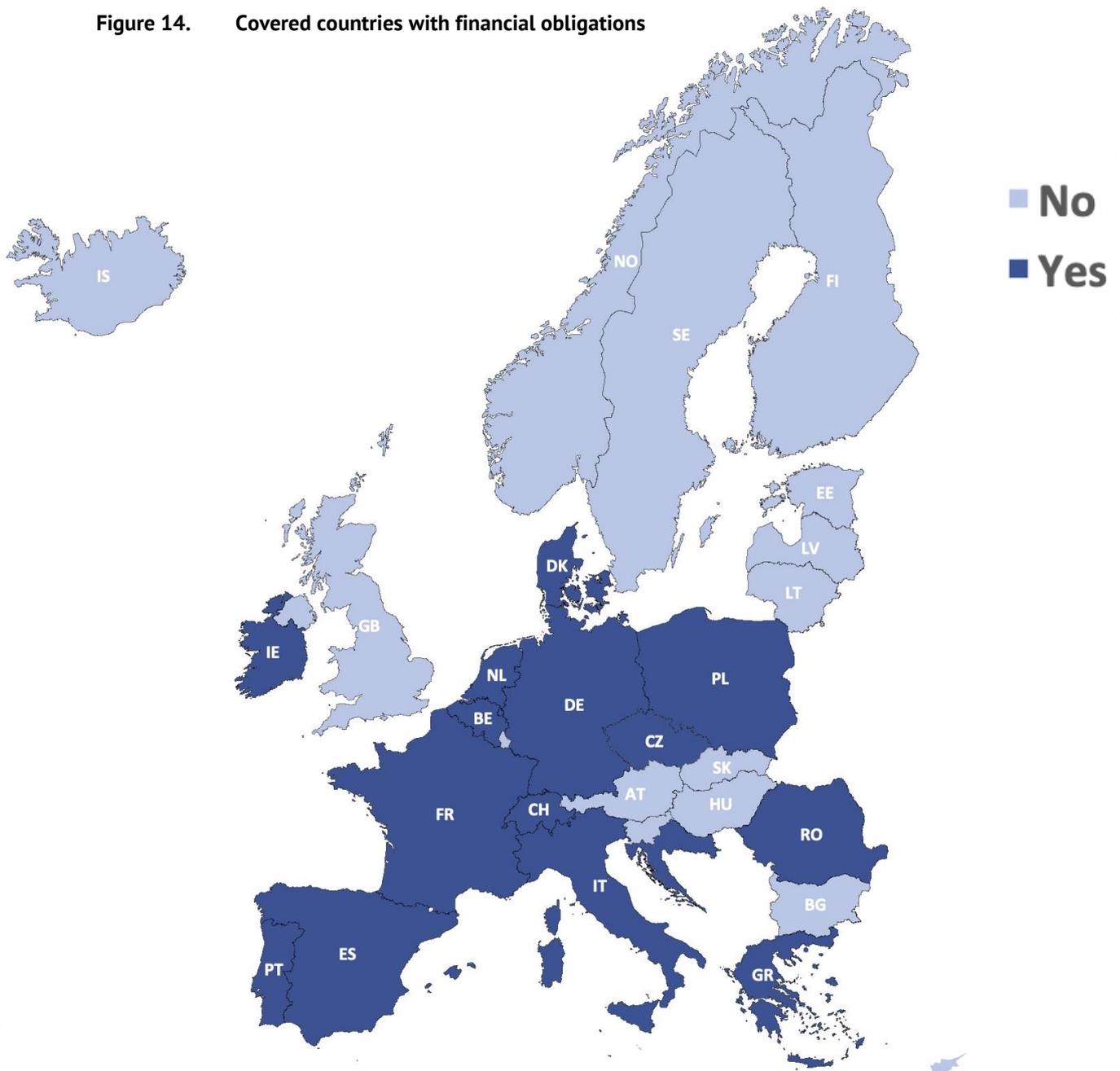


6. State of play

Article 13(2) AVMSD leaves plenty of leeway for member states to introduce financial obligations on VOD services. Most member states have already introduced obligations among the different types of obligations available, with a clear preference for direct investment obligations, and whenever they have introduced obligations for domestic services, they have done the same for targeting services. As to the level of investments, Italy and France have chosen to impose much higher obligations than the other member states.

The current situation with regard to covered countries that have chosen to introduce financial obligations, as per 22 September 2022, is as follows:

Figure 14. Covered countries with financial obligations

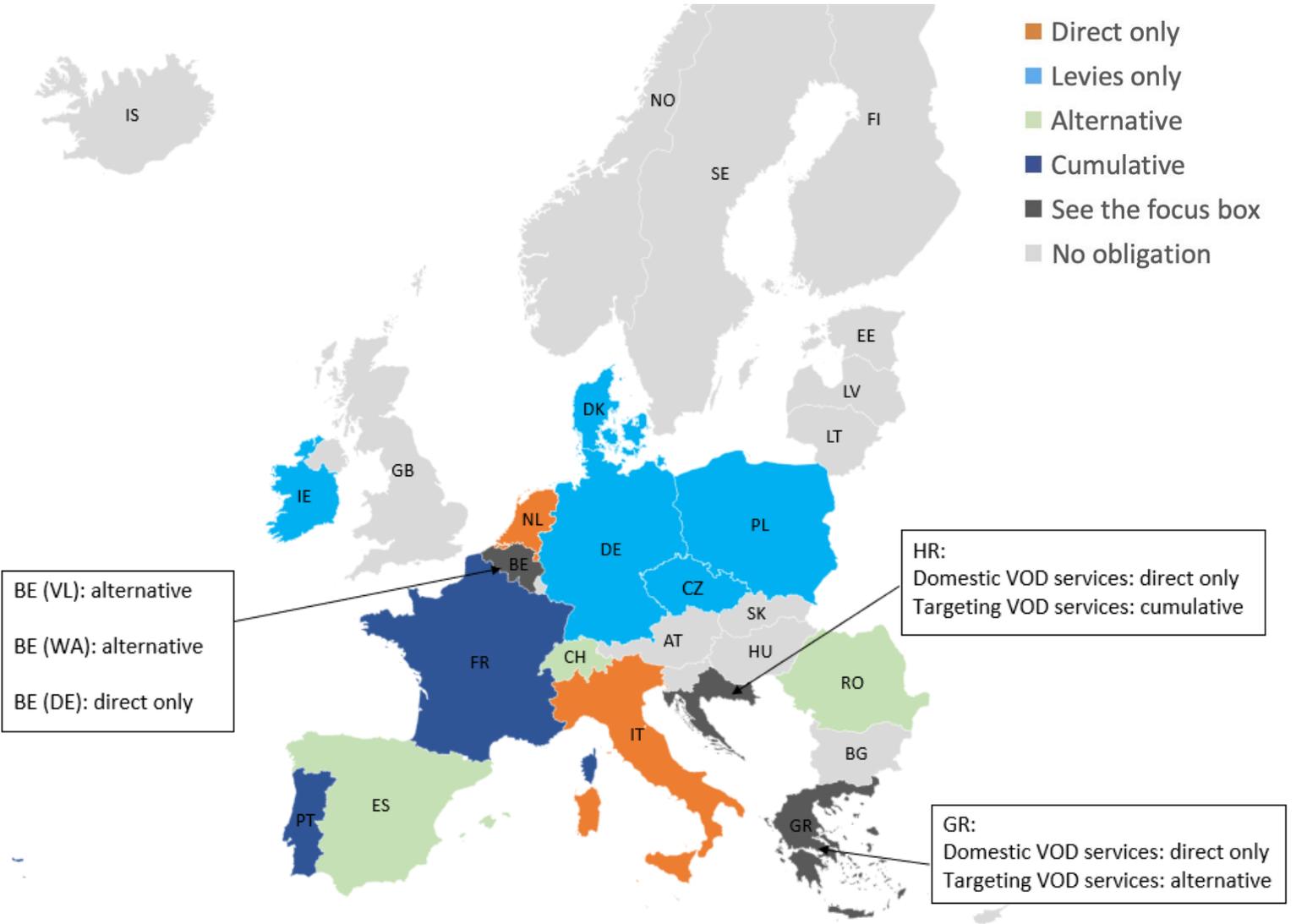


Source: European Audiovisual Observatory

As shown in Chapter 3, when zooming in on how the obligations have been detailed with regard to AVMS providers falling under national jurisdiction, a certain variety appears, which applies as a rule both to domestic and targeting services.



Figure 15. Type of financial obligations



Source: European Audiovisual Observatory



The cross-border application of the financial contribution obligations will certainly be one of the greatest challenges to the application of the revised AVMSD.

As mentioned in Chapter 4 of this publication, imposing obligations on targeting services will require that the relevant national authorities be informed about the economic data relating to foreign service providers. Moreover, the collection and verification of the economic data relating to these services may also raise specific challenges for NRAs in practice, such as those relating to the power to request all relevant information, defining what a targeting service is, and applying enforcement and sanctioning regimes. Certainly, the enhanced role of ERGA will play a fundamental role in this regard, and strengthening cooperation in cross-border cases will certainly be one of ERGA's key strategic priorities for the future.

Given the delayed implementation of the revised AVMSD, it is too soon to draw any conclusions as to the effects of these obligations on the market.



7. Annex

For an overview of the transposition into national law of Articles 13 (1) and (2), 16 and 17 AVMSD, see the tables available at <https://rm.coe.int/iris-plus-2022-2-tables/1680a6889d>.

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