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# Video on Demand and the Promotion of European Works



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# **Video on Demand and the Promotion of European Works**



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Published by the European Audiovisual Observatory

Europe has a strong tradition of promoting European works, which generally speaking we Europeans regard as an important part of our culture and which we are traditionally ready to defend against blockbusters and to foster in the name of cultural diversity. The promotion of European works is at the same time an important investment in Europe's future in as much as the creative sector depends on financial support and a generally welcoming attitude towards European works.

This multi-faceted importance of promoting European works is reflected in a variety of available mechanisms, be it the European Cinema Support Fund Eurimages, the different "generations" of the MEDIA programme or the various very concrete legal obligations to promote European works existing in national and European law. How crucial states judge these promotional means to be is well illustrated by the EU's reluctance to open WTO GATS negotiations on audiovisual works but also by the complex body of EU competition law decisions that has developed with regard to state aid in the cultural sector.

To draw the line between legitimate promotion and unjustified privileging of European over other works will continue to be as difficult as is the struggle to find out what type of promotion renders the desired beneficial effects for European works. What is new in the equation is the increasing consumption of audiovisual works in on-demand services. This has shifted the focus from solely promoting European works on traditional media to promoting them on whatever service might potentially be able to offer European works in the future. The European Audiovisual Observatory documents regularly in its publications how fast the VoD market is growing and a recent Observatory study has also shed some first light on how European films succeed on this market. This *IRIS Special* now adds information on different schemes to promote European works in on-demand services and related legal challenges.

Recently, the promotion of European films and TV series online was highlighted in a debate that the European Commission organised in Brussels on 18 November 2013. The goal of this hearing was to assess the efficiency of existing rules on the promotion of EU works in VoD services, a goal that is part of the overall debate about a review of the Audiovisual Media Services Directive (AVMSD) launched by the Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values (COM(2013) 231 final). Since 2010, Article 13 AVMSD makes it clear that such promotion is required but the provision, as well as many of its transposing national rules, leaves many questions open as to how this might be done. In the November hearing the Commission indicated that it considers providing guidance through establishing best practices.

This endeavour will be informed by this publication which, on the one hand, presents existing promotion schemes and, on the other hand, discusses related policies and legislative challenges.

In a first stocktaking part, this *IRIS Special* introduces five concrete examples of obligations that EU member states have imposed on on-demand audiovisual media services with a view to promoting European works. Each of them introduces the relevant legal framework as well as the reasons for choosing the particular system (be it financial contributions, quotas, prominence requirements or a mix of these elements) and each of them compares the requirements for on-demand services to those defined for television. In a second step, each of the contributions reflects on how the obligations for on-demand services are applied in practice. The examples cover Italy, Slovakia, France, the Netherlands and the French Community of Belgium. They were chosen because they stand for different philosophies, traditions, intensity and legal instruments in promoting European works, thus helping to sketch out the whole bandwidth of currently available solutions.

The second part of this *IRIS Special* addresses and challenges principal assumptions linked to the policy decisions that generally underpin the promotion of European works. It starts by asking the question of whether the current rules are detailed enough and whether they are at all apt to cope with today's and tomorrow's likely forms of offering and consuming content. Owing to the logic of the Audiovisual Media Services Directive, the monitoring of promotional measures focuses on catalogues whereas it is providers of multiple content services and increasingly platform providers who control what content reaches the consumer. Another relevant question attaching to the effectiveness of promotional measures is to what extent the building of content recommendations based on user preferences (e.g. most viewed by other users-function) might necessitate to shift within promotion systems from supply to demand criteria. An even greater challenge to effectively fostering European works might lie in the significant influence of non-EU players such as Netflix and Google on the VoD market. The countries of their establishment tend to be more relaxed with regard to promotion and related monitoring systems, an issue also discussed in this publication. The *IRIS Special* finally takes account of overarching economic and cultural interests by exploring how they are framed by international law and to what extent they are reflected in promotion systems.

The content for this *IRIS Special* has been compiled for and during a workshop jointly organised by the European Audiovisual Observatory and its partner institutions, the Institute for Information Law (IViR) and the Institute of European Media Law (EMR). The workshop took place in Amsterdam on 18 March 2013 and was co-chaired by Nico van Eijk (IViR) and Susanne Nikoltchev (Observatory). During the workshop Ernesto Apa (Portolano Cavallo Studio Legale), Juraj Polák (Council for Broadcasting and Retransmission – SK), Alexandre Entraygues (then Gide Loyrette Nouel), Marcel Betzel (Commissariaat voor de media – NL), and Jean-Francois Furnémont (Conseil supérieur de l'audiovisuel – BE) introduced the national examples. The written version of their presentations forms the first part of this publication. Alexander Scheuer (then EMR), Jeroen Verspeek (Dutch Public Broadcaster – NPO), Thomas Roukens (Telenet), André Lange (Observatory), Jenny Metzdorf (University of Luxembourg), and Mira Burri (World Trade Institute, University of Bern) were main actors of the second part of the workshop dedicated to the wider context of promoting European works in on-demand services. Their oral contributions too are offered as written versions. The other participants of the closed workshop were Ross Biggam (ACT), Francisco Cabrera (Observatory), Madeleine de Cock Buning (Commissariaat voor de media – NL), Harald Karl (Pepelnik & Karl Rechtsanwälte), Emmanuelle Machet (EPRA), Tarlach McGonagle (IViR), Martin Rupp (EMR), Elisabeth Sjaastad (FERA), Emmanuel Joly (DG EAC

(MEDIA), European Commission), Heiko Zysk (ProSiebenSat.1 Media AG), the latter three with the additional role of discussants. All participants engaged in the general debate, which is reflected in the summarising report drafted by Annabel Brody (IViR) that forms the third and final part of this IRIS *Special*.

The Observatory is very grateful to all participants and especially also to its co-organisers and report writer for having made this publication possible.

Strasbourg, December 2013

**Susanne Nikoltchev**  
*Executive Director*



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# **Part I**

## **Existing Promotion Obligations Imposed on On-demand Audiovisual Services in Selected Countries**



# The Italian Perspective

*Ernesto Apa\**

*Portolano Cavallo Studio Legale*

## I. On-demand media service providers under Italian law

According to the Italian Audiovisual Media Services Code (Legislative Decree no. 177/2005, hereinafter the “AVMS Code”)<sup>1</sup>, implementing in Italy the Audiovisual Media Services Directive 2010/13/EC (“AVMS Directive”), audiovisual media services<sup>2</sup> (AVMS) are divided into television broadcasting (linear) and on-demand services (non-linear).

Linear AVMS are defined as audiovisual media services provided by media service providers (i.e. television broadcasters) for simultaneous viewing<sup>3</sup> of programmes on the basis of a programme schedule.<sup>4</sup> By contrast, non-linear AVMS are defined as media services provided for the viewing of programmes at a time determined by the user and at his or her individual request, on the basis of a catalogue of programmes selected by the provider.<sup>5</sup>

The regulatory provisions concerning on-demand AVMS are set out in the regulation attached to the Resolution no. 607/10/CONS<sup>6</sup> (hereinafter the “Video On-demand Regulation”)<sup>7</sup> approved by the Italian Communications Authority (“AGCOM”).

\* Thanks to Francesca Fabris and Federica De Sanctis for their precious contribution.

- 1) *Decreto Legislativo 31 luglio 2005, n. 177, Testo unico della radiotelevisione*. A consolidated version is available at: [www.agcom.it/Default.aspx?DocID=593](http://www.agcom.it/Default.aspx?DocID=593)
- 2) Media service provider is defined in Article 1, paragraph 1, letter b) of the AVMS Code as “the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised. Natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties are excluded from the definition of ‘media service provider.’” See also Article 1, paragraph 1, letter d) and Recital 26 of the AVMS Directive.
- 3) According to Recital 30 of the AVMS Directive “in the context of television broadcasting, the concept of simultaneous viewing should also cover quasi-simultaneous viewing because of the variations in the short time lag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process.”
- 4) Article 2, paragraph 1, letter i) of the AVMS Code, which mirrors Article 1, paragraph 1, letter (e) of the AVMS Directive.
- 5) Article 2, paragraph 1, letter m) of the AVMS Code, which mirrors Article 1, paragraph 1, letter (g) of the AVMS Directive.
- 6) The text of the resolution is available at: [www.agcom.it/Default.aspx?DocID=5417](http://www.agcom.it/Default.aspx?DocID=5417). The Video On-demand Regulation states that on-demand AVMS providers must satisfy certain requirements, namely: (i) provision of on-demand AVMS is subject to general authorisation, based on a notice of start of activity filed by operators. Operators may provide the services starting from the date of the abovementioned notice and AGCOM may prohibit the continuation of the activity within 30 days from the notice, in case the requirements set forth by the Regulation are not met. The authorisation expires after 12 years starting from the date of the notice of start of activity and it is renewable for further 12-year periods; (ii) an application fee equal to EUR 500 is due; (iii) AVMS providers must keep a “register of programmes” which must record on a monthly basis various information relating to the programmes contained in the catalogue; (iv) AVMS providers must provide to AGCOM, upon request, the tapes of all contents delivered to the public for 3 months following the last day of availability of such contents to the users; (v) AVMS providers must comply with the provisions on protection of copyright and on advertising and commercial communications; (vi) AVMS providers must fulfil the obligations relating to the promotion of production and distribution of European works. The full text of the Resolution is available at: [www.agcom.it/Default.aspx?DocID=5417](http://www.agcom.it/Default.aspx?DocID=5417)
- 7) See Greppi G., “La disciplina dei servizi di media audiovisivi a richiesta,” *Rivista di diritto ed economia dei mezzi di comunicazione*, Vol. 2, 2011.

According to the Video On-demand Regulation, the definition of “audiovisual media services” does not include:<sup>8</sup>

- services that are not primarily for profit-making purposes and services that are not in competition with television broadcasting. On-demand services whose annual revenue (from advertising, teleshopping, sponsorship, agreements with other entities, state contributions and pay-television programmes) does not exceed EUR 100 000 are deemed not in competition with television broadcasting and therefore are not subject to the Video On-demand Regulation;
- private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing or exchange within communities of shared interests, i.e. user-generated content (UGC), unless the operator which aggregates the UGC assumes editorial responsibility (however this may be exercised)<sup>9</sup> and uses the material for commercial exploitation;
- any form of private correspondence, including e-mails;
- services whose principal purpose is not the provision of programmes; and
- services in which the audiovisual content does not constitute a principal purpose – this includes websites that incorporate audiovisual elements (e.g., animated graphics or brief advertisements) in a purely incidental way, as well as online games, search engines and online magazines or newspapers.<sup>10</sup>

In addition, the Video On-demand Regulation states that “no autonomous general authorisation is required” for (i) services providing catalogues including only programmes already broadcast within a duly authorised linear service (i.e. catch-up TV services) and (ii) contents’ provision identified by a specific trademark which is not autonomously accessible by the public.<sup>11</sup>

The AGCOM Resolution 66/09/CONS of 13 February 2009 on the promotion of European works (hereinafter the “EU Quotas Regulation”)<sup>12</sup>, as amended,<sup>13</sup> does not apply to services that are excluded from the definition of “audiovisual media services” under the Video On-demand Regulation.<sup>14</sup> Therefore, all services falling outside the scope of the AVMS definition are not subject to the EU quota restrictions.

## II. Rules on promotion of European works applicable to both linear and non-linear audiovisual media service providers

Under Italian law, AVMS providers (both broadcasters and on-demand media service providers) are required to promote the production and distribution of European works under a quota system.<sup>15</sup> The

8) Article 2, paragraph 1 of the Video On-demand Regulation.

9) See Recital 25 of the AVMS Directive, stating that “Member States may further specify aspects of the definition of editorial responsibility, notably the concept of ‘effective control’, when adopting measures to implement this Directive.”

10) See Recitals 22 and 23 of the AVMS Directive. The general authorisation is not required for online newspapers and magazines (see AGCOM Resolution no. 607/10/CONS, p. 7, according to which the exclusion is aimed at complying with Article 21 of the Italian Constitution).

11) Article 2, paragraph 3 of the Video On-demand Regulation.

12) The Resolution is available at: [www.agcom.it/default.aspx?DocID=2872](http://www.agcom.it/default.aspx?DocID=2872)

13) Resolution 66/09/CONS has been amended by Resolution 291/09/CONS of 20 May 2009 and Resolution 397/10/CONS of 22 July 2010.

14) Article 4-bis, paragraph 7 of the EU Quotas Regulation.

15) The evolution of the legislation on the promotion of European works in Italy is described by Zaccaria R., and Valastro A., *Diritto dell’informazione e della comunicazione*, Cedam, Padova, 2010, p. 374 et seq. For an analysis of the Italian implementation of the rules on the promotion of European works provided by the Television without Frontiers Directive 89/552/EEC, see Carretti P., “Riserva di opere comunitarie e nazionali,” in Roppo E., and Zaccaria R., *Il sistema radiotelevisivo pubblico e privato*, Giuffrè, Milan, 1991; Rolla F., “La disciplina comunitaria dei servizi televisivi,” *Diritto dell’informazione e dell’informatica*, 1991, p. 213 et seq.

system reflects the general aims of the AVMS Directive.<sup>16</sup>

According to the EU Quotas Regulation, “European audiovisual works” are defined as works made:

- by one or more producers established in one or more EU member states;
- in non-EU states that have signed the European Convention on Transfrontier Television of 5 May 1989, provided that:
  - the works are made by one or more producers established in a signatory state; or
  - the production of works was supervised and controlled by one or more producers established in a signatory state; or
  - co-producers from signatory states made the largest contribution to the total co-production costs and the co-production was not controlled by producers established in non-signatory states;
- in European states other than those mentioned above, where such works are produced exclusively (or in co-production with producers residing in one or more member states) in states with which the European Union has executed an international television treaty, and provided that such works are produced with a predominant contribution from film or programme makers or other contributors residing in one or more EU member states.<sup>17</sup>

In compliance with the AVMS Directive’s purpose, the criterion adopted to define “European works” relies upon the subject in charge of the control over the content produced (more than over investments) who is required to be established in a member state and whose work must be made with the essential contribution of authors and workers resident in the EU.<sup>18</sup>

However, both the AVMS Directive’s definition and its Italian implementation do not provide for any distinction within the concept of “European works” between national and non-national works. Some commentators pointed out that this approach allows member states to boost exclusively their own domestic markets without promoting the European market as a whole.<sup>19</sup>

### III. Outline of the main rules on promotion of European works applicable to linear AVMS providers

To better understand the rules applicable to on-demand media service providers, it could be helpful to briefly describe the legal framework on the promotion of European works by linear AVMS providers.<sup>20</sup>

16) See Articles 13, 16 and 17 of the AVMS Directive. For articles and books analysing the AVMS Directive’s provisions on the promotion of production and distribution of European works see Cappello M., “La revisione della direttiva televisione senza frontiere nella direttiva sui servizi media audiovisivi,” *Rivista di diritto ed economia dei mezzi di comunicazione*, Vol. I, 2009; Castendyk O., Dommering E., and Scheuer A., *European Media Law*, Kluwer Law International, The Netherlands, 2008, p. 429 et seq.; Donati F., “La direttiva ‘servizi di media audiovisivi’”, in De Minico G., Pace A., and Zaccaria R., *Mezzi di comunicazione e riservatezza. Ordinamento comunitario e ordinamento interno*, Jovene, Naples, 2008, p. 13 et seq.; Mastroianni R., *La direttiva sui servizi di media audiovisivi*, Giappichelli, Turin, 2009, pp. 99-102; Rossi G., “Produzione audiovisiva europea ed indipendente,” in Bassan F., and Tosi E., *Diritto degli audiovisivi. Commento al nuovo Testo Unico dei Servizi di Media Audiovisivi e Radiofonici così come modificato dal D. Lgs. 15 marzo 2010, n. 44*, Giuffrè, Milan, 2012, p. 273 et seq.; Sammarco P., “La produzione audiovisiva europea,” *Diritto dell’informazione e dell’informatica*, 2010, p. 243 et seq. (also published as a chapter of the book Zeno-Zencovich, V., *La nuova Televisione Europea, Commento al “Decreto Romani”*, Maggioli, San Marino, 2010, p. 59 et seq.); Sbrescia V. M., *I servizi di media audiovisivi nel mercato europeo della radiotelevisione, il nuovo quadro della regolamentazione tra il diritto interno e il diritto dell’Unione Europea*, Jovene, Naples, 2012, p. 220 et seq.

17) Article 1, paragraph 1, letter d) of the EU Quotas Regulation. See also Article 2, paragraph 1, letter cc) of the AVMS Code.

18) Guglielmetti G., “La promozione delle opere europee,” *Aida*, Giuffrè, Milan, 2008, p. 86.

19) According to such commentators, as AVMS providers gain more profits from works targeted at their audience, the system leads to the increase of separated national markets, in contrast with the letter and the spirit of the EU Treaty’s principles: see Gambuto S., “La produzione audiovisiva europea,” in Frignani A., Poddighe E., and Zeno-Zencovich V., *La televisione digitale: temi e problemi. Commento al D. Lgs. 177/05 T.U. della Radiotelevisione*, Giuffrè, Milan, 2006, p. 361; Sammarco P., “La produzione audiovisiva europea,” *Diritto dell’informazione e dell’informatica*, 2010, p. 249 (also published as a chapter of the book Zeno-Zencovich V., *La nuova Televisione Europea, Commento al “Decreto Romani”*, Maggioli, San Marino, 2010, p. 65).

20) See Sciacchitano F., “Le quote di programmazione e di investimento in opere europee e dei produttori indipendenti,” *Rivista di diritto ed economia dei mezzi di comunicazione*, Vol. I, 2009.

Broadcasters must fulfil the obligations relating to the promotion of production and distribution of European works laid down in the EU Quotas Regulation, which has been issued pursuant to Article 44 of the AVMS Code.

Pursuant to Article 44 of the AVMS Code, broadcasters are required to reserve for European works the majority of their airtime, excluding time allotted to certain forms of programming (i.e. news, sports events, game shows, advertising, teletext services and teleshopping).

In addition, broadcasters must ring-fence 10% of their annual revenues for the production, financing, options acquisition or purchase of European audiovisual works created by independent producers.

The promotion of the production and distribution of European works by broadcasters is regulated in detail by the AGCOM EU Quotas Regulation and its subsequent amendments, as described below.

Specific requirements (higher percentages) apply to the public service broadcaster.

## 1. Content quotas

Television broadcasters subject to Italian jurisdiction are required to include a certain percentage of European works in their programming schedules.

Broadcasters are required to allocate over 50% of their transmission time to European works. In the case of broadcasters operating more than one TV channel, the channels are considered collectively (although each channel must meet a minimum 20% quota). Of this 50% quota, 6% must be reserved for programmes specifically aimed at minors and 20% must be reserved for programmes that are suitable for minors to watch on their own or with an adult.<sup>21</sup>

Moreover, broadcasters and pay-per-view operators must reserve at least 10% of their airtime for European works produced in the past five years, including films which are “original expressions of Italian culture” (regardless of where they were made). They have to include films that are specifically aimed at minors or are suitable for minors watching on their own or with an adult.<sup>22</sup> The definition of films which are original expressions of Italian culture and the percentage of the transmission time that broadcasters must devote to such films are set forth by the Decree (*decreto interministeriale*) of 22 February 2013.

The EU Quotas Regulation does not apply to a channel’s entire programme schedule, as it excludes the airtime allocated to certain content, namely news, sports events, game shows, advertising, teletext services and teleshopping.

AGCOM monitors broadcasters’ compliance on an annual basis.

## 2. Investment quotas in favour of independent producers

Broadcasters must allocate 10% of their annual net revenues to European works by independent producers. It is worth noting that the quota is calculated on the net revenues, while the AVMS Directive refers to the programming budget.<sup>23</sup>

Pursuant to the EU Quotas Regulation and the AVMS Code, “independent producers” are European producers of audiovisual content that (i) are not controlled by or affiliated to operators with a broadcasting licence or authorisation, and (ii) have not sold 90% or more of the content that they produce to a single channel over a three-year period.

21) Article 3, paragraph 1 of EU Quotas Regulation.

22) Article 3, paragraph 2 of EU Quotas Regulation.

23) See Article 17 of the AVMS Directive.

An adequate percentage of the investment in European works by independent producers must be allocated to recent European works (broadcast within five years from the production), including films which are original expressions of Italian culture.<sup>24</sup> The proportion of films which are original expressions of Italian culture to be included in the 10% allocation of the investment is set forth by the abovementioned Decree (*decreto interministeriale*) of 22 February 2013.

For the purposes of fulfilling the abovementioned obligations, investments by companies belonging to the same group as the broadcaster are taken into account, provided that such investments are aimed at the Italian market.

The requirement covers revenue derived from advertising, teleshopping, sponsorship, other agreements between the broadcaster and other entities, state contributions and pay-television programmes (excluding sports programmes) over which the broadcaster exercises editorial control – this includes programmes distributed on a third-party platform.

In certain cases, broadcasters may apply to AGCOM for derogations from the content and investment quotas, as described for on-demand AVMS providers below.<sup>25</sup>

#### IV. Promotion of European works by on-demand AVMS providers

Pursuant to Article 13 of the AVMS Directive, member states are required to guarantee the promotion by on-demand AVMS providers of the production of and access to European works.<sup>26</sup>

Article 13 of the AVMS Directive is designed to meet both an economic and a cultural objective, aiming at strengthening the European audiovisual industry. In particular, it is aimed at (i) protecting European content production, facing the colonisation of the market by audiovisual contents produced in the United States and (ii) promoting both European and national cultures and identities.<sup>27</sup>

Notwithstanding the fact that the system introduced by the AVMS Directive for on-demand AVMS providers leaves a wide degree of discretion with reference to on-demand services (compared to the linear ones),<sup>28</sup> some commentators raised concern with regard to the suitability of protectionist measures to foster production of high quality content able to compete with overseas original works. According to such commentators, on the assumption that quality works are proved to be so by their success in terms of audience and revenues, they should be able to compete with foreign works without the need for any protective provision. Based on the above, some commentators argue that the more regulators will try to coerce the audience's tastes and choices, putting all costs of such choice on European AVMS providers, the less the European entertainment industry will be able to create successful works.<sup>29</sup>

24) Article 4, paragraph 2 of the EU Quotas Regulation.

25) See section IV.2 below.

26) Article 13 of the AVMS Directive states: "1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service. 2. Member States shall report to the Commission no later than 19 December 2011 and every 4 years thereafter on the implementation of paragraph 1. 3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity."

27) See Cappello M., "La revisione della direttiva televisione senza frontiere nella direttiva sui servizi media audiovisivi," *Rivista di diritto ed economia dei mezzi di comunicazione*, Vol. I, 2009, p. 26; Donati F., "La direttiva 'servizi di media audiovisivi'" in De Minico G., Pace A., and Zaccaria R., *Mezzi di comunicazione e riservatezza. Ordinamento comunitario e ordinamento interno*, Jovene, Naples, 2008, p. 13; Sbrescia V. M., *I servizi di media audiovisivi nel mercato europeo della radiotelevisione, il nuovo quadro della regolamentazione tra il diritto interno e il diritto dell'Unione Europea*, Jovene, Naples, 2012, p. 222.

28) See Rossi G., "Produzione audiovisiva europea ed indipendente," in Bassan F., and Tosi E., *Diritto degli audiovisivi, Commento al nuovo Testo Unico dei Servizi di Media Audiovisivi e Radiofonici così come modificato dal D. Lgs. 15 marzo 2010, n. 44*, Giuffrè, Milan, 2012, p. 295.

29) *Id.*, p. 302.

Article 13 is characterised by wide flexibility as to the methods to be used for promoting European works, providing only examples of means to implement it (e.g. financial contribution or the share and/or prominence of European works in catalogues).

The AVMS Directive has been implemented in Italy by Legislative Decree no. 44/2010 (called Romani Decree, after the name of the then Vice-Minister of Communications), which amended the Italian AVMS Code. Article 44 of the AVMS Code now states that AGCOM regulates the promotion of European works by on-demand AVMS with particular regard to

- the financial contribution by such services to the production and rights acquisition of European works; or
- the proportion or prominence of European works in the catalogue of programmes offered by on-demand AVMS providers.<sup>30</sup>

The AVMS Code delegated to AGCOM (through co-regulatory procedures) the regulation of the promotion of EU works by on-demand AVMS providers.

In compliance with the legislative provision, on 6 April 2011 AGCOM issued specific rules on the promotion of production and distribution of European works by on-demand AVMS providers. This is Annex A to Resolution 188/11/CONS, which amends the EU Quotas Regulation; the new provisions came into force on 5 May 2011.

Resolution 188/11/CONS is the result of discussions by a panel of interested parties to develop proposals for the promotion of European works by on-demand AVMS providers. It introduces specific measures to promote access to, and the production of, European works by on-demand AVMS providers.

The amended EU Quotas Regulation has introduced the definition of “catalogue”, defining it as “[a] number of programmes, arranged by the non-linear audiovisual media service provider according to predetermined criteria, which can be viewed at a time chosen by the user.”<sup>31</sup>

The new Article 4-bis of the EU Quotas Regulation requires on-demand AVMS providers to alternatively:

- ensure that at least 20% of their catalogue consists of European works, calculated in terms of the total number of hours of programming made available each year in the same catalogue; or
- allocate an annual financial contribution to the production of, or purchase of rights to, European works for their catalogues, representing at least 5% of the revenue specifically attributable to the public provision of on-demand audiovisual content within the same catalogues in the preceding year.<sup>32</sup> AVMS providers that fail to meet the financial contribution percentage under such requirement by less than 1% must comply during the subsequent year.<sup>33</sup>

Any variation falling short of the abovementioned thresholds shall be motivated by the AVMS providers.<sup>34</sup>

For media service providers that own or control more than one catalogue, compliance with the two requirements is determined on the basis of all catalogues provided. The percentage under the first requirement must be calculated as the percentage of hours for European works compared to the total

30) Article 44, paragraphs 4 and 7 of AVMS Code.

31) Article 1, paragraph 1, letter r) of the EU Quotas Regulation, as amended by Article 1, paragraph 1 of Annex A to AGCOM Resolution no. 188/11/CONS.

32) Article 4-bis, paragraph 1 of the EU Quotas Regulation, as amended by Article 1, paragraph 3 of Annex A to AGCOM Resolution no. 188/11/CONS.

33) Article 4-bis, paragraph 4 of the EU Quotas Regulation.

34) Article 4-bis, paragraph 5 of the EU Quotas Regulation.

hours of programming made available in the catalogues.<sup>35</sup> Such solution, which benefits big providers operating several catalogues, mirrors a similar rule laid down for broadcasters operating more than one channel (although each channel must meet a minimum 20% quota), which is deemed by some commentators not to comply with the AVMS Directive.<sup>36</sup>

The EU Quotas Regulation does not set forth any requirement to display European works with a certain prominence within the catalogue. In this regard, it may be worth noting that other member states dealt with the due prominence criterion promoting, by way of example, the introduction of advertising inserts, separated tabs, magazine articles and promotional programmes as well as the adequate identification of European works or indication of the country origin.<sup>37</sup>

## 1. Timing of the implementation

The regulator provides for a transitional period in order to avoid unequal treatment between AVMS providers already in the market and newcomers.

Media service providers may implement such requirements gradually, within four years of the regulation entering into force (i.e. 5 May 2011), taking into account market conditions and offers of rights.<sup>38</sup>

During the transition period, either the content quota under the first requirement (i.e., the quota calculated in terms of the total number of hours of programming made available in the catalogue) must be at least 5% a year or the investment quota under the second requirement must be at least 2% a year.<sup>39</sup>

## 2. Derogations from content and investment quotas

On-demand service providers not subject to the Video On-demand Regulation<sup>40</sup> are not required to comply with the obligations relating to promotion of European works.<sup>41</sup> Therefore, the EU Quotas Regulation does not apply, for example, to (i) UGC platforms, (ii) on-demand services whose annual revenue does not exceed EUR 100 000, (iii) etc. (see the list of exclusions in section I above). It is worth noting that according to AGCOM's Annual Report for 2012, in 2012 only three on-demand providers have filed the relevant notice to operate an AVMS under the Video On-demand Regulation.

Instead, according to a reasonable interpretation, the promotion of European works is mandatory for catch-up TV services, because, although they are not subject to an autonomous general authorisation, nevertheless it is reasonable to assume that catch-up TV services have to comply with the Video On-demand Regulation.

Furthermore, on-demand AVMS providers subject to the EU Quotas Regulation may apply to AGCOM for derogation from the content and investment quotas. AGCOM may grant such derogation in any of the following cases:<sup>42</sup>

- the AVMS provider has not made a profit in the past two years; or
- the AVMS provider's market share in terms of revenue is below 1%; or

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35) Article 4-bis, paragraph 6 of the EU Quotas Regulation.

36) See Mastroianni R., *Riforma del sistema radiotelevisivo italiano e diritto europeo*, Giappichelli, Turin, 2004, p. 154.

37) First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010, on the promotion of European works in EU scheduled and on-demand audiovisual media services of 24 September 2012, p. 5.

38) Article 4-bis, paragraph 2 of the EU Quotas Regulation.

39) Article 4-bis, paragraph 3 of the EU Quotas Regulation.

40) Article 2, paragraph 1 of the Video On-demand Regulation.

41) Article 4-bis, paragraph 7 of the EU Quotas Regulation.

42) Article 8, paragraph 2 of the EU Quotas Regulation.

- the AVMS provider's catalogue is a thematic catalogue – that is, at least 70% of the total programming time available relates to a specific theme for a defined audience.<sup>43</sup> AVMS providers wishing to exploit the derogation for thematic catalogues shall be required to prove that European works that are consistent with the editorial line of the catalogue are available on the market in a quantity not sufficient to comply with the requirement provided by the law.

The exemption from the quota system for AVMS providers operating thematic catalogues has been introduced in order to provide a balanced compromise between the duty to promote the production of EU works and the principle of freedom for AVMS providers to choose the editorial line of their catalogues. Although such exemption is not provided by the AVMS Directive,<sup>44</sup> it may be deemed to be grounded in the flexibility which inspires Article 13 of the AVMS Directive. Indeed, it can be argued that imposing quotas on catalogues expressly dedicated to special-interest works would be excessively onerous and would not comply with the spirit of EU works' protection which shapes the entire system of the AVMS Directive.

AVMS providers may apply for a total or partial derogation from content and/or investment quotas filing a form through the AGCOM website. Once the form has been received, the competent AGCOM division informs the applicant on the opening of the proceeding and the name of the officer in charge of the same. The AVMS provider may ask within 15 days from the filing date to be heard in order to provide AGCOM with clarifications on the request, if needed. The hearing is scheduled within the following seven days and communicated to the applicant five days in advance. The officer in charge may ask for additional information and documents if necessary.<sup>45</sup> AGCOM's decision of acceptance or denial of the request of derogation is issued within the following 90 days starting from the day when the form was received. Should further investigations be needed, the term can be extended by AGCOM for an additional 60 days.<sup>46</sup>

The same derogations apply to linear AVMS providers.<sup>47</sup>

### 3. Monitoring and enforcement

The Commission has asked those national authorities who have not yet done so to put in place systems that allow data provided by the on-demand service providers to be verified.<sup>48</sup>

According to Article 10 of the EU Quotas Regulation, the responsibility for supervising compliance with the provisions on quotas lies with AGCOM, which verifies compliance with these rules on quotas based on (a) the information provided by the AVMS providers and (b) a monitoring activity on programmes.

The non-linear AVMS providers' compliance with the content and investment quotas is verified on a yearly basis by AGCOM.<sup>49</sup>

However, the EU Quotas Regulation does not provide for specific criteria for AGCOM's supervision over the compliance of on-demand AVMS providers with the rules set forth by Article 44 of the AVMS Code. In this regard, after a public consultation carried out in 2012,<sup>50</sup> AGCOM has issued the regulation

43) As defined by Article 1, paragraph 1, letter s) of the EU Quotas Regulation.

44) Commentators raised some concerns with reference to the derogation provided by the EU Quotas Regulation to content quotas for thematic television channels: see Mastroianni R., *Riforma del sistema radiotelevisivo italiano e diritto europeo*, Giappichelli, Turin, 2004, p. 156.

45) Article 8, paragraphs 4 and 5 of the EU Quotas Regulation.

46) Article 8, paragraph 8 of the EU Quotas Regulation.

47) For the application by Italian administrative courts of the derogation for thematic channels please refer to the decision of TAR Lazio no. 3577/04 of 27 April 2004. See Bruno F., and Nava G., *Il nuovo ordinamento delle comunicazioni, Radiotelevisione, comunicazioni elettroniche, editoria*, Giuffrè, Milan, 2006, p. 753, footnote no. 758.

48) First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010, on the promotion of European works in EU scheduled and on-demand audiovisual media services of 24 September 2012.

49) Article 44, paragraph 8 of the AVMS Code.

50) The public consultation was launched with AGCOM Resolution no. 430/12/CONS of 20 September 2012.

attached to Resolution no. 186/13/CONS concerning (i) modalities and criteria for the monitoring of both linear and non-linear AVMS providers' obligations for the protection of European and independent audiovisual production and (ii) the individuation of criteria for evaluating requests for derogation.

In case of failure to provide AGCOM with information on the content and investment obligations (as well as in case of provision of incomplete information) AGCOM may apply fines ranging between EUR 516 and EUR 103 291.<sup>51</sup> In case of non-compliance with the content and investment obligations AGCOM can impose fines ranging between EUR 10 329 and EUR 258 228.<sup>52</sup>

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51) Article 1, paragraph 30 of Law no. 249/1997: "Those who do not provide, within the terms and modalities required, documentation, data, information required by [AGCOM] are subject to an administrative fee ranging from EUR 516 up to EUR103 291 issued by [AGCOM] itself."

52) Article 51, paragraph 2, letter g) of the AVMS Code.



# The Approach in the Slovak Republic

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It is relatively safe to assume that in many aspects the overall approach towards promotion of European works in Slovak on-demand services can serve as a typical example for most of the European post-communist countries. Keeping in mind the cultural differences of these countries and with no intention to underestimate the effort of any of them, it is quite difficult to recall one where the promotion of European works in on-demand services would undoubtedly qualify as a “hot” topic. There are certainly many factors shared by these countries that contribute to the current status quo. The (so far) slow development of the on-demand market would surely stand out as the key issue in most, if not all of them. However, the rather strong rejection by journalists, intellectuals and NGOs of (almost) any attempt of the government to enforce restrictive policies upon the industry (an aversion that results naturally from the appreciation of the newly acquired freedoms) should not be underestimated or completely left out of the equation.

## **I. Promotion of European works in the pre-AVMS era**

Before the transposition of the Audiovisual Media Services (AVMS) Directive into the Slovak legal system no regulation of on-demand services existed. Regulators and legislators only started to reflect upon the promotion of European works in on-demand services during the consultations on the transposition of the AVMS Directive. In the case of linear services, quotas, as the most traditional tool for promoting European works, were almost exclusively used. The existing alternative to fulfil the legal requirement to promote European works through investment was very rarely opted for. The idea of prominence seemed at that time a remote and unfamiliar concept.

At the same time, as already indicated, the on-demand market was still in its infancy, if not absolutely newborn. Quotas were therefore rather swiftly rejected as too restrictive for the current state of the on-demand market. The obligation to invest was dismissed for identical reasons. With the long tradition of quotas being the only familiar means to promote European works and the overall distaste for any “Internet regulation”, a successful implementation of the prominence tools was hardly imaginable. It is worth pointing out that the rather vague wording of Article 13 AVMS Directive was not very helpful.

Based upon experiences with the industry approach and the overall formalistic structure of the Slovak legal system, the belief that a legal provision asking solely for promotional measures (without attaching any concrete obligation and thus remaining non enforceable) would bring no effects was

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mutually shared. All these factors eventually led to the adoption of a “wait and see” approach. It must, however, be admitted that neither a solid timetable nor any indicators to actually assess the future changes of the market were laid down.

## **II. Promotion of European works in the post-AVMS era**

### **1. Situation before the European Commission’s review of the AVMS Directive’s transposition**

After the AVMS Directive’s transposition, the amended law contained a single provision on the promotion of European works in on-demand services. This provision laid down only the obligation for the service provider to supply, upon request, to the Council for Broadcasting and Retransmission (hereinafter “CBR”) data on the number of European works in catalogues, funds invested into European works or any other means used to promote European works.

Due to its limited resources, the CBR did not envisage a standard practice as to how it would make use of its right to ask for information. In fact the competence was used for the first time during the preparation of the European Commission’s report on the application of Articles 13, 16 and 17 AVMS Directive for the period of 2009-2010. During the data collection the regulator realised how little the providers of on-demand services were familiar with the concept of promoting European works. This undesirable situation is mostly due to the specific structure of the on-demand market:

The overall number of on-demand services reported to the European Commission (for the year 2010) was 36. A majority (21) of these services were catch-up TV services of local or regional broadcasters. These services are clearly not in direct competition with linear broadcasters and they simply provide the opportunity to watch local content (previously aired on TV) also on the Internet. There are a few services that focus on specific content (e.g. Horse TV and a service with content for children) and some Internet-based news services. A total of 10 VoD services of that kind were reported. Even these, however, do not present real competition to linear offers since for the providers they often represent only a marginal part of their business undertakings (cable operators, etc.).

All of these factors naturally led to the situation where the promotion of European works in the on-demand world was almost completely overlooked. Nevertheless, the high proportion of services that focus on local content (and thus content which is also European) in the Slovak on-demand market naturally boosts the statistics. In the Commission’s report, Slovak on-demand services “scored” 93.3%<sup>2</sup> of European works, even though the vast majority of them are domestic works. In two main VoD services (both operated by cable operators) the total length of European works was 30% or 51.8% of qualifying hours.<sup>3</sup> These figures indicate that one of the main objectives – the circulation of European works that would enable all players to benefit from a single European audiovisual market – remains unachieved.

### **2. Change of legislation after the Commission’s review of the AVMS Directive’s transposition**

From the very beginning of the evaluation process of the AVMS Directive’s transposition carried out by the European Commission, the question of the promotion of European works in on-demand services (or rather the absence of such promotion) was on the table.

The idea of quotas had already been suggested in the very early stages of the discussion. Although other means to promote European works (investment obligation, prominence tools, etc.) were mentioned with regard to the wording of Article 13 (and the relevant recitals), the idea of quotas was favoured by the Slovak Republic throughout the whole process.

2) Point 2.26 of the Staff Working Document accompanying the First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012SC0269:EN:NOT>

3) Total length of the programmes provided excluding commercial communications and the programmes devoted to news, sports events and entertainment games.

The best way to illustrate the environment for promotional measures as well as the overall approach of the public, experts and industry (including the audiovisual content creators) towards promotion of European works in the Slovak Republic is to summarise the public consultation with respect to the related legislative change. The Ministry of Culture as the initiator of the amendment to the Act on broadcasting and retransmission did not receive throughout the whole debate a single opinion in favour of the promotion of European works in on-demand services as such. Whenever proposed governmental policy involves quotas it will probably not receive many cheers from the benefactor. However, it is rather exceptional when you do not get any positive feedback (or any feedback at all) even from the beneficiary (for the moment leaving aside the reflection whether the benefactor is not also a beneficiary in this case).

During the public consultations, the Ministry of Culture received contributions from a total of three subjects. One came from the Association of people with hearing disabilities, despite the fact that the amendment did not contain any changes with respect to accessibility. The other two subjects were NGOs focusing on the audiovisual market and its players.

These contributions raised legitimate concerns about the “overburdening” of the slowly evolving market. They touched upon constitutional issues (proportionality, necessity, effectiveness, etc.), though it remains arguable whether these issues were really of relevance. Nonetheless, the contributions deemed the (non)existing promotion of European works in Slovak on-demand services to be sufficient because: “the providers of on-demand audiovisual media services are according to the law also distributors of audiovisual works and therefore obliged by law to contribute to the audiovisual fund. Hence they are already fulfilling the obligation laid down by the AVMS Directive.” In reality, however, the very same provision to which NGOs referred explicitly states that a provider of an on-demand service is not a distributor of an audiovisual work (and therefore is not obliged to contribute to the audiovisual fund).

During the public consultation, NGOs also raised concerns about the fact that the original draft did not include any means to decrease prescribed quotas for certain circumstances such as a difficult economic situation of the service provider, insufficient availability of EU works or the specific nature of the service (service exclusively devoted to non-European works, e.g. Japanese anime, John Wayne westerns, etc.). Coincidentally, identical concerns were expressed by the CBR during internal consultations with the Ministry.

During internal consultations, the question of the “time unit” in which the quotas would need to be achieved was also (re)opened. In the past, the CBR was engaged in several legal disputes with broadcasters, which claimed that it was sufficient to fulfil given quotas within one year (the law did not explicitly state for which period quotas had to be achieved). On the contrary, the CBR declared that since the interval for the reporting obligation regarding quotas was one month, the quotas also needed to be reached within each month. The CBR stressed that this interpretation was aimed at preventing (at least to some extent) the bypassing of the quotas by placing (possibly less attractive) European works predominantly within “slow” months, e.g. summer holidays.

The new legislation<sup>4</sup> came into effect on 1 January 2013 and it mainly introduced the minimum quota of 20% of European works for on-demand service providers. The law now clearly states that the quota must be obtained within one month.<sup>5</sup> The calculation of the European works’ share is based on the qualifying hours. The providers are obliged to keep records of the European works within their catalogues and upon request to submit these records to the CBR.<sup>6</sup> The CBR imposes sanctions for any breach of this obligation, namely a warning for the first violation and fines (100 to 10 000 EUR) for any further violation. In response to the concerns expressed in the public and internal consultations,

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4) *Zákon z 18. októbra 2012, ktorým sa mení a dopĺňa zákon č. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách v znení neskorších predpisov*, available at: <http://www.zbierka.sk/sk/predpisy/342-2012-z-z-p-34900.pdf>

The reference to the Council of Europe Convention on Transfrontier Television had to be dropped within the provisions on jurisdiction due to its conflict with the AVMS Directive. For more details see Slovak country report for the 37<sup>th</sup> meeting of EPRA in Krakow, available at: [www.epra.org/attachments/krakow-country-report-sk](http://www.epra.org/attachments/krakow-country-report-sk)

5) This also applies to the abovementioned quotas for linear services.

6) Lighter regulation as compared with that for linear services, which provides for a monthly reporting obligation.

the CBR is now entitled to grant temporary exemptions<sup>7</sup> based on the economic situation of the service providers, the availability of EU works or the specific nature of the service.

So far, no steady routine has been established for the monitoring of the actual application of the new obligation. However, with respect to the legal reporting obligation to the Slovak Parliament it is necessary to collect relevant data at least once a year.

### **3. Light at the end of the tunnel (?)**

The economic crisis did not spare the Slovak Republic as it did not spare any other EU member state. A gradual decrease in the funds invested into the Slovak audiovisual sector constantly threatens the market that even in its better days already had to fight for survival in light of strong overseas competition. In times like today's it is vital to raise the awareness of the market players about all possibilities they might benefit from. Recently, a new and (for the Slovak Republic) rather groundbreaking business model was discovered:

The entire system was more or less created by accident. It all started when the operators of multiplex cinemas rejected a controversial documentary film about Slovak politics as too political and thus unattractive for a mainstream audience. Subsequently, the provider of the TV section of the e-version of a Slovak magazine and the operator of the (only existing) Slovak Internet paywall<sup>8</sup> decided to offer this film as premium content within this electronic service (that only members of the paywall were allowed to access). The film was a massive success, with almost 10 000 viewers<sup>9</sup> accessing it just during the first week.

This success paved the way for other Slovak documentary films, which are currently provided and promoted in two on-demand services. Recently, also other genres and not only documentary films are being provided. Although the content is so far exclusively domestic, the important achievement is the setting up of a vital business model and thus the creation of a classical win-win scenario: on-demand service providers and the paywall operator acquire (for free) attractive content. The creator "pushes" his work to more viewers and obtains extra finances for his future works. And last but not least, the viewer receives for a reasonable price through modern and easily accessible technology new and attractive content.

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7) The lowered share may be increased again if the relevant circumstances change.

8) This is a rather unique system where the user gets, within a single paywall, premium (locked) content from various Internet services for a single (repetitive) payment. The payments are subsequently distributed to the service operators based on the readership.

9) The final number of viewers increased to 16 000. In comparison, in 2012 the total number of viewers who watched Slovak films in cinemas was roughly 90 000.

# French Solutions

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Linklaters

## Preliminary remarks

In December 2012, the European Commission (“Commission”) published its first report regarding the promotion of European works in EU scheduled and on-demand audiovisual media services.<sup>1</sup> The first part of the report is devoted to linear TV and the second part focuses on video-on-demand services (“VoD services”). The Commission’s general conclusion is that regulation applying to VoD services in the various EU countries is not yet fully defined and that work is still in progress in this regard. Policy makers adopted a “wait and see” policy, which reflects the flexible approach to regulation of VoD services established by the provisions of the Audiovisual Media Services Directive<sup>2</sup> (“AVMS Directive”) applicable to on-demand audiovisual media services.

In France, the implementation of Article 13 of the AVMS Directive in 2010 gave rise to a debate between the French regulator, namely the *Conseil supérieur de l’audiovisuel* (“CSA”), and the government. The government interpreted extensively the provisions of the Directive and proposed the implementation of Article 13 through a very detailed and prescriptive legal framework. During the consultation period, the CSA raised objections against the government’s proposition, underlining notably that the proposed provisions were too strict and that they entailed a serious risk of entrenching the development of on-demand services.

Article 13 was finally implemented in France with Decree No. 2010-1379 of 12 November 2010 (“the Decree”).<sup>3</sup> The first part of this short report describes the legal framework applicable to VoD services for the promotion of European works and the second part provides information on the mechanisms designed to ensure that obligations imposed on VoD service providers (“VoDSP”) are respected.

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\* The author would like to thank Aurelia Pons, intern, for her help with writing this article.

- 1) European Commission First Report of 9 December 2012 on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010 Promotion of European works in EU scheduled and on-demand audiovisual media services, COM(2012) 522 final.
- 2) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, codified by 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.
- 3) Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande, JORF n°0264 du 14 novembre 2010 page 20315, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023038244&dateTexte=&categorieLien=id>

## I. Description of legal framework

### 1. General description

The Decree provides two kinds of obligations for VoDSP: financial obligations and quotas/promotion obligations.

#### 1.1. Financial obligations

According to the Decree, financial obligations apply to VoDSP, so long as they have an annual net turnover of at least 10 million euros. This threshold does not apply to catch-up TV providers, who are subjected to financial obligations provided they offer annually at least 10 feature movies.

The Decree sets out the content of financial obligations and establishes three different regimes for catch-up TV, pay VoD and subscription VoD.

#### a) Content of financial obligations

Financial obligations consist of a contribution to European and French cinematographic and audiovisual production. Investments may notably be achieved through:

- purchase of a production share before the end of shooting;
- purchase of exploitation rights before the end of shooting;
- purchase of exploitation rights after shooting or paying author's rights; or
- financing accessibility to the work for the hearing or visually impaired.

Three quarters of the investments must be dedicated to independent production.

For audiovisual works, a production is deemed independent where the on-demand service provider is not an executive producer of the work and does not detain more than 15% of the share capital or voting rights of the production company and vice versa.

For cinematographic production the assessment is essentially based on a maximum quantity of exploitation rights that the VoDSP can detain.

#### b) Catch-up TV

The providers of catch-up TV services have to contribute to cinematographic production if their receipts are not by law consolidated with the TV channel the catch-up services relate to.<sup>4</sup> Where the receipts are not consolidated, the catch-up TV service providers' obligations of contribution to cinematographic production are the same as the obligations of the TV channel they relate to.

Although the scope of obligation is narrow concerning catch-up TV services, this contribution to cinematographic production may apply for example to SelecTV, which was authorised to broadcast on DTT and was supposed to be launched by Summer 2013.<sup>5</sup>

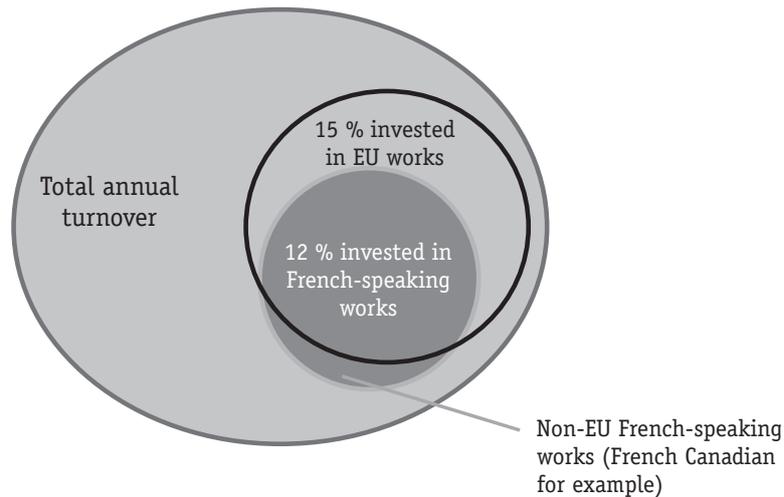
#### c) Pay VoD

Pay VoDSP must invest 15% of their turnover in production of European audiovisual and cinematographic works, and not less than 12% of the turnover should be invested in production of French-speaking works.

Investments in French-speaking works produced in Europe and qualifying as European works are recorded for both categories as explained by the diagram below:

4) Such consolidation applies to all "cinema channels".

5) SelecTV went into liquidation on 28 February 2013.



#### d) Subscription VoD

The extent of investment obligations imposed on subscription VoDSP depends on the French “media chronology”. The earlier works are available on-demand after theatrical release, the higher the financial obligations imposed.

The share of annual turnover to be invested respectively in European audiovisual and cinematographic works and French-speaking works ranges from 15% and 12% when content is made available on-demand more than 36 months after theatrical release, up to 26% and 22% when it is made available less than 22 months after theatrical release.

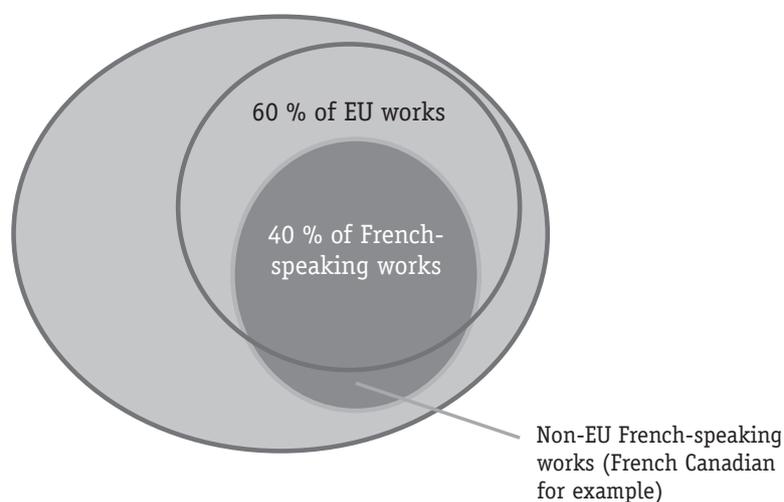
Based on a proposal by the CSA, the draft Decree was amended to introduce a scaled implementation of financial obligations. The investment obligations described above only came into force on 1 January 2013.

#### 1.2. Quotas and prominence

The implementation of the provisions of Article 13 of the AVMS Directive relating to the share and/or prominence of European works in the catalogue of programmes offered by on-demand audiovisual media services resulted in strong obligations for VoDSP.

The provisions of the Decree on quotas and prominence only apply to VoDSP whose catalogue comprises a minimum of 20 cinematographic works or 20 audiovisual works.

As regards quotas, the catalogue of VoDSP should feature at least 60% of European works and 40% of French-speaking works. During the three first years after the catalogue of a VoDSP has met one of the above-mentioned thresholds, lower quotas apply (respectively 50% and 35%).



Concerning prominence, the Decree provides that the home page of the VoDSP must display a substantial proportion of European or French-speaking works, and this should be achieved not only by mentioning the title but also by showing visuals and trailers.

## 2. Reasons that led to this particular national solution

The system is basically an extension of the rules applicable to linear TV services, which aim to promote cultural diversity. The quota policy was first implemented in France in the 1970s and it still applies today to all kinds of TV channels (general channels, cinema channels, thematic channels, etc.).<sup>6</sup> The quotas applying to linear TV services are the same as those applying to VoD services, that is, broadcasting of at least 60% of European works and 40% of French-speaking works.

As far as VoD services are concerned, the quotas ensure that European and French-speaking works are made available to the public in addition to being promoted. A system based on mere promotion would indeed not be sufficient considering that without quotas, the catalogues could contain a very limited number of European and French-speaking works.

However, the transposal of rules designed for linear TV services to VoD services was the source of a debate between the government and the CSA in 2010. The CSA was indeed advocating for a more flexible regime in order not to hinder the development of VoD services in France and thus the development of an attractive legal online offer.

In its answer to the government consultation, the CSA put forth that VoD services were new, not profitable yet, submitted to fierce competition, especially international competition, and had difficulties accessing rights. One of the main concerns was that too stringent rules would incite VoDSP to establish themselves in countries with more favourable legal frameworks.

The CSA obtained that the Decree would be re-examined after two years in order to assess the impact of its provisions on the development of VoD services in France and to proceed to amendments if needed. The report on the application of the Decree due by the CSA in January 2013 is still pending.

Moreover, the CSA managed notably to obtain that:

- financial obligations would be progressive in time;
- quotas would be progressive in time;
- catch-up TV would be submitted to distinct obligations;
- obligations as regards prominence of European and French-speaking works on the home page would be lighter.

## II. Monitoring and enforcement

### 1. Monitoring

#### 1.1. Reporting

The Decree provides for the following declaration obligations:

- one annual financial declaration certified by a chartered accountant, which applies to all VoDSP subjected to financial obligations, meaning those whose annual net turnover is above 10 million euros (apart from catch-up TV service providers who are subjected to a different regime, as described above); and
- one annual declaration relating to the observance of quotas and prominence obligations applying to all VoDSP.

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6) Article 13 of Decree No. 90-66 of 17 January 1990 on general principles applying to the broadcasting of audiovisual and cinematographic works by television services.

The financial declaration should be sufficiently detailed to provide the CSA with the necessary information to assess whether the service provider complies with its financial obligations.

The section of the declaration relating to quota obligations should describe the mechanism set up to ensure that the catalogues made available to the public for each kind of VoD services (catch-up TV, pay VoD and subscription VoD) contain the appropriate share of European works and of French-speaking works. To support the declaration, the CSA requires proof such as screen shots and a list of works classified on a nationality basis available in the catalogue throughout the year covered by the declaration.

The same kinds of requirements apply to the section of the declaration relating to prominence of European and French-speaking works on the home page.

### *1.2. CSA monitoring*

According to the Commission's report, the majority of member states rely on the information submitted by the on-demand service providers without any verification. In France, the CSA adopted a system whereby monitoring is based on the annual declarations of VoDSP and on further verifications.

First, the CSA exerts its monitoring power through the collection of annual declarations. The reporting mechanism is reinforced by the possibility that the CSA (i) request a certified declaration when the disclosed turnover is less than 10 million euros; (ii) check investment obligations by requesting copies of right acquisition contracts.

In addition, the CSA has reported to the Commission that it conducts random / spot checks in respect of the share and prominence of European works in catalogues.

Finally, the CSA also has a general power to monitor audiovisual media services.

## **2. Enforcement**

The CSA may exert its general power of sanction against a VoDSP which does not comply with its obligations after formal notice.

Under Article 42-1 of Law No. 86-1067 of 30 September 1986, the range of sanctions goes from suspension of a part of the programmes offered by the VoDSP to pecuniary sanctions.



# The Dutch Approach

*Marcel Betzel*  
*Commissariaat voor de Media*

Until now around 30 commercial on-demand audiovisual media services have been notified to and are registered with the Dutch Media Authority, the *Commissariaat voor de Media* (CvdM). At this stage, these consist mainly of catch-up services, movie rental services and stand-alone video services of publishers. According to Article 3.29c of the Dutch Media Act 2008,<sup>1</sup> media service providers should encourage the production of and access to European works as described in the European Audiovisual Media Services (AVMS) Directive.<sup>2</sup> In its report to the European Commission, which covered the years 2009 and 2010 and was submitted by the end of 2011, the CvdM sketched out the situation in the Netherlands.

At that time, the body of relevant services was still relatively small and consisted mainly of the typical catch-up services of broadcasters and video rental services. Now the group of on-demand media services falling under the Media Act 2008 is increasing, especially because the CvdM has started to approach media service providers which have not yet notified their on-demand media services.

Right now the CvdM is in the middle of further shaping its policy regarding the promotion of European works in on-demand media services. The approach is to assess the effects of the regulation in practice and to investigate how the presence and consumption of European works in on-demand services can be encouraged without imposing exceedingly heavy constraints and administrative burdens, which could have counterproductive effects. In addition, the data should not only be relatively easy to collect and submit for the media service providers but also easy to measure and evaluate when it comes to monitoring compliance. The less time is needed for administration and reporting activities the more time and attention can be devoted to the encouragement of creation of and access to European works in on-demand media services.

## **I. Regulation on the promotion of European and independent works in linear services: Media Act 2008 and policy guidelines of the CvdM**

Before addressing the issue of how the Dutch legislator and the CvdM aim to promote European works in the on-demand environment, it is worthwhile to have a closer look at the relevant legislation and policies regarding the promotion of European works within linear services.

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1) *Wet van 29 december, 2008, tot vaststelling van een nieuwe Mediawet (Mediawet 2008)*, *Staatsblad* (State Journal) 2008 583.

2) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities (Official Journal L 332, 18/12/2007).

## 1. Media Act 2008

The provisions of the AVMS Directive have been transposed almost word for word into national law. Article 2.115 of the Media Act 2008 applies to national public service broadcasting (PSB) and Article 3.20 of the Act applies to private broadcasting. With regard to the definition of “European works”, both sections refer to Article 1 of the European Directive. For both PSB and private channels the percentage of European works to be broadcast has been set at 50%. With regard to private broadcasters, in particular cases the CvdM has the possibility to grant exemptions on a temporary basis; in such cases the percentage set can never be lower than 10%.

As far as independent and recent productions<sup>3</sup> are concerned different percentages apply to private and PSB channels since the latter are bound by a higher percentage: 25% (Article 2.116 Media Act 2008). For their part, private channels have to dedicate at least 10% of their broadcasting time to independent productions (Article 3.21 Media Act 2008). The definition of independent works is also laid down in the Media Act 2008 (Article 2.120 Media Act for PSB and Article 3.22 Media Act for private channels).

Independent productions are all programmes which have not been produced by:

- the broadcaster broadcasting the programme, or another broadcaster;
- a legal person in which a broadcaster holds, either directly or indirectly through one or more of its subsidiaries, a share capital of at least 25%;
- a legal person in which two or more broadcasters hold, either directly or indirectly through one or more of their respective subsidiaries, a share capital of more than 50%; or
- a company in which a broadcaster or one or more of its subsidiaries is as a general partner fully liable to the production company’s creditors for its debts.

## 2. Policy guidelines of the CvdM regarding programme quotas

The Policy guidelines on programme quotas<sup>4</sup> give a further clarification of the terms “European product”, “independent product” and “originally Dutch or Frisian product”. Also the exemptions policy of the CvdM and the way broadcasters should report on the productions they broadcast have been laid down in the guidelines. The definitions of European and independent productions have adopted the wording chosen in the AVMS Directive.

The CvdM noticed that in practice broadcasters sometimes experience difficulties when trying to determine the producer of a programme. This applies especially for old material. Therefore it is stated in the policy guidelines that in those cases the CvdM will consider the location of the distributor as the relevant country of origin but only when the broadcaster has demonstrated that he could not locate the place of establishment of the producer.

Before establishing the guidelines, the CvdM and the broadcasters had some discussions on how to define “independent product”. According to the broadcasters “independent product” only means a programme that has not been produced by the broadcaster in question. This would lead to a situation where a BBC programme broadcast by a Dutch broadcaster would be counted in the amount of independent products of that Dutch broadcaster. Article 4 of the policy guidelines clarifies that this interpretation is not correct: any programme produced by any organisation that broadcasts programmes will not be considered as independent. This article also states that a programme produced by a producer who in the last three years has produced more than 90% of its programmes for the same broadcaster

3) The Act provides that one third of independent works shall be made up of recent productions, i.e. less than 5 years old (Article 2.119 Media Act 2008 for PSB and Article 3.21 Media Act for private broadcasters)

4) *Regeling van het Commissariaat voor de Media van 18 december 2007 houdende beleidsregels omtrent Europese, onafhankelijke, recente, Nederlandstalige of Friestalige programmaonderdelen en oorspronkelijk Nederlandstalige programmaonderdelen die voorzien zijn van ondertiteling ten behoeve van mensen met een auditieve beperking (Beleidsregels programmaquota)* (Regulation of the Commissariaat voor de Media of 18 December 2007 consisting of policy guidelines regarding European, independent, recent, Dutch or Frisian programmes and also subtitling (Policy guidelines on programme quotas)), available at: <http://77.87.161.243/wp-content/uploads/2013/07/Beleidsregels-programmaquota.pdf>

and who, over that period of time, has made more than one programme or series of programmes will not be considered to be of an independent nature.

In the policy guidelines, the CvdM has also described under which circumstances it may exempt a broadcaster from the obligation to broadcast the required percentages of European, independent and Dutch productions. The nature of the channel (special interest channel), the possibilities of obtaining broadcasting rights and particular economic circumstances of the channel (initial costs of a channel which just started) are taken into account when the CvdM decides on a related request. The exemption will be granted for a maximum of three years and the percentage can never be lower than 10%.

Recently, the policy guidelines have been amended.<sup>5</sup> An important reason for this modification was the introduction of a tolerance threshold in recently revised guidelines of the European Commission.<sup>6</sup> In its modified guidelines, the CvdM has stated that commercial TV channels with a technical reach of less than 75% of Dutch households and a national market share smaller than 0.3% are exempted from the regular obligation to report on quotas once every two years. However, the providers of these TV channels still have to meet the European quota obligations; so despite the general reporting exemption they can always be required by the CvdM to submit all relevant data in order for it to check compliance.

### 3. Reporting in practice

The CvdM supervises the observance of the Media Act, the Media Decree<sup>7</sup> and the regulations of the Commissariaat, which are based on the Media Act and Media Decree. Therefore, the CvdM is responsible for the monitoring and application of all the aforementioned provisions. The Ministry of Education, Culture and Science is responsible for providing the European Commission, every two years, with the report on the compliance with the European and independent quota provisions of the Directive; meanwhile the CvdM provides the relevant data.

The CvdM requests all broadcasters, public service providers as well as private providers, to submit yearly all relevant data on the European and independent programmes broadcast over the previous year. Private channels and public regional channels are requested to report at random over 1 week per 3 months, so 4 weeks in total per year. In order to facilitate the reporting obligation for the media service providers, the reports can be submitted through spreadsheets developed by the CvdM. The national PSB has to report over the whole broadcasting time and the policy guidelines contain a detailed description of all data that should be included in the forms.

## II. Regulation on the promotion of European works in on-demand media services: Media Act 2008 and pilot study of the CvdM

### 1. Media Act 2008

The legal provision laid down in Article 3.29c of the Dutch Media Act 2008 as a consequence of the Implementation Bill<sup>8</sup> contains almost identical wording to Article 13 of the AVMS Directive: "A media service provider offering a commercial on-demand media service promotes the creation and access to European productions as meant in article 1 of the European Directive". In the Explanatory

5) *Wijziging Regeling van het Commissariaat voor de Media van 18 december 2007 houdende beleidsregels omtrent Europese, onafhankelijke, recente, Nederlandstalige of Friestalige programmaonderdelen en oorspronkelijk Nederlandstalige programmaonderdelen die voorzien zijn van ondertiteling ten behoeve van mensen meteen auditieve beperking (Beleidsregels programma-quota)* (Amendment of the Regulation of the Commissariaat voor de Media of 18 December 2007 consisting of policy guidelines regarding European, independent, recent, Dutch or Frisian programmes and also subtitling (Amendment Policy guidelines on programme quotas)), available at: [www.cvdM.nl/dsresource?objectid=14010&type=org](http://www.cvdM.nl/dsresource?objectid=14010&type=org)

6) Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services (AVMS) Directive of July 2011 Doc CC AVMSD (2011) 2.

7) *Besluit van 29 december 2008 houdende vaststelling van een nieuw Mediabesluit (Mediabesluit 2008)* (Decree of 29 December 2008 on establishing a new Media Decree (Media Decree 2008)).

8) *Wet van 10 december 2009 tot wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten* (Act of 10 December 2009 amending the Media Act 2008 and the Tobacco Act to implement the Audiovisual Media Services Directive) *Staatsblad* (State Journal) 2009 552.

Memorandum<sup>9</sup> to the Implementation Bill, some further guidance is provided by the Dutch legislator. There it is stated that the CvdM will investigate on a regular basis whether media service providers comply with this obligation. The outcomes of these investigations will serve as information in the reports supplied to the European Commission every 4 years. In its assessment the CvdM will have to take into account the situation of the media service provider since the AVMS Directive states that the obligation is to be fulfilled “where practicable and by appropriate means”.

The main feature of the Dutch approach is that the obligation is applicable to all commercial media service providers. There is no minimum share of European works or financial contribution specified in the Media Act 2008. Every year the media service providers should measure their promotion of European works and report to the CvdM who checks the data submitted.

## 2. Pilot study of the CvdM

At the beginning of 2013, the CvdM drafted a form including an instruction which media service providers should use when reporting each year on the promotion of European works in their on-demand media services. The CvdM decided to use the indicators which are laid down in the updated reporting guidelines of the European Commission, but only those which can be applied relatively easily in practice in order to keep administrative burdens as low as possible. For media service providers collecting and reporting the data should not be too time-consuming an exercise. And the same goes for the CvdM when it comes to checking the data’s validity and reliability and monitoring compliance with European quota obligations.

Regarding the share of European productions made available, it is stated that media service providers should report each year on the amount of European works in their catalogue on at least one reference date picked at random each year. So the reference date can differ each year. Furthermore, share is defined in terms of duration of videos. The CvdM explains which programme categories should be left out of the calculation because they should be considered as games, news or current affairs items.

As regards accessibility, the CvdM intends to apply indicators consisting of the following questions, which can be answered relatively easily:

- Can the user search within the catalogue for videos labelled as European works? For instance, are tags or labels regarding nationality/origin used?
- Has the service provider developed tools in order to recommend European works to users?
- Does the catalogue, website or EPG contain a special section dedicated to European works?
- Does the service provider use any other instruments to facilitate access to European works?

The CvdM felt it was necessary to test whether the system did not create too many administrative burdens for media service providers and whether the data asked for was relatively easy to monitor and evaluate. Therefore it organised an expert meeting in March 2013. The relatively small but representative group of stakeholders attending the meeting welcomed very much the opportunity to share their experiences and thoughts with the CvdM. For the CvdM the workshop provided more insight into the possible effects of implementation of its policies.

In the discussions during the experts meeting the following remarks and observations were made from the side of the media service providers:

- The most time-consuming exercise for media service providers is to assess the origin and nationality of audiovisual content offered. This is regardless of whether or not this content is part of a schedule and broadcast or part of a catalogue and offered within an on-demand media service.
- Figures about actual consumption are not always easy to deliver by media service providers.
- Figures about share and turnover are not always easy to deliver due to the different business models of the media service providers.

9) *Memorie van Toelichting bij de wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten* (Explanatory Note to the amendment of the Media Act 2008 and the Tobacco Act to implement the Audiovisual Media Services Directive) TK, 2008–2009, 31 876, nr. 3.

- There is a preference amongst service providers to report on numbers of titles of videos and not on total duration of the videos offered in the catalogue.
- There are considerable doubts whether reporting obligations serve the objective of promoting European works.
- No one feels it is necessary to report on European works at all when it is clear all content is of national origin.
- Many service providers stress the importance of ensuring a level playing field with non-EU based competitors.

### III. Conclusion and remaining issues

Reporting obligations in the area of on-demand media services should preferably not lead to high administrative burdens or time-consuming exercises for both media service providers and the authorities responsible for monitoring compliance. Especially now, when many media service providers are struggling with declining (advertising) revenues and many on-demand media services are still in their infant stage, excessively high administrative burdens should be avoided as much as possible since they could be counterproductive when it comes to the stimulation of the production of European works. Therefore the CvdM has opted for indicators that are relatively easy to apply in practice and likely to provide good insight in the actual performance of media service providers.

The experts meeting was a crucial stage during the pilot study, addressing some issues which needed further exploration and consideration by the CvdM when implementing its policies regarding the promotion of European works in practice. One of the remaining questions is whether niche (like special thematic) services should be treated more leniently. The reporting obligations seem to make sense mainly for VoD film services (rental or download to own) and catch-up services but not for the many news video services since news programmes do not count towards the quota of European works within linear services. Yet, one could question why news, games and sports programmes should be left out of the calculation in light of the fact that the creation of these works also contributes to the European audiovisual sector. Also, one could think of granting exemptions to media service providers which are very small in terms of users or revenues. One could consider an approach more or less comparable to the domain of linear media services. Following the revision of the guidelines of the European Commission, member states are now allowed to exempt from reporting on European quotas those linear channels whose market share remains below the threshold of 0.3%. It does not seem reasonable and fair to treat small on-demand media services in that respect more strictly than small linear media services.

An important challenge for all regulatory authorities in the near future will be how to deal with same services offered over different platforms. An on-demand media service could be offered simultaneously on a website, in an EPG of a cable operator or IPTV service provider, in the portal of a smart TV and as a mobile app. In every single case the look and feel of the service in question could differ slightly or significantly. It should be clear in advance which services are subject to a reporting obligation and which services are not, for instance because they should be considered to be supplementary to another on-demand media service.

One approach to achieve more clarity in that respect could be that when a catalogue on another platform is just a part of another catalogue provided by the same media service provider it is not treated as a separate service. These are all issues the CvdM will try to find an answer to when implementing its policies, also taking into account further feedback from the media service providers involved.



# New Issues and Challenges for Audiovisual Policy-makers, Films Institutions and Audiovisual Regulators: the Example of the French Community of Belgium

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*"Without promotion, something terrible happens... Nothing"*  
*P.T. Barnum*

The new methods of distribution and consumption of audiovisual works, together with the resulting broadening of the scope of application of regulations on audiovisual media services, are creating new challenges for audiovisual policy-makers, at both European and national levels. One of the main challenges is to ensure that their policies continue to remain effective and can be adapted to an economic context in which large and small screens can no longer be treated separately.

## I. The context

The production and promotion of European works has been at the heart of European Union audiovisual policy since the adoption of the Television Without Frontiers Directive (TWF Directive) in 1989. Articles 4 and 5 of the TWF Directive (now Articles 16 and 17 of the Audiovisual Media Services Directive – AVMSD) were one of the main pillars of the 1989 text. The nine reports since published by the European Commission have shown that the three broadcasting obligations imposed on television channels (broadcast of a certain percentage of European works, independent European works and recent European independent works) have, on the whole, been implemented.<sup>1</sup>

It might therefore be assumed that all is rosy and that the effectiveness of these provisions, demonstrated in report after report, will naturally be transferred from the world of linear television to the growing number of non-linear services, whose economic importance is set to increase steadily in the years to come.

## II. Obstacles

However, nothing could be less certain, for two main reasons.

The first reason is that, since 2007, the European regulatory framework that applies to on-demand services has been much less strict for non-linear services than for linear services (and will probably remain so for a long time to come, considering how long it takes for directives to be revised by the

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\* The author would like to thank Michel Gyory, Anne Libert and Paul-Eric Mosseray for their decisive contribution to this article and to all the work carried out by the CSA on this subject since 2010.

1) Available at: [http://ec.europa.eu/avpolicy/reg/tvwf/implementation/promotion/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/implementation/promotion/index_en.htm)

European Union and then transposed by the member states). The AVMS Directive, for example, only imposes obligations of means on the member states: whereas Articles 16 and 17 continue to impose an obligation of results in the form of quotas for broadcasts of European works, Article 13 merely urges the member states to ensure that “on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.”<sup>2</sup> This is therefore very different to the system in place since 1989.

The second reason, which is perhaps more fundamental because it moves us away from the law towards a more practical perspective, is that on-demand audiovisual media service (on-demand AVMS) providers assume a new function, which is less akin to that of linear television service providers and more like that of cinema film distributors. However, they are not necessarily aware of this role or in possession of the expertise needed to carry it out. “In order to find its audience, a film will have to go through two very different stages,” explains Michel Gyory, a lawyer in Brussels and expert adviser to the European Commission. “The first stage consists in generating demand. In order to do so, the film’s content must ‘speak’ to its audience, and that audience must be aware of the film’s existence. The film’s producer, director and script-writer are responsible for its contents, while the distributor is usually responsible for advertising and promoting it, as part of the film-screening business. Where on-demand services are concerned, part of the responsibility for promoting a film to the public is transferred to the provider. The second stage, which involves both the distributor and the (cinema venue or VOD) ‘operator’, consists in ‘positioning’ a work that has succeeded in attracting the public’s interest, when the consumer – who is interested in several works – finds themselves faced with a comparative choice. Showcasing European works therefore implies that non-linear service providers adopt an active, two-pronged approach. They are responsible for creating demand, alongside the film’s authors and distributors, and they are also responsible for ‘positioning’ the work within the selection that they offer to the public when that demand has been created. These two responsibilities are different, in that the first is shared, while the second is not.”<sup>3</sup>

### III. Case study: the French Community of Belgium

In the French Community of Belgium, the legislator and regulator, each in its own field of responsibility, have tried to confront these two challenges in an effort to achieve the objectives of the European Union’s audiovisual policy.

#### 1. The regulatory framework...

The legislator decided to only transpose two of the three tools suggested in the AVMS Directive. As far as production is concerned, on-demand AVMS providers must, like those of linear services, contribute a certain percentage of their turnover to support audiovisual production. On the other hand, in relation to distribution, the legislature chose a new mechanism that takes into account the specific characteristics of non-linear services: the prominence of European works in the catalogue, considering that quantitative measures such as a percentage of European works in a catalogue would be ineffective or even counterproductive.

Indeed, while the link between programming and consumption is clear for linear services, it certainly is not for non-linear services: an on-demand AVMS provider could easily ensure that 20-30% of the works in its catalogue were European, but fail to promote them at all and consign them to menus or sub-menus that TV viewers would never find without embarking on a perilous journey through their electronic programme guide (EPG).

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2) Available at: [http://ec.europa.eu/avpolicy/reg/tvwf/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/index_en.htm)

3) Available at: [www.csa.be/documents/2044](http://www.csa.be/documents/2044)

Furthermore, as the legislator explains in the explanatory memorandum of the AVMS decree<sup>4</sup>, an on-demand AVMS provider “could also decide to launch or boost its on-demand service by focusing firstly on providing mass/popular content (blockbusters) before offering other (more specialist) types of programmes that are only of interest to a limited number of viewers (see, for example, postal DVD sale/rental, where such blockbusters are used first to create a critical mass). The imposition of traditional quotas based on compulsory minimum percentages would make such a strategy impossible and would therefore be likely to hinder the launch of new services that could subsequently serve a useful purpose in the promotion of European works”.<sup>5</sup>

Finally, such a quota could stand in the way of on-demand AVMS providers’ freedom to create their catalogue. Regular changes to the catalogue’s contents or problems acquiring the rights for a sufficient number of European films during certain periods could, for example, make it difficult to respect a quota on a day-to-day basis or discourage the purchase of non-European films, in view of the proportions laid down.

It is interesting to note that this emphasis on regulatory tools focusing more on demand than supply, even if it was only based on a hunch when the AVMS Directive was transposed, has since been borne out, in particular by the authors of the study conducted by Attentional for the European Commission on the implementation of the provisions of the AVMS Directive concerning the promotion of European works.<sup>6</sup>

## 2. ... its advantages...

The change of paradigm created by the transition from an obligation of results to one of means has numerous advantages.

The first is that ensuring prominence, unlike quotas, is not intrusive. For almost 25 years, European television providers have been operating under a serious constraint, which they have sometimes struggled to accept, since they associate it with an infringement of their editorial freedom: the obligation to broadcast a majority proportion of European works, and sometimes even more in some countries. However, Article 13 of the AVMS Directive provides the opportunity for totally free “programming” (the word “programming” should, strictly speaking, not be used for on-demand AVMS, since in the end this is the role of the viewer, based on a catalogue offered by the provider), in other words, for providers to compose their catalogue as they see fit. The only “constraint” lies in the obligation, if their catalogue contains European works (which it invariably does), to promote them to their subscribers.

The second advantage of ensuring prominence is that, unlike obligations to contribute financially to audiovisual production, it is, so to speak, free. Generally speaking, giving prominence to works is an indispensable condition of the viability of on-demand AVMS, just as self-promotion is, for example, for linear services. This promotional activity is an everyday task for the providers of such services, the results of which editorial and marketing teams are constantly analysing and interpreting in order to ensure their service remains profitable.

The third advantage is the fact that on-demand AVMS can offer their users numerous different works at the same time. In contrast to linear services, which have to try to attract as many people as possible to a single programme at a specific time, these non-linear services can potentially attract the same number of people to an unlimited number of programmes simultaneously. As a result, although blockbusters are an important means of effectively promoting the service and building a “critical mass” of users, the promotion of other programmes is not detrimental to viewer numbers, but on the contrary, it increases them by reaching “niche” as well as “mass” audiences. Since most blockbusters are not European, unlike the majority of niche films, this obligation does not hinder the providers, but helps them.

4) *Décret du 27 février 2003 sur la radiodiffusion, modifié par l’art. 1<sup>er</sup> décret du 5 février 2009*. A consolidated version is available at: <http://www.csa.be/documents/1440>

5) Parliament of the French Community, Doc. Parl. 634 (2008-2009) – No. 1, p. 23.

6) Available at: [http://ec.europa.eu/avpolicy/docs/library/studies/art\\_13/final\\_report\\_20111214.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/art_13/final_report_20111214.pdf)

### 3. ... and its implementation

On the basis of this regulatory framework, and taking its advantages into account, the regulator has, for its part, developed a strategy designed to help on-demand AVMS providers to promote European works. The approach adopted is far removed from the traditional surveillance-based relationship between regulator and regulated, favouring collaboration and the sharing of qualitative objectives. It has been implemented in four stages:

- the adoption (in June 2010) of a recommendation on the way in which the CSA would evaluate on-demand AVMS providers' efforts to implement this objective of promoting European works, set out by the legislator;
- an initial evaluation (in early 2011) of the measures taken by these providers;
- a second evaluation (in late 2011) of the first results obtained in terms of promotion, but also in terms of consumption, in accordance with recital 69 of the AVMS Directive;
- a third and final evaluation, after two years (in June 2012) aimed at helping the legislator to assess the pertinence of the decisions taken as part of the transposition of the AVMS Directive between 2007 and 2009.<sup>7</sup>

This approach created two main challenges.

#### 3.1. Defining "prominence"

The first challenge was to define the concept of "giving prominence" used in the AVMS Directive. According to recital 69 of the Directive, it is the "attractive presentation of European works in electronic programme guides". While adopting the same wording, the legislator had already further specified this notion, stating that "this will be achieved by increasing the visibility of the European works available in the provider's catalogue through the use of all possible promotional techniques, such as:

- advertising inserts on the homepage of the provider's electronic programme guide and website, referring to the European works available in its catalogue;
- the creation of a special category in its electronic catalogue, dedicated specifically to European works (but not the only category in which such works appear, since some viewers may be put off by the European aspect);
- references to the European works available in its catalogue in feature articles in its magazines or folders sent to its customers and devoted, for example, to European actors/directors or to specific events promoting European works (e.g. European film festivals such as those in Namur, Liège, Cannes, Berlin, Venice, etc.);
- references to European works available in its catalogue in its broadcasts advertising non-linear programmes".<sup>8</sup>

The CSA decided to suggest some further possibilities, such as giving prominence to these works:

- under headings such as "new releases", "last chance", "great classics", "favourites", etc.
- in sections with preferential pricing, or even available free of charge to users;
- in promotional campaigns for the VoD service itself.

It also emphasised other parameters which, although strictly speaking they do not relate to prominence, may influence the objective pursued, particularly when positioning the work, such as:

- date of entry in the catalogue;
- length of time in the catalogue;
- diversity of works in terms of genre, nationality, actors, directors, etc.

7) All these documents, and a summary of the evaluation results, are available at: <http://csa.be/breves/689>

8) Parliament of the French Community, Doc. Parl. 634 (2008-2009) – No. 1, p. 23-24.

### 3.2. Evaluating prominence

The second challenge lay in the difficulty of evaluating not only the measures taken in terms of prominence, but also their impact on consumption. In this regard, the June 2010 recommendation noted that “at first glance, it seems fairly difficult to isolate the possible impact of a measure in terms of consumption within one and the same service. On the other hand, it should be instructive to compare, for a single film, the strategies used by different VoD services or in parallel markets, such as DVD rental or TV broadcasting. The evaluation should also try to distinguish the efforts specifically made by the VoD platform to give prominence to European works from the promotional activities normally carried out by film distributors when films are first released.”<sup>9</sup>

#### 3.2.1. Object of evaluation

To this end, the CSA concentrated on fictional works and creative documentaries available via on-demand AVMS independent of any linear service.

Indeed, according to recital 27 of the AVMS Directive, non-linear catch-up TV services include the same programmes as those available on their linear equivalent. Since the latter are subject to stricter obligations, particularly concerning broadcast quotas, catch-up TV services are considered to meet their obligation to promote European works *de facto* if their linear counterparts meet their broadcast quotas.

The CSA also selected the programmes to be evaluated in order to focus on fictional works and creative documentaries, considering that:

- these programmes currently represent the vast majority of works available via the services in question;
- these works are particularly symbolic and representative of European creativity;
- these programmes contribute naturally to the objectives of the AVMS Directive concerning the promotion of cultural diversity and heritage;
- they require considerably larger production budgets than one-off broadcasts;
- this choice is in line with Articles 16 and 17 of the AVMS Directive, which exclude transmission time allotted to news, sports events, games, advertising, self-promotion and teleshopping.

#### 3.2.2. Evaluation contributors

In order to carry out these evaluations, the CSA relied on information from various contributors.

The service providers themselves submitted data concerning:

- the contents of their catalogue on a given day (film title, genre, origin, date of production, start and expiry dates of transmission rights);
- film consumption (overall consumption on the given date, top 50 films during the six months preceding this date);
- the promotional techniques used (thumbnails, magazines, self-promotion programmes, etc.);
- the link between promotion and consumption (general trends noted during qualitative surveys, influence of weather conditions on consumption in general, etc.).

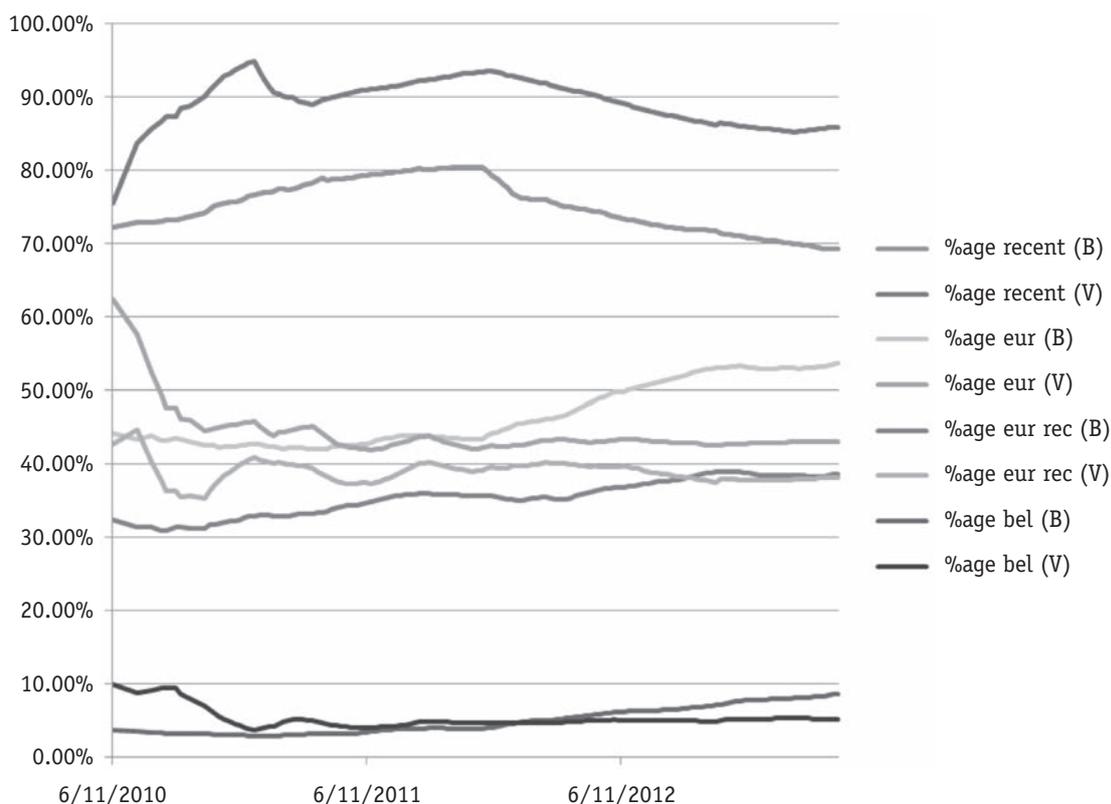
For its part, the CSA compiled a list of the promotional activities carried out by each on-demand AVMS provider on a weekly basis (week evaluated, title of films promoted, origin, year of production, places where they were promoted).

Finally, the *Moniteur du Film en Belgique* sent to the CSA the relevant Belgian cinema viewing figures.

This information was then compared, both for individual service providers and between the different VoD service providers, as well as with cinema viewing figures. In this way, the CSA endeavoured to identify trends and relationships between film promotion and consumption on VoD services, as well as with the promotion of films linked to their release in cinemas.

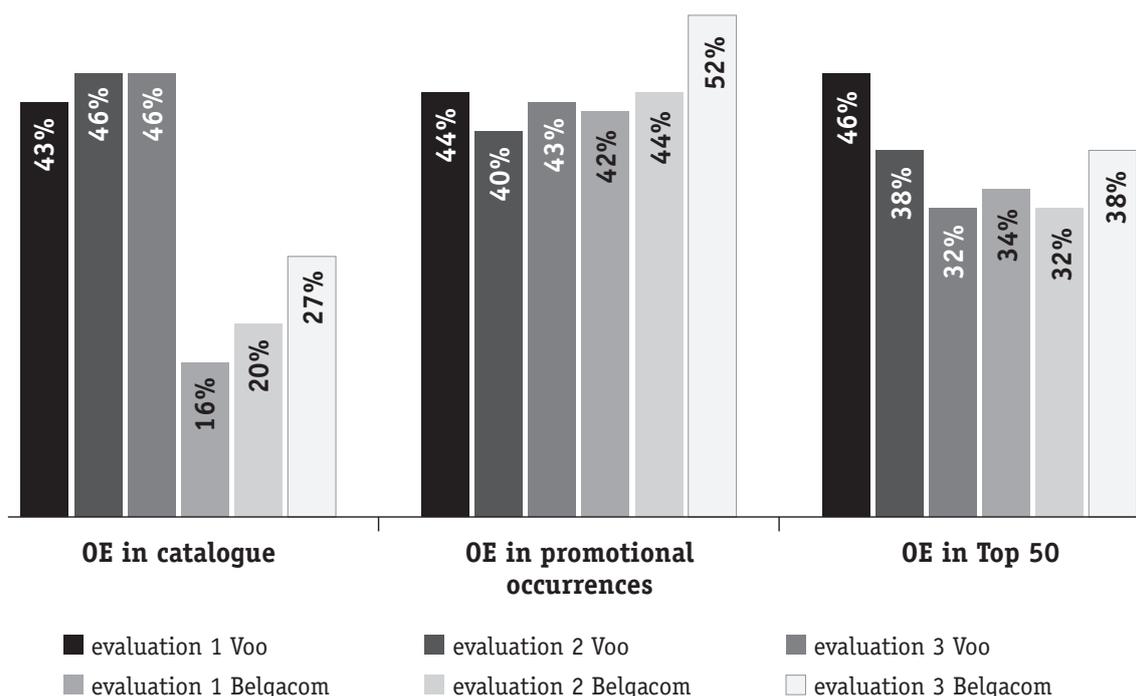
<sup>9</sup>) Available at: <http://csa.be/documents/1313>

3.2.3. Evaluation results



This graph, which illustrates the promotional activities devoted to European, recent and Belgian works on the Belgacom and VOO services (the two main VoD service providers in the French Community of Belgium) between June 2010 and April 2013, shows:

- high representation of recent works, i.e. works produced in the five years preceding their presence in the VoD catalogue, all nationalities combined;
- satisfactory representation of European works, mostly recent;
- in contrast, low representation of national works, although this seems to increase slightly over time.



This second graph represents the changing presence of European works in on-demand AVMS, compared with their promotion and an indication of their consumption. It shows that:

- European works benefit from “positive discrimination” in terms of promotion, which is equal to or greater than the proportion of European works included in the catalogues;
- the different policies regarding the presence of European works in the catalogues do not appear to have a direct impact on the consumption of these works; quotas therefore do not seem to be the most effective tool;
- although it is difficult to establish a definite causal link between the promotion and consumption of a film (particularly in view of the high number of factors involved), giving prominence to works seems to be effective: with European works making up an average of 33% of the catalogues, they also represent an average of 37% of those watched the most (a figure higher than the consumption of European works in cinemas, which varied between 25% and 28% during the same period<sup>10</sup>).

In addition to these general data compilations, the editors noted some classic examples of European films of all genres that were included in a catalogue without any particular promotion, consumption of which increased by up to 1500% when they were the subject of special promotions.

## IV. Lessons learned

The results of these evaluations tend to show that the decision to promote works rather than impose catalogue quotas was positive in the sense that it helped to bring European films to the attention of the public. This is a vital lesson, bearing in mind that the market share of these services is growing, that they provide access to works that form part of European culture, and the positive spin-offs for the European creative industries.

In addition to the results described above, this evaluation process highlighted two main issues.

### 1. Cooperation

The first is cooperation. Isolated actions will clearly not be sufficient to enable European works to continue competing successfully with other works, some of which benefit from extremely effective promotional tools. This objective must be pursued jointly by the public authorities concerned, in particular:

- the European Commission, both DG Education and Culture and DG Connect, in order to take into consideration the whole audiovisual value chain (production, distribution, promotion and consumption on all screens);
- European cinematography centres, which know all about the promotion of works;
- European regulatory bodies, responsible for ensuring compliance with Article 13 of the AVMS Directive.

As noted in the Commission’s first report on the application of Article 13 in the member states, “[a]t the end of 2010, 14 member states had reproduced the wording of the AVMS Directive without imposing concrete obligations concerning on-demand service providers ... As far as monitoring is concerned, the Study shows that the majority of member states rely on the information submitted by the on-demand service providers without any verification. Independent monitoring is carried out in only two member states and the information supplied by on-demand service providers is verified in another four.”<sup>11</sup> The market seems to have adapted well to this situation, which is not without consequence for effective

10) Available at: [http://www.obs.coe.int/en/press/individual-press-releases/2012/-/asset\\_publisher/WZG5qzdbE32H/content/eu-box-office-inches-to-record-high-in-2011-as-european-comedies-provide-welcome-relief-and-3d-matures](http://www.obs.coe.int/en/press/individual-press-releases/2012/-/asset_publisher/WZG5qzdbE32H/content/eu-box-office-inches-to-record-high-in-2011-as-european-comedies-provide-welcome-relief-and-3d-matures).

However, it should be noted that, for practical reasons and in accordance with the data available, these figures relate to the presence of European works in the top 50, rather than the consumption of European works in general, although data on the latter would be highly relevant given the fact that some European films are aimed at more limited audiences, and that films remain available in VoD catalogues for a longer period so that they can reach their audience over an extended period of time.

11) Available at: [http://ec.europa.eu/avpolicy/reg/tvwf/implementation/promotion/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/implementation/promotion/index_en.htm)

compliance with Article 13: the European Audiovisual Observatory, for example, estimates that “in the European Union over 52% of the VoD services available in one country are established in another. This development in the cross-border provision of on-demand audiovisual services, which is especially pronounced in the case of film VoD services, might make it difficult to implement measures laid down by the most stringent national regulations for the promotion of European works or for contributing to production funding.”<sup>12</sup>

In this connection, paragraph 64 of the European Parliament resolution of 11 September 2012 on the online distribution of audiovisual works in the European Union recommends that member states “monitor how European works, particularly films and documentaries, are actually presented and promoted through the different audiovisual media services accessible to the public, and stresses the need for closer cooperation between regulatory authorities and film funding organisations.”<sup>13</sup>

## 2. Timing

The second issue is awareness that such cooperation is urgently needed if the expected results are to be achieved, especially since the AVMS Directive now only requires reports to be drawn up every four years.

According to recital 69 of the AVMS Directive, on-demand AVMS have the potential to replace traditional television one day. Although this potential remains a long way from being realised, it is certainly apparent that linear consumption will suffer as a result of the expected growth of on-demand viewing.

A parallel could be drawn between small and big screens: the on-demand consumption of audiovisual works in the living room will also be partly detrimental to cinema consumption.

Although the scale of the changes that are currently taking place in the audiovisual sector remains to be confirmed, it is clear that we are in a pivotal period. The last time such a turning point was reached in the film industry, it was problematic for the European cinematographic sector, and even catastrophic in some European countries, where it was doomed to virtual extinction. The sequence of events is well known: drop in cinema attendance, rise in ticket prices, further drop in attendance, and, faced with this crisis, an extremely effective strategic response from the American studios, i.e. the creation of the “blockbuster”: produce fewer films, but with larger budgets and, in particular, huge marketing budgets that enabled them to retain their audience despite the fall in cinema attendance. However, one of the main consequences of this trend was cinema operators’ financial dependence on these studios, which could then impose their strategy of block booking and screen occupation on them, to the detriment of European productions.<sup>14</sup>

Previous attempts at forecasting the future of the audiovisual sector have been sufficiently inaccurate (think, for example, of the predicted revolution of personal mobile television and its resounding failure) that there is no point daring to predict the future of the on-demand AVMS sector here.

Nevertheless, it would not be inappropriate to stress that there is certainly a danger that audiovisual creation in on-demand AVMS will be marginalised, as was the case in cinemas in the 1960s and 1970s. It is more effective to intervene when a market is taking shape than when it is stable, or so well established that it is untouchable. This is particularly true here, in so far as the evaluation seems to show that public authorities and players in the audiovisual sector now have tools at their disposal to give prominence to audiovisual creations with flexibility, adaptability and efficiency. These tools pursue an objective that everyone should be able to share: to ensure that European works continue not only to be produced and distributed in cinemas, but also promoted and watched in living rooms via all digital platforms, on all kinds of devices, through both linear and on-demand services.

12) Available at: [www.obs.coe.int/-/more-than-3-000-on-demand-services-in-europe](http://www.obs.coe.int/-/more-than-3-000-on-demand-services-in-europe)

13) Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0324+0+DOC+XML+V0//EN>

14) This historical sequence is described in full by Michel Gyory in his article “Promotion of European works in non-linear services. What is at stakes?” available at: [www.csa.be/documents/2044](http://www.csa.be/documents/2044)

## **Part II**

# **Challenging Principal Assumptions that Underpin the Promotion of European Works in On-demand Services**



# Are the Guards Stationed at the Right Portals?

## The Suitability of Regulations on the Promotion of European Works in Non-linear Audiovisual Media Services

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The broadening of the scope of application of the 1989 “Television Without Frontiers” (TWF) Directive when it was revised for the second time in 2007<sup>1</sup> to include certain video-on-demand (VoD) services was not without consequence for the promotion of European works, an objective that had been pursued from the very beginning:<sup>2</sup> Article 13(1) of the Audiovisual Media Services Directive (AVMSD) now requires on-demand audiovisual media services to promote the production of and access to European works “where practicable and by appropriate means”.

Since the AVMSD was adopted, we have witnessed not only much faster convergence in the media and the information and communication technologies (ICT) sectors, but also, in particular, increased differentiation and market penetration of an extremely wide range of audiovisual content as well as of the distribution platforms used by this content (especially via connected TV).<sup>3</sup> In view of these developments, it is necessary to consider whether the adopted regulatory approach is suitable or, in other words, future-proof.

Provided there is still a political will to at least continue pursuing this general interest objective, we need to consider which aspects should be covered by any review or adaptation of the legal framework. The present article examines this question. It begins by painting a picture of the world of on-demand

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1) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending 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, OJ L 298 of 17 October 1989, p. 23 [in the version of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJ L 202 of 30 July 1997, p. 60], OJ L 332 of 18 December 2007, p. 27 (Audiovisual Media Services Directive, AVMSD). Unless otherwise indicated, quotations from the AVMSD in this article are taken from the version codified by Directive 2010/13/EC 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, OJ L 95 of 15 April 2010, p. 1.

2) See Scheuer A., “Transparency of quotas”, in *10 Years of Transparency in the Audiovisual Sector*, European Audiovisual Observatory, Strasbourg, 2003, pp. 78 et seq.

3) For details, see Scheuer A., “Convergent Devices, Platforms and Services for Audiovisual Media – Challenges Set by Connected TV for the EU Legislative Framework”, in Nikoltchev S. (ed.), *Converged Media – Same Content, Different Laws?*, IRIS plus 2013-3, European Audiovisual Observatory, Strasbourg, 2013, pp. 7-22.

audiovisual media from the EU legislator's perspective, at least as far as can be deduced from the content of the AVMSD. Three potential areas of conflict are then described, each of which could indicate that the regulations will be inadequate in the future.

## I. View of the world of on-demand audiovisual media services when the AVMSD was drafted

The current regulations are fundamentally characterised by the fact that *one* (single) audiovisual media service (AVMS), for which *one* (particular) media service provider is responsible, was chosen as the starting point and point of reference. Recitals 22 *et seq.* of the Directive suggest that various services should not be considered as AVMS. For example, services whose principal purpose is not the distribution of audiovisual content are excluded. The recitals of the Directive also exclude search engines, stand-alone electronic programme guides (EPGs) and electronic versions of newspapers and magazines from the scope of the Directive. An essential characteristic of an on-demand audiovisual media service, such as VoD, is that it is "television-like". The main difference between a linear and a non-linear AVMS is (merely) that users of the latter have greater control over and a wider selection of content than viewers of television content distributed via a broadcasting schedule rather than catalogues. Recital 59 of the Directive states that there will be new challenges in connection with new platforms and new products, particularly for on-demand media. In recital 57, reference is made to television providers' practice of offering their live television news programmes on demand after live transmission.

As well as these general characteristics of on-demand media, which were described by the EU legislator in 2006, when most of the negotiations for the AVMSD took place, the following more specific observations are particularly relevant to the subject of this article. In view of their potential to partially replace television broadcasting, non-linear AVMS should contribute actively to the promotion of cultural diversity. This might, for example, take the form of a minimum share of European works in VoD catalogues and/or the attractive presentation of European works in EPGs (recital 69). This recital adds that the actual consumption of European works offered by on-demand media services is an important factor. The European Commission must take all this, together with the market situation and technological developments, into account when fulfilling its obligation under Article 13(3) AVMSD to report on the application of Article 13(1) of the Directive.

In summary, it is clear that the picture painted in the Directive of the technological and economic environment in which on-demand audiovisual media services are distributed, and of the characteristics of such services, is extremely basic and, therefore, rather rudimentary. Nevertheless, the importance of platforms is mentioned, as well as the possibility of drawing users' attention to certain content and of analysing their viewing habits.

## II. Potential challenges for the chosen regulatory approach

In view of the diversification of on-demand audiovisual media since the AVMSD was adopted and, in particular, of the platforms used to distribute them and of the related marketing models, it is appropriate to consider, with reference to examples, whether the current model of support for European works provided by the services relevant here faces a new set of challenges. In all three of the examples mentioned below, reference is necessarily made to the regulatory concept of the AVMSD, which both defines and limits the material and personal scope of application of the Directive in equal measure. Taking the above description (in section I.) of the "Directive's view" of the world of non-linear AVMS one stage further, we will now consider the European Commission's first report on the application of the provisions concerning the promotion of European works, among other things, in television and on-demand media services.<sup>4</sup> This report, along with the accompanying Commission Staff Working

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4) Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010; Promotion of European works in EU scheduled and on-demand audiovisual media services, COM(2012) 522 final, 24 September 2012.

Document (CSWD)<sup>5</sup> published in 2012, clearly shows that the perception of the services relevant to this article had changed. It was based on a study on the implementation of the provisions on promotion, conducted on the Commission's behalf in accordance with Article 13(3) AVMSD.<sup>6</sup>

## 1. Examine services collectively rather than individually?

A starting point for our initial observations is the question of what constitutes a platform for audiovisual media, communications and/or information services from the user's point of view.<sup>7</sup> For example, a VoD portal is primarily characterised by the access it gives to a large number of different and extremely varied audiovisual services. The Internet homepage of a television provider, for example, enables users to choose from the following services:

- catch-up TV,
- media library,
- programme clips,
- additional material, and
- access to premium content, such as series episodes not yet broadcast on television, or films that have already been broadcast but that are not available via the free media library, etc.

However, when such services are available via a platform, is it still necessary to assess the contribution to the promotion of European works of each individual on-demand media service for which a media service provider is responsible? Or should the whole package of services be taken into consideration and the suitability of the relevant measures be evaluated?

Reasons for such a (different) approach can be found in the CSWD, which firstly refers to the existence of so-called "mixed services" alongside pure forms of catch-up TV and VoD services (section 1.2 CSWD). It also mentions various indicators, some of which seem to be particularly relevant to the subject of this article (see section 1.3 CSWD). According to the CSWD, when assessing whether European works are given appropriate prominence, references to such content placed by the provider on its homepage should be taken into account; measures should be taken to investigate whether there are sections specifically devoted to European productions or whether relevant trailers (advertising spots for a particular European work) are made available. Finally, the CSWD considers that if the provider refers to European works on a user interface that it operates, it is contributing to the promotion of such works.

## 2. Include platform operators and providers of "bundled services"?

One very basic question that needs to be addressed is whether it is still appropriate to hold media service providers alone accountable, particularly because the ways in which they can influence how the content they distribute is presented to users are, at least partly, disappearing. In the convergent world of media and ICT, users can access specific audiovisual content in a whole range of different ways, not all of which are controlled by the media service provider.<sup>8</sup> This is particularly obvious on convergent end devices, especially when a general search engine is used to find a programme and it includes numerous platforms in its search. When a portal offers access to the media libraries of different providers, it is clear that the stipulation that media service providers must present European works prominently and attractively cannot always be achievable.

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5) Commission Staff Working Document, Promotion of European works in EU scheduled and on-demand audiovisual media services, Part I on the application of Article 13 of Directive 2010/13/EU for the period 2009-2010, SWD(2012)269 final, 24 September 2012.

6) Attentional et al., *Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services*, final report of 13 December 2011, available at: [http://ec.europa.eu/avpolicy/info\\_centre/library/studies/index\\_en.htm](http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm)

7) These observations may also apply from the point of view of other stakeholders, such as media supervisory and regulatory authorities.

8) EU telecommunications law includes various measures to ensure that the content and form of television services are not changed by electronic communications network operators and/or electronic communications service providers and associated bodies. However, these do not cover all situations, some of which are problematic.

The AVMSD is not very clear about whether platform operators fall within its scope of application. Recital 26 states that the definition of “media service provider” excludes (only) those who merely transmit programmes for which the editorial responsibility lies with third parties. This raises the question of what constitutes “mere transmission”. In other words, the criterion of “editorial responsibility” comes into play. For on-demand audiovisual media services, the AVMSD defines this as the exercise of effective control over both the selection of programmes and their organisation in a catalogue.<sup>9</sup>

This tricky question leads directly to another aspect which has already been mentioned above (under II.1.) in another context: should specific services (in their integral form) continue to be treated separately, or would it be more appropriate to also include “bundled services”? In the context of “recommendation systems”, which have been used on book- and music-ordering platforms for a long time and are increasingly available for audiovisual content, catalogues are, in some circumstances, much less important. If the “menu” is no longer created by the service provider, but by algorithms that evaluate the user’s viewing habits, it is hard to determine who effectively controls the organisation and provision of content.

This question also gives rise to another observation. The aforementioned CSWD mentions, as indicators of possible tools for the promotion of European works, the use of content descriptions, specific search options, tools that generate recommendations and marketing via other media (services).

### 3. Differentiate between free content and paid services?

In principle, the AVMSD applies equally to all kinds of service, regardless of whether or not users have to pay for them. The only exception where a distinction is made is in the provisions on events of major importance for society (Article 14 AVMSD)<sup>10</sup> and – most relevantly<sup>11</sup> – the protection of minors (see Articles 12 and 27(2) AVMSD).

Might the promotion of European works represent an area in which a (further) distinction could be made between free content and paid services? What might such a distinction look like and what grounds could there be for it? Could it be suggested, for example, that a service that requires users to pay for access could possibly direct its resources better so that investment in the purchase of distribution rights for European works is substantially facilitated? At present, the market does not seem to be developing in such a way that stricter regulation of on-demand paid services could be justified. Another reason not to differentiate between free and paid services could be that it would go against current regulatory tradition. For example, Article 17 AVMSD (previously Article 5 of the TWF Directive) shows that, where the promotion of works of independent producers is concerned, the origin of the relevant programming budget does not matter, as long as at least 10% of it is spent on such works. Recital 69, which explains the obligation for providers of on-demand audiovisual media services to promote European works, enshrined in Article 13 AVMSD, also fails to offer any justification for such differentiation.

## III. General conclusions

One fundamental problem appears, in any case, to remain: what does recital 27 of the Directive actually mean, and how is its scope of application defined?

“In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e. linear transmission.”

9) See, in detail, Nikoltchev S. (ed.), *Editorial Responsibility*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2008.

10) The Directive enables the member states to prohibit the exclusive broadcast of specifically designated events in order that short reports may be broadcast on free-to-air television.

11) With regard to the non-linear distribution and linear broadcast of content that might seriously impair the development of minors, technical means must be used to prevent minors from accessing such content; such measures are traditionally taken mainly in the pay-TV sector.

In the current context, it could be deduced from this that it would be sufficient if a television broadcaster reserved a majority proportion of its relevant transmission time for European works (see Article 16 AVMSD). It could then offer its programmes as on-demand audiovisual media services without having to take any further steps aimed at promoting the production of or access to these works. This would clearly contradict the provisions of recital 69 AVMSD, which particularly emphasise both the potential of on-demand media services to replace television services and the fact that on-demand services should also promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity.

At this moment in time, it may appear premature to think about the further development of the relevant legal framework, firstly bearing in mind the fact that several EU member states have only relatively recently introduced provisions on the promotion of European works in on-demand AVMS. As the descriptions of various national regulations contained in this issue show, the approaches taken to achieve this differ significantly. This, together with the fact that there are hardly any meaningful examples of the successful application of such provisions, does not form much of a basis for reform. Nevertheless, the questions raised as a result of the overall development of the distribution and marketing of audiovisual services, particularly in connection with convergent television, make it clear that, firstly, there is a definite cause, which is not limited to the context of this article, to think about the general regulatory concepts of the AVMSD. Secondly, there are already indications that it might be sensible to consider gradually updating the provisions that we have been discussing here. All under the proviso that the media policy objective of promoting European works is maintained in relation to on-demand audiovisual media services.



# Is the Audience Moving towards Online Consumption?

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## Central question and initial answer

This article starts with an initial answer to the central question raised in the title of the article in order to hint at the final conclusions. It also provides the context for which the answer is formulated, namely the situation in the Netherlands, although this context actually isn't very different from that of the immediately surrounding or other European countries. A lot of observations will be presented, both on the use of broadcast and broadband media. And of course the article closes with a summary and an attempt to give a final answer.

So the central question is: "Is the audience moving towards online consumption?". The initial answers and the observations amount both to a slightly schizophrenic: "No, hardly" and "Yes, indeed".

That's why this initial answer is given at the beginning. An abundance of articles, reports, presentations, with results, findings, conclusions, forecasts, visions, etc., exists on the topic from all over the globe... and a lot of them seem to lead to the same conclusion, namely that everything is going to change, and to change fast. Even the CEOs of major Dutch media companies nowadays are predicting the same development.

But a cautious reaction to that conclusion might be appropriate because the picture might not be that simple. If it were that simple, we would only have to find out in what way the expected change might take place and then every media company could adjust its strategy accordingly, and at the required pace. However, the answer to the question whether or not the audience is moving towards online consumption is much more complex. Broadband will not take over broadcast; instead both will find a way to coexist, in a probably ever-changing way.

This leads to another initial remark: some things are changing, at least for the foreseeable future, but – at the same time – a lot of things remain as they are. At least for the foreseeable future, which lasts longer than one might think.

## I. Context

The Dutch media market is fairly advanced when it comes to online media. Having broadband Internet is pretty common for the vast majority of Dutch households nowadays. And the use of mobile Internet and the uptake of tablets are growing fast.

According to figures supplied by Intomart GfK (Trends in digital media of December 2012), 58% of the Dutch population owns a laptop, 58% owns a smartphone and already 34% owns a tablet. The ownership of the latter is growing rapidly. In addition to those who already own one, some 14% of the population intends to buy a tablet in the months to come.

When it comes to digital TV the Netherlands is moderately advanced: we are neither at the forefront nor lagging very much behind. TV is the biggest medium in the Netherlands. Statistics supplied by KijkOnderzoek (SKO) | CKO (NPO KLO) for the last 13 years show no sign of decline in viewing time. In 2012 the time spent on watching television was 3 hours and 16 minutes per day compared to 2 hours and 40 minutes viewing time in 2002.

Viewing time for younger audiences is at a lower level. We might be facing a first decline in the amount of viewing by the younger age groups. But historically they always have watched less TV than older generations.

Figures from the Media Standard Survey (MSS 2012) show that 76% of households have digital TV. This means a typical household can watch between 40 and 80 channels. However, the 10 major channels in the Netherlands still had a market share of over 80% in 2012 (SKO). So no real fragmentation has occurred over the last 13 years, despite the availability of numerous channels. The reason for that might originate in the analogue era. Cable TV has played a big role in the Netherlands since the early 1980s. Dutch people have therefore been used to having a choice between a lot of channels for over 30 years. Until the 1980s they also had a significant choice of different channels, mainly because of the spill over from public channels of surrounding countries, to which nowadays a lot of (foreign) commercial channels have been added. Therefore, unlike other Western countries (except for Flanders), the Dutch TV market is not a very fragmented market, even though a typical household has access to between 40 and 80 channels.

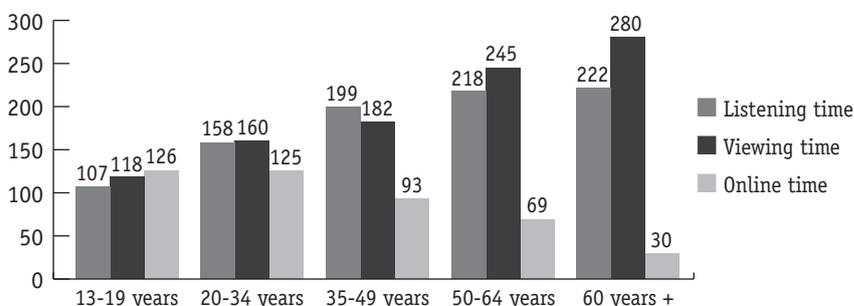
The Netherlands is fairly advanced when it comes to the radio landscape. A reasonably fragmented<sup>1</sup> radio market exists, with a large array of strongly competing both public and commercial channels. Here too the audience has had a lot of choice for a long time already. Partly as a result of this wide range of radio stations, listening time is not declining according to the statistics supplied by the *Nationaal Luister Onderzoek* (NLO 2012). On average a person aged 10 years or older spends 3 hours 5 minutes per day listening to the radio. Again listening figures for a younger audience are at a lower level.

## II. Observations

This section of the article provides various observations on the shift from broadcast towards broadband based on different recent media research.

### 1. Time spent on media by age group

The first observation made is on time spent on the three big audiovisual media. Looking at figures for the various age groups, some clear distinctions are evident between those age groups. Observing the audience of 35 and older, we can conclude that this part of the audience still mainly uses (traditional) radio and TV. For the younger audience, the Internet is just as important as radio and TV. In their mindset the Internet might even be more important.



Source: NLO (radio), SKO (TV), MSS (online)

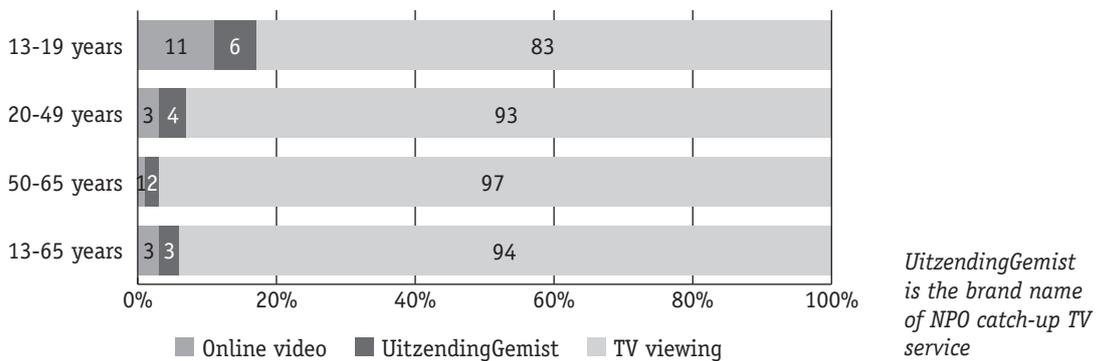
1) Whereas in the TV market 10 channels account for over 80 percent of the audience share, for the radio market this percentage is an accumulation of around 15 channels.

## 2. Impact of non-linear video

The next 2012 figures show the impact of non-linear viewing. If the total viewing time is divided into TV viewing, catch-up viewing and other online viewing, both catch-up and online viewing account for 3% of the total viewing time. That is not a large proportion. Actually the percentage does not differ much from the times when digital had just started. Even during the times of VHS tapes, recorded viewing accounted for a similar proportion of the viewing time. 15 years ago (1997) about 6% of viewing was recorded viewing on VHS.

The younger audience, however, has clearly different viewing habits. The combined figures for catch-up and online video are about three times as high when compared to those of the other age groups. So, again, we see a clear distinction between the older and the younger age groups.

% of total viewing time



Source: SPOT Time Budget Study 2012

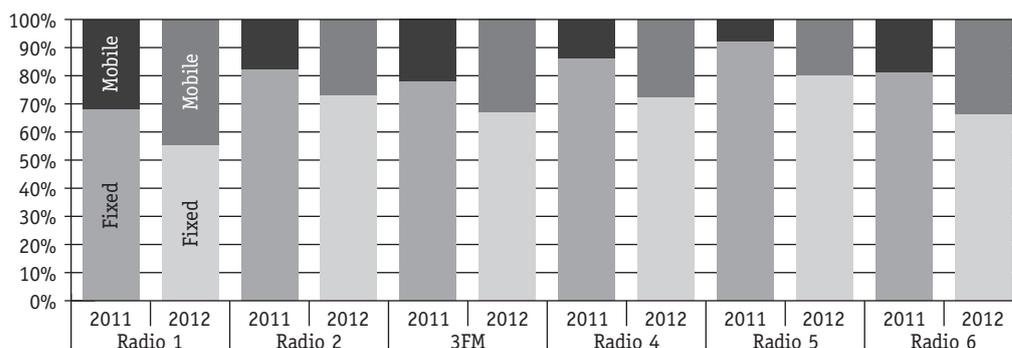
## 3. Audio devices/platforms used

Older generations use radio via FM (car/tuner) and cable (stereo/TV set), the traditional ways of listening in the Netherlands. Of course younger people also use these platforms but additionally they use various other platforms such as IP, so that their sources tend to be much more fragmented. Much more than the older audience they also use PCs, laptops, smartphones, iPods, digital set-top-boxes and tablets.

## 4. Streaming audio fixed v. mobile

IP is becoming more important as a distribution platform for radio. Last year, however, a clear shift occurred within IP listening. For all the radio channels of the Dutch public service media (PSM) the number of requested streams is moving from fixed Internet to mobile Internet (web and apps).

Requested streams radio channels NPO (fixed vs. mobile)



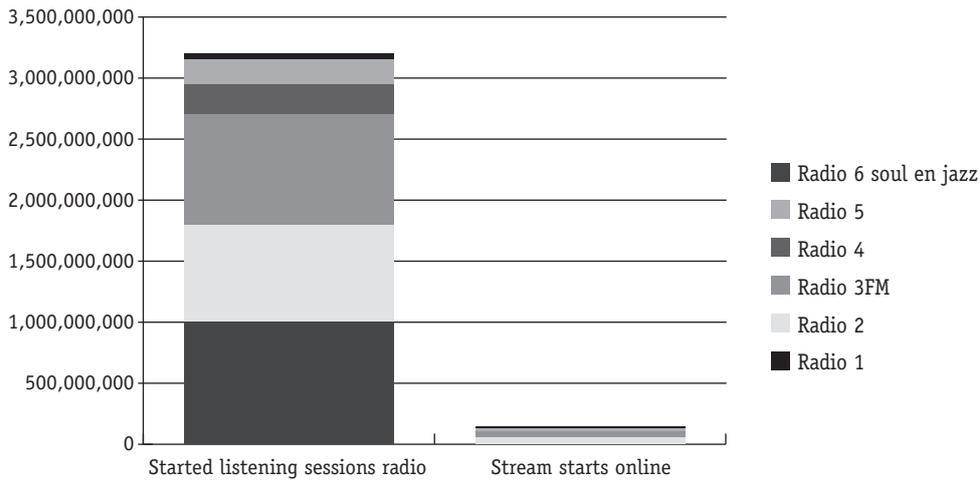
Source: NPO Audience Research Dept. (KLO)

### 5. IP v. traditional (FM/cable)

Although the uptake of online radio is high, these figures must be put into perspective. When compared to traditional (FM/cable) radio, IP listening is still relatively small in size (and biggest for NPO's youngest channel 3FM).

If we compare the number of started listening sessions (mainly FM and cable) from the National Listening Survey to the stream starts measured online, we see the still relatively small position of IP compared to FM and cable.

**Number of started listening sessions vs. stream starts 2012 target group 10+ - entire day**



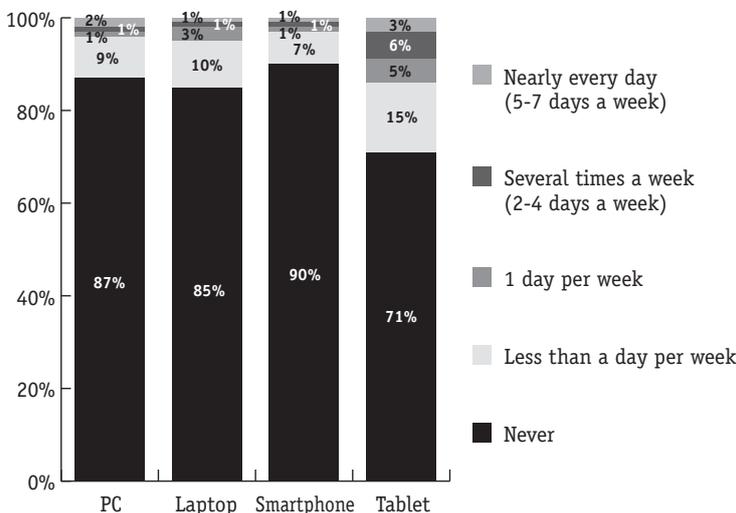
Source: NPO Audience Research Dept. (KLO)

### 6. Frequencies per device

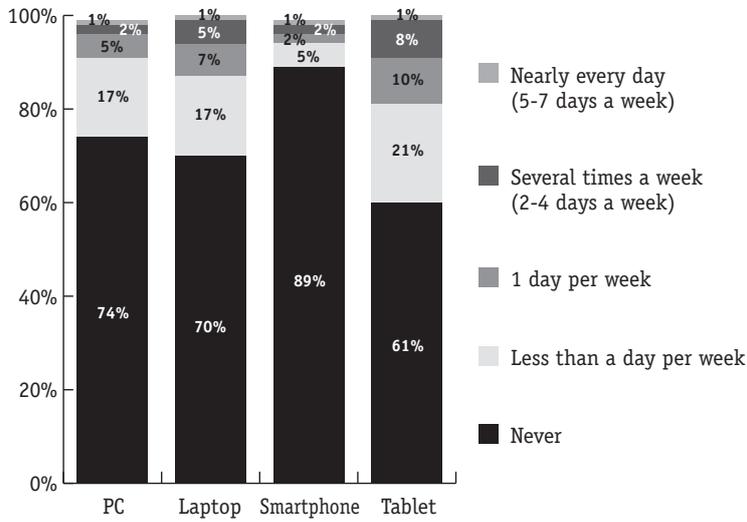
When asked how they watch television on different devices, the vast majority of people respond that they never watch live or catch-up TV on a PC, laptop, smartphone or tablet.

However, the still fairly recent introduction of the tablet already shows some impact for live viewing (first graph). We also observe that catch-up viewing is done mainly at home, on PCs, laptops and tablets, not (yet) on smartphones (second graph). So when it comes to live viewing or catch-up viewing the role of the smartphone still seems to be small.

**Frequency of live viewing per device**



**Frequency of catch up viewing per device**

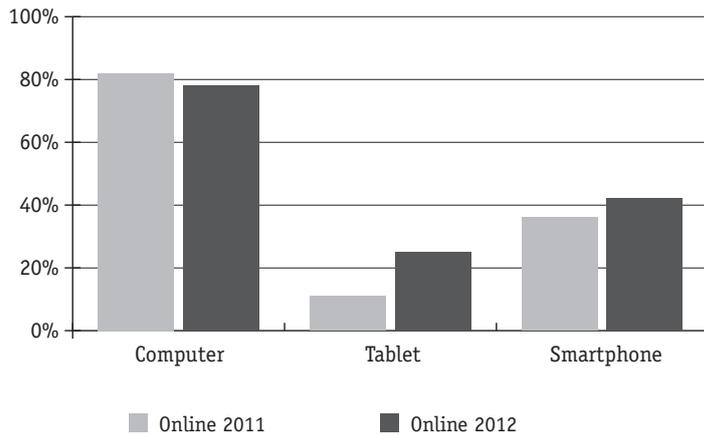


Source: Intomart GfK Trends in digital media | December 2012

**7. Audiovisual material other than on TV**

Smartphones are used for other audiovisual material as well (besides live viewing and catch up TV), and at the same time the importance of the tablet is growing. As a consequence, for the first time, the importance of computers is declining a bit.

**% Dutch people that watch AV material (at one time or another)**

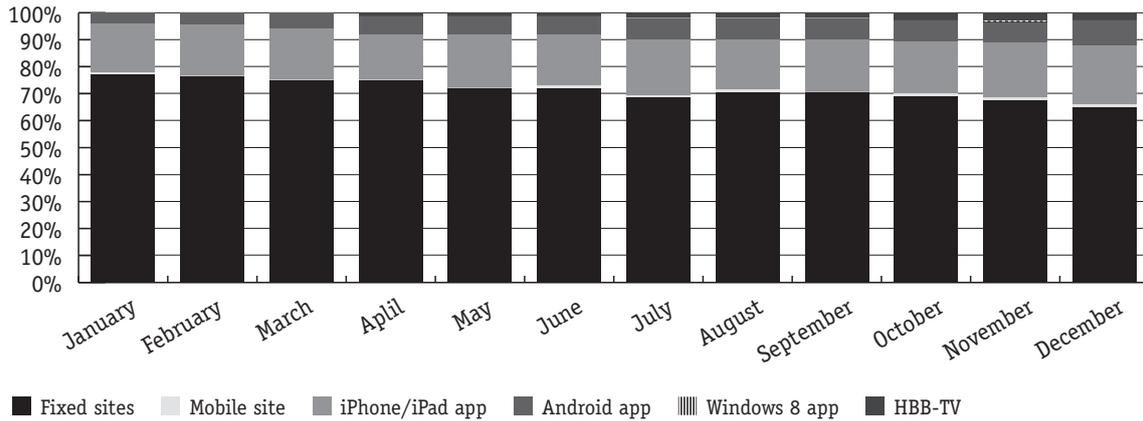


Source: SKO Moving Pictures 2012

### 8. Catch-up TV on different platforms

The statistics on stream starts for NPO’s catch-up service called UitzendingGemist (literally MissedBroadcast) show something similar. Here as well the importance of mobile is growing rapidly, including the growth of the Android platform/devices. But actually HbbTV (connected TV) is growing as well.

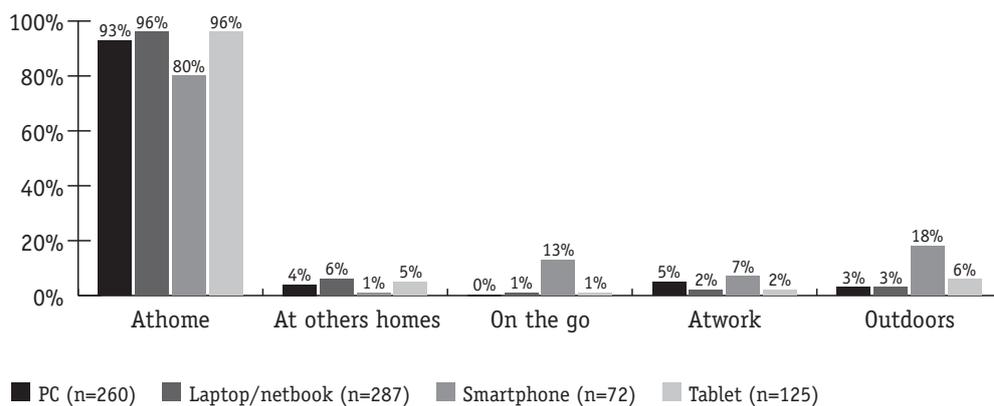
**Number of stream starts UitzendingGemist (Catch Up TV) via fixed sites, iOS app, Android app, Windows 8 app and HbbTV 2012**



Source: comScore Stream Sense and Triple IT

### 9. Places to watch

TV or online video is mainly watched at home. For the relatively few moments when audiovisual material is watched outside the home, for example while traveling by train or outdoors in a park, it is mainly a smartphone that is used for viewing online video (not previously made for TV broadcasting) (as the earlier figures showed).

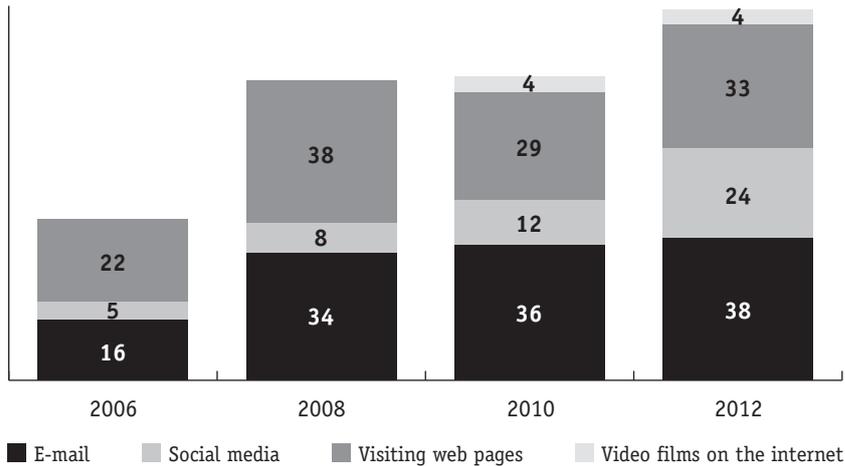


Source: SKO Moving Pictures 2012

## 10. Usage of Internet

This section contains some observations on the Internet and its functions with regard to broadcast and broadband and, hence, mainly on audiovisual content. When comparing the time spent online with the time spent on audio and video it is easy to err because the Internet is only partly audiovisual. To date and despite the easy access via broadband Internet, the majority of Internet use (maybe not in terms of bandwidth used) concerns e-mailing, surfing and social media. The use of social media is growing rapidly. The use of online video (excluding catch-up) is growing as well, but still not very fast when compared to the other functions.

### 20-65 years, minutes per day



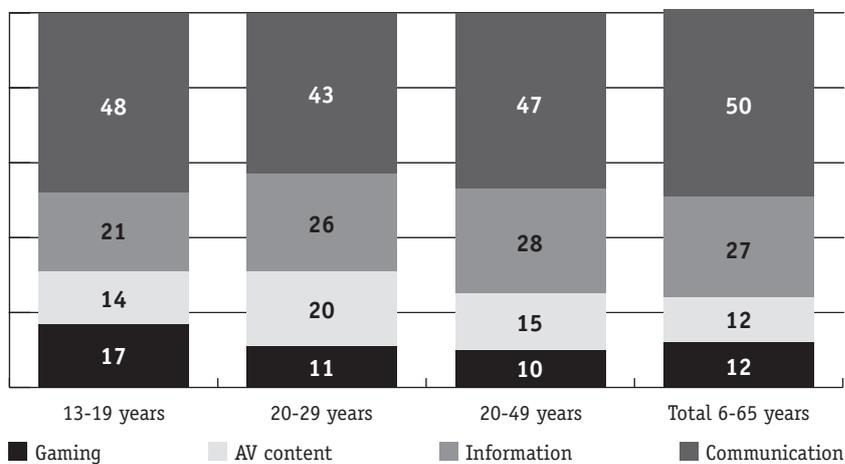
Source: SPOT Time Budget Study 2012

## 11. Social media

Over half of the use of Internet is (interpersonal) communication. About a quarter of the use is related to the search of information. In terms of time spent, the use of audiovisual content competes with that of gaming.

Whereas for the youngest age group gaming is important, audiovisual content is more important for the audience in their twenties.

### % of online



Source: SPOT Time Budget Study 2012

## 12. Use of functions on smartphones and tablets

Figures on daily reach show the position of audiovisual media on mobile Internet. The use of Internet is growing, but as we have seen the Internet isn't necessarily (primarily) an audiovisual medium but rather combines a broad array of functions.

The importance of audiovisual media on smartphones is in some ways still limited. Audiovisual content (TV, video and radio) consumes only some bits of the total pie of the Internet used via smartphones. The same is true for the use of tablets, which are mainly used for surfing, e-mailing, social media, gaming, photos, etc.

NPO does have a reasonably good market position when it comes to apps on smartphones and tablets compared to other audiovisual apps, but this position is much weaker when compared to all apps, including non audiovisual apps.

## 13. Use of second screen

So far this article hasn't mentioned the buzzword of the last two years: second screen. We already see a fair amount of usage of the second screen, but only a small amount is related to TV viewing.

Public service media organisations (just like all broadcasters) have to be critical in their decisions on what role they actively want to play, when it comes to second screen functions and what role should be given to other services/suppliers.

## 14. Qualitative online research regarding young audience

All previous observations were made with regard to "faceless", "anonymous" respondents. In early 2013, the NPO's research department was in the middle of a qualitative online research regarding a young audience, in which this audience was given a direct voice and a face. NPO asked young participants (aged 18-35) in an online research community to upload pictures and quotes of their multitasking media behaviour and this revealed two things: portable, personal, mobile media are present, but at the same time, the big screen remains present as well (although in the background). For the younger audience we obtained the same results.

Some quotes from participants:

- "While I'm working on my website on my laptop, I watch a film cosying up with my darling daughter and my iphone is keeping me up2date on all social media, Bruno Mars is keeping me from falling asleep."
- "Watching TV, checking Internet, polishing nails and checking my voicemail. Is that multitasking or what?"
- "The media centre is already ready so we can watch a series, while checking on our son via an IP camera that we watch via the Samsung Tab 2 (adjacent the TV). I'm checking Facebook on my Samsung Galaxy s2 and my husband is watching a funny film via [www.youtube.nl](http://www.youtube.nl) which I'm watching for a bit as well :)."

## III. Conclusions

All these observations lead to the following conclusions:

- A very large part of the older audience (PSM's main audience) is hardly showing any shift in audience behaviour.
- The younger audience is shifting behaviour (at various rates for the different functions), but not replacing all current behaviour. The younger audience is using the Internet for all sorts of other functionalities next to audiovisual media.
- Concerning platforms we see that whereas the older audience has not even discovered the Internet on a large scale, the younger audience is already shifting from fixed to mobile and from 1-to-1

communication to social media (as if no other world has ever existed before – which for them is true).

- At the same time there is no (serious) decline in the use of linear media, not even for the younger audience. Linear media still have a prominent role in media consumption. The younger audience is adding media behaviour (multitasking) to their menu.
- A certain disclaimer must be added in that the distinction between “younger audience” and “older audience” is a bit artificial at times; older people can be progressive in their media behaviour too, just as younger people can act like older “generations”.

Concerning the central question “Is the audience moving towards online consumption?” one might conclude that this movement, namely a shift towards mobile and to social media, is about the younger audience. But one must keep in mind that also in an online world scarcity (both physical and in mindset) remains an issue.

#### **IV. Final answer**

The initial answer to the central question was twofold: “No, hardly” and “Yes, indeed”. Actually the initial answer hasn’t changed much. And still one could also resort to a black and white answer provided that some nuances be added.

The black and white version of the final answer would be “No, the audience as a whole isn’t moving, they are sticking to traditional audiovisual media”. To add a further dimension it would be formulated as “Yes, the younger audience is, but the older audience isn’t”. And finally to add some more nuance to it, the answer would be “Yes, the younger audience is adding online consumption at different paces to the traditional linear audiovisual consumption”.

But in addition to that, the following question can be raised: “Is adding the same as shifting their consumption?”. Broadband isn’t taking over broadcast; they will find a way to coexist, in a probably ever-changing way. So whereas this article can temporarily conclude with some answers, it holds no final answer. But despite what some people might think, the foreseeable future does: “We do see tendencies, but neither all nor nothing shifts”.



# The Promotion of European Audiovisual Productions in Flanders: Reflecting the Relevant Criteria

Thomas Roukens  
Telenet<sup>1</sup>

## 1. Introduction

Flanders, the northern region of Belgium, has seen an incredible evolution in the distribution of television over the last decade. In 2004 cable networks in Flanders, at that time the major platform to watch television, still only distributed analogue television channels. In neighbouring countries digital distribution had already been launched at the end of the 1990s, while it took until the summer of 2005 for digital television to be introduced in Flanders. The Flemish broadcasting market was clearly lagging behind.

2009 also saw a thoroughly revised Media Decree,<sup>2</sup> primarily inspired by the then recent jurisprudence on jurisdictional issues. This case law clarified which regional government of Belgium was competent for media matters and consequently what media services could be regulated by the *Vlaamse Regulator voor de Media* (Flemish media regulator – VRM).<sup>3</sup> This meant also that as of the adoption of the new Media Decree on-demand/non-linear services (of a public nature<sup>4</sup>) have been regulated in Flanders.

Although Flanders was thus early in regulating non-linear media services this was not immediately combined with criteria or quotas for European audiovisual productions. Because these services were new and required important investments it was considered at the time not opportune to impose any regulation regarding the promotion of European audiovisual productions on these services.<sup>5</sup>

When the 2007 AVMS Directive<sup>6</sup> had to be transposed in 2009, the market had already evolved considerably. Digital television was well established and it was estimated that more than 47% of households in Flanders were watching digital television.<sup>7</sup> An amendment to the Media Decree adopted on 29 July 2009 subsequently introduced a number of criteria for promoting European audiovisual productions in non-linear services in line with the 2007 AVMS Directive.

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1) Thomas Roukens works for Telenet as Regulatory Affairs Manager.

2) *Decreet betreffende de radio-omroep en de televisie van 27 maart 2009* ("Media Decree"), latest amendment published in the Belgian State Gazette on 17 August 2012.

3) Vlaamse Regulator voor de Media, [www.vlaamseregulatormedia.be/nl/home.aspx](http://www.vlaamseregulatormedia.be/nl/home.aspx)

4) Public here means non-confidential communication as opposed to e.g. e-mail communication.

5) *Ontwerp van decreet houdende wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 25 januari 1995, en van sommige andere bepalingen betreffende de radio-omroep en de televisie*, 24 February 2004, p. 8.

6) 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), OJ L 95, 15 April 2010, p. 1-24

7) Digimeter, First report 2009.

Historically, for linear broadcasting services the promotion of European audiovisual productions had already been part of previous versions of the Media Decree and even more stringent rules applied to the Flemish public service broadcaster, VRT.<sup>8</sup> Consistently for many years media policy memoranda issued by the successive media ministers emphasised the importance of European audiovisual productions.<sup>9</sup>

These various rules, measures and market developments resulted by early 2013 in an incredibly strong presence of European works, in particular local productions, on television and non-linear media services in Flanders.<sup>10</sup>

## 2. Legal and policy framework for the promotion of European audiovisual productions in Flanders

### *The Flemish Media Decree*

Articles 154 to 157 of the Media Decree contain the provisions for the promotion of European productions. For linear media services (television), broadcasters should:

- Endeavour to allocate the majority of airtime, excluding news, sports, advertisement, games, teletext, and teleshopping, to European productions (Article 154 paragraph 1);
- Of which an important part should be dedicated to European productions in the Dutch language (Article 154 paragraph 2);
- Endeavour to allocate at least 10% of airtime, excluding news, sports, advertisement, games, teletext, and teleshopping, to independent European productions (Article 155 paragraph 1);
- Of which an important part should be recent productions, meaning less than five years old (Article 155 paragraph 2).

And for non-linear (on-demand) media services, such as VoD, providers should endeavour:

- To promote where practicable and by appropriate means, the creation and access to European productions. Such promotion could include financial contributions or be achieved through a share and/or prominent presence of European productions in the non-linear catalogue (Article 157 paragraph 1);
- The promotion measures should include for a major part Dutch language European productions (Article 157 paragraph 2).

With regard to the above the Flemish Government is entitled to foresee stricter rules, e.g. impose quotas or other promotion measures, but has never done so in concrete terms. However, in his latest Media Policy Memorandum the Flemish Media Minister did suggest to introduce a financial contribution system to be imposed on distribution platforms.<sup>11</sup>

Apart from the language criterion, the Media Decree follows rather closely the relevant 2007 AVMS Directive articles<sup>12</sup> and can be seen as taking a flexible approach.<sup>13</sup> The monitoring obligation<sup>14</sup> on the promotional measures only applies to linear broadcasting and the annual information collected from the broadcasters is only used to supply information to the European Commission and not separately published by the VRM.

8) E.g. VRT Beheersovereenkomst 2007-2011.

9) E.g. Beleidsnota Media 2004-2009.

10) In January 2013 the 20 most viewed television programmes were all European productions, of which 18 were Flemish productions, Centrum voor Informatie over de Media (CIM), [www.cim.be](http://www.cim.be)

11) See below.

12) Articles 16 and 17 for linear services and Article 13 for non-linear services.

13) Although the final report "Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services" of 13 December 2011 ("Report European works"), page 72, describes the Flemish provisions in this context as being "prescriptive" presumably due to the language criterion. Available at: [http://ec.europa.eu/avpolicy/docs/library/studies/art\\_13/final\\_report\\_20111214.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/art_13/final_report_20111214.pdf)

14) Article 156 Media Decree.

*Flemish Media Policy Memorandum*<sup>15</sup>

The Memorandum puts particular focus on Flemish productions and their promotion through subsidies and tax breaks, while referring as well to the introduction of an investment obligation on all television distribution platforms. This suggested investment obligation does not fit within the AVMS Directive framework where a financial contribution system may be set-up for linear and non-linear audiovisual media services but may not be extended to distribution platforms as such. This is probably why this policy suggestion has not materialised yet.

*VRT Convention*<sup>16</sup>

The VRT should at least spend 25% of its production budget on external (independent) productions. Along the same lines, 65% of primetime<sup>17</sup> viewing should be dedicated to Flemish production companies and co-productions. This and the policy objective reveal a clear vision to promote local European productions.

### 3. Overview of offerings on distribution platforms

The Flemish television viewer has over three decades received a broad bouquet of national and foreign European television channels. Flemish, Dutch, French, English, German and Italian public broadcast channels have since the 1970s been part of the cable operators' offers. With the advent of commercial television by 2004 the number of channels was further increased to comprise around 34 channels, of which more than half are non-Belgian channels. Digital television boosted this number further to more than 40 non-Belgian channels out of around 75 channels in the basic television tier,<sup>18</sup> with competing platforms – i.e. IPTV – providing a similar mix of channels. The competition between television distribution platforms has grown considerably since 2005. Today, IPTV in particular is a strong competitor from a content offering and qualitative point of view. As a result cable loses television customers and more than 20% of households in Flanders already have switched to IPTV.

On the non-linear front, a wide variety of broadcast-related content mostly from Belgian – Flemish and French-speaking – channels is available on the different interactive digital platforms next to a broad catalogue containing on-demand films and series. From a European production perspective, broadcast-related non-linear content is local in as much as it parallels broadcasting services. Even in the case of on-demand film catalogues, which are normally dominated by US content in Flanders, three out of the top ten most watched films are locally produced.<sup>19</sup> In addition, the various distribution platforms promote their non-linear catalogue by creating suggestions and recommendations for the viewer.<sup>20</sup>

In terms of popularity over 80% of viewing time for linear channels goes to Flemish broadcasters<sup>21</sup> and for the take-up of broadcast-related viewing a similar pattern can be identified, with around 80% of transactions going to Flemish productions.<sup>22</sup>

15) Media Policy Memorandum 2009-2014. *“Geen enkele aanbieder kan een divers en kwalitatief aanbod opmaken zonder goed audiovisueel materiaal. Er zijn dan ook belangrijke hefboomen nodig voor nieuwe audiovisuele creaties. De Vlaamse Regering heeft in het regeerakkoord in die context een investeringsverplichting ingeschreven voor de distributeurs. Dit komt er op neer dat de distributeurs verplicht zullen worden om een deel van hun inkomsten door te storten aan de audiovisuele sector. Voor alle duidelijkheid: het gaat hier niet over het doorstorten van de auteursrechten, wat nu al wettelijk geregeld is. De modaliteiten hiervan zullen uitgewerkt worden in een besluit van de Vlaamse Regering.”*, pp. 19-20.

16) VRT Beheersovereenkomst 2012-2016.

17) Between 18h and 22h.

18) That is, basic TV subscription.

19) Telenet figures, end 2012.

20) However this is not specifically directed towards the promotion of European productions.

21) CIM, TV audience measurement 2012.

22) Telenet figures, Broadcast related on demand, end 2012.

## 4. Promoting European production looked at from different angles

Although linear distribution platforms are not covered by the abovementioned regulatory measures it is clear that they do play an important role in bringing the content to the viewer. According to the Report "Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services" the inclusion of non-domestic European productions by Flemish broadcasters is considered just above EU average.<sup>23</sup> However, when looking at it from a platform level the high number of non-domestic European channels ensures an even stronger availability of non-domestic European productions to the Flemish viewer. However, as seen earlier, the local productions are by far more watched than non-domestic European productions. One of the reasons why this may be the case could be the impact of the specific Dutch language criterion as described above.

In order to promote European works, at the end of 2012 Telenet voluntarily committed to transferring EUR 30 million to the Flemish audiovisual production sector over a period of four years with the goal of primarily financing local initiatives.<sup>24</sup>

In turn, Flemish broadcasters within the EU are at the forefront of channels that broadcast the highest number of European works.<sup>25</sup> The VRT too, in pursuing the more stringent regime described above, shows a clear positive evolution in respect of the broadcasting of European works.<sup>26</sup> Over the last fifteen years the VRT has basically served as a great stimulus for other Flemish commercial broadcasters to invest in locally produced high quality content and make it attractive for the viewers. This also resulted in a strong decrease of the audiences for the Dutch public broadcaster's channels.

Made possible by a strong vision on brand awareness, similarly to the BBC in the UK, the VRT has been able to lift its audience viewing share from 28% at the end of the 1990s to over 40% at the end of 2012.<sup>27</sup> In the slipstream of this climb it has pushed the Flemish commercial broadcasters and the Flemish independent production companies to flourish since.

## 5. State of play

The Flemish audiovisual market is in rather good shape, the number of hours spent on viewing linear media services is still increasing and in parallel local television production has seen again an increase in output.<sup>28</sup> Not only are distribution platforms competing strongly with each other for every TV household, but in 2011 the competition between local broadcasters also reached its climax when De Vijver Media acquired SBS Belgium.<sup>29</sup> The three main broadcasters in Belgium, VRT, VMMa and SBS – together responsible for more than 80% of viewing time – are now all in the hands of the local investors with a specific focus on local content. Woestijnvis, the production company behind one of the three investors in SBS Belgium, lost its exclusive TV production contract with the VRT and no longer supplies the VRT. As a consequence, it since focuses strongly on developing the new style SBS channels. Similarly, the new SBS channels needed to take a larger share of the television advertisement market in Flanders in order to finance the 2011 acquisition. The method used to compete for advertising was strongly based on creating more local content, since Woestijnvis, one of the most well-known TV production companies in Flanders, is a shareholder in SBS.

The amount of high quality content on television has become so great that television viewers have increased the recording of these programmes on PVRs (Personal Video Recorders),<sup>30</sup> which in turn creates more pressure for quality content on the local commercial broadcasters and local television production companies. While PVR viewing is similar to catch-up TV services<sup>31</sup> in that both enable the

23) Report European works, p. 146.

24) <http://blog.telenet.be/2012/10/telenet-investeert-extra-30-miljoen-euro-in-vlaamse-audiovisuele-producties/>

25) Report European works, p. 134.

26) VRM Toezichtsrapport VRT 2011.

27) VRM mediacontractierapport 2012, p. 150.

28) VRM mediacontractierapport 2012.

29) [www.demorgen.be/dm/nl/996/Economie/article/detail/1253210/2011/04/20/De-Vijver-koopt-VT4-en-Vijftv.dhtml](http://www.demorgen.be/dm/nl/996/Economie/article/detail/1253210/2011/04/20/De-Vijver-koopt-VT4-en-Vijftv.dhtml)

30) [www.demorgen.be/dm/nl/2909/tv/article/detail/1523925/2012/10/26/Uitgesteld-kijken-zorgt-voor-revolutie-op-tv.dhtml](http://www.demorgen.be/dm/nl/2909/tv/article/detail/1523925/2012/10/26/Uitgesteld-kijken-zorgt-voor-revolutie-op-tv.dhtml)

31) [www.schole.fr/television-de-rattrapage/](http://www.schole.fr/television-de-rattrapage/)

skipping of advertising, they differ significantly in as much as in the case of PVR viewing broadcasters lose control of their broadcasts. As a consequence, they can to a lesser extent market such viewing. In contrast, catch-up services are mostly managed and controlled by the broadcasters.

Due to their lack of control over non-linear viewing the local broadcasters introduced a proposal for amending the Media Decree, in order to ensure that not only the broadcast signal but also that all functionalities provided by distribution platforms surrounding the broadcast channels remain under the sole control of the broadcaster. The offering of any functionality should receive prior explicit authorisation from the broadcaster concerned.<sup>32</sup> However, the State Council criticised the proposed amendment of the Media Decree as not balanced and in violation of the free movement of services principle.<sup>33</sup> It is also felt that it would hamper innovation and should be addressed rather at EU level.<sup>34</sup>

At EU level, the European Commission launched a public consultation at the end of April via its Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values.<sup>35</sup> The underlying question of the Green Paper is whether a revision of the AVMS Directive is required to ensure that technical and market evolution in the media sector are properly taken into account within the applicable regulatory framework. Questions about the promotion of European works are also raised, in particular for non-linear service providers. They point towards a financial contribution from non-linear players as a possible option to safeguard the promotion objective for the future.<sup>36</sup> Interested parties had until the end of August 2013 to submit their remarks on the Green Paper. It is expected that interested parties will also raise the “Flemish” proposal detailed above within this consultation.

## 6. Thoughts for the future

Summarising the current situation in Flanders leads to the following observations with regard to the promotion of European audiovisual productions.

From a legal perspective Flanders has enacted all relevant European provisions for the promotion of European audiovisual productions and added an additional Dutch language criterion. For the promotion of both linear and non-linear media services it refers to the concept of “where practicable and by appropriate means” resulting in an encouragement for broadcasters and non-linear service providers to fulfill the stated objectives but without any clear sanction should they fail to do so.

The monitoring of the application of these provisions has been limited, it only covers broadcasting and the VRM does not currently publish the results of the annual monitoring exercise.<sup>37</sup>

Next to this, over the years the ministers responsible for media matters have consistently highlighted the importance of European audiovisual productions, with again a focus on local audiovisual productions. The local production requirements for the VRT also remained high over the last 20 years. The VRT has clearly served as engine for scheduling European works. Local productions have as a consequence become very popular, in linear and non-linear media services. Broadcasting and making available (local) European productions has thus become crucial in obtaining and sustaining a valuable viewing audience for Flemish broadcasters and local distribution platforms.

This has created a very distinct Flemish media market, supported by distribution platform competition and the strong direct and indirect investment in local productions. European productions,

32) [www.apache.be/2013/04/25/het-geld-van-televisiekijkend-vlaanderen/](http://www.apache.be/2013/04/25/het-geld-van-televisiekijkend-vlaanderen/)

33) <http://docs.vlaamsparlement.be/docs/stukken/2011-2012/g1703-2.pdf>

34) In the meantime the Decree has been adopted in the Flemish Parliament on 19 July 2013 and published in the Belgian State Gazette on 13 August 2013.

35) <http://ec.europa.eu/digital-agenda/public-consultations-media-issues#green-paper---preparing-for-a-fully-converged-audi>

36) “(4) Do the current AVMSD requirements provide the best way to promote the creation, distribution, availability and market appeal of European works? and (5) How will convergence and changing consumer behavior influence the current system of content financing? How are different actors in the new value chain contributing to financing?”

37) Flanders is not the only entity not reporting on the application of Article 13 non-linear services. Report from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010 Promotion of European works in EU scheduled and on-demand audiovisual media services {SWD(2012) 269 final}, p. 6.

domestic and non-domestic, are very widely available to the Flemish viewer thanks to a combination of Flemish broadcasters' investments and the availability of many European channels from other member states.<sup>38</sup>

The local broadcasters and distribution platforms are also heavily marketing (local) European productions. Government subsidies have become more widely available for local European productions<sup>39</sup> also benefiting from voluntary distribution platform contributions. In view of this, the investment obligation as suggested in the government Media Policy Memorandum 2009-2014 might not be necessary (anymore) and even fall outside of the current regulatory framework.

Would however other legal measures, such as the prior consent for every TV functionality, be useful to further strengthen the availability of European works? Most probably not, because it could quickly have a negative effect on innovation and the free movement of services, in particular if such measure were only limited to Flanders and were to freeze the necessary commercial deals between broadcasters and distribution platforms.

Could further fine-tuning the existing rules be an option then for Flanders? Not clear yet. What could be ensured, however, is the periodical publication of the results on the fulfillment of the European works promotion provisions, including for non-linear services. This will allow for a better analysis and assessment in preparation of future policy and regulatory intervention.

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38) Also highlighted in footnote 270 of the Report European works.

39) [www.vaf.be/mediafonds/](http://www.vaf.be/mediafonds/)

# The Implementation of Article 13 of the AVMS Directive in the Context of the European Distribution of On-demand Audiovisual Services and “Ease of Doing Business Policies”

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Much has already been written about the implementation of the AVMS Directive in relation to on-demand audiovisual services, particularly concerning the legal interpretation of the concepts laid down in the Directive. In the present article, the implementation of Article 13 with regard to the promotion of European works by on-demand audiovisual services will be examined not from the regulatory point of view, but by comparing the methods being used to implement it with the “reality of the market”, a concept that is itself rather vague. Before we can analyse the “reality of the market”, however, we need to agree on a standard definition of the on-demand audiovisual services market, or more probably markets, in so far as economic analysis based on competition law methods would almost certainly show that there are several such markets rather than just one.

In this article, we will study how the “ease of doing business policies” adopted by some member states, while respecting the letter of the directive, which is transposed in a minimalist way, are affecting the structure of the entire European market. Since the 1989 “Television Without Frontiers” Directive, European regulation of audiovisual services has been based on the “country of origin” principle, i.e. a service based in a member state that has correctly transposed the directive may be distributed in other countries without any additional legal restriction. In other words, a state may not oppose the distribution in its territory of a service authorised in another member state. Article 3 of the AVMS Directive maintained this principle, while including in paragraph 4 a number of possible exemptions that do not, however, concern the promotion of European works.

## “Ease of doing business policies” in the audiovisual services field

The notion of “ease of doing business policies” was introduced by the World Bank, which drew up a global comparative index measuring the efficiency of laws, regulations and institutions aimed at facilitating domestic or foreign investments.<sup>1</sup>

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1) “The *Doing Business* project measures the efficiency and strength of laws, regulations and institutions that are relevant to domestic small and medium-sized companies throughout their life cycle. By gathering and analyzing comprehensive quantitative data to compare business regulation environments across economies and over time, *Doing Business* encourages countries to promote more efficient regulation; offers measurable benchmarks for reform; and serves as a resource for academics, policymakers, journalists, private-sector researchers, business executives and others interested in the business climate of each country”, see the website created by the World Bank and IFC: [www.doingbusiness.org](http://www.doingbusiness.org)

The measurement criteria proposed in the World Bank's index cover all economic activities. We propose to transpose the concept of "ease of doing business policies" to the provision of audiovisual services. Such policies in this field may include, for example, a national policy that sets out a less stringent regulatory framework in one or more of the following areas:

- level of content regulation;
- level of obligation to promote European works;
- level of regulation of commercial communications;
- level of protection of minors;
- level of protection of intellectual property rights;
- level of monitoring.

Clearly, in some cases, there may be no regulatory framework at all in one or more of these areas. Similarly, these specific measures may be coupled with other types of easing measures, such as:

- fiscal policies ("tax haven", "regulatory haven" or "judicial haven");
- simplification of company registration and accounting procedures;
- creation of favourable communication technology infrastructures.

We believe it is an economic advantage for providers of on-demand audiovisual services if they are established in a country that has transposed Article 13 of the Directive in a minimalist way.

## Pan-European strategies for video-on-demand services

Although easing policies have already been implemented by some member states in the television sector, since the main television channels in most countries are based in the country to which they broadcast, these policies have almost always concerned special-interest channels, which remain relatively marginal in terms of viewing figures. The situation is somewhat different with regard to the development of video-on-demand (VoD) services,<sup>2</sup> a field in which some of the main services are established outside the countries which they target. According to the figures in the MAVISE database produced by the European Audiovisual Observatory,<sup>3</sup> in April 2013, 52% of VoD services were based outside the country of reception.

Most VoD services are geo-localised, either because of the national dimension of distribution platforms in the case of VoD services provided by cable, satellite, IPTV or DTT operators, or by systems that identify IP addresses or bank card numbers where online services are concerned. This geo-localisation does not conflict with major operators' strategies to roll out their services across Europe, or even beyond.

An analysis of the main operators' European strategies demonstrates the existence of various approaches to the fragmentation of the European market:

- *national localisation model*: a number of operators establish their services in the country of reception. This strategy is adopted by television groups present in several countries, but whose television services are localised. One example is the CME group, which provides various VoD services in several central and east European countries under the same name (Voyo), but through the group's national subsidiary in each country. The services provided by cable (Liberty Global), satellite (Sky) and IPTV operators (Deutsche Telekom, Orange, Telefonica, etc.) also follow this model;
- *centralisation in one country, with different language or national versions of the same brand*. This model is particularly suited to online VoD services (see below);

2) Video-on-demand services constitute a particular category of on-demand audiovisual services. Unlike catch-up TV services, whose catalogues are structured in a similar way to the programme schedules of television channels and are generally either free or provided as part of a subscription, VoD services offer catalogues of films or other audiovisual programmes that may not have previously been broadcast on television.

3) <http://mavise.obs.coe.int>

- *a combination of the two above models*: this is the case, for example, with the Lovefilm service (Amazon group), which is partly centralised (for services aimed at the United Kingdom and the Nordic countries, which are operated from London) and partly localised (for the service aimed at Germany).

## Four European Union countries as preferred bases for VoD services

The model based on centralisation with different national versions is usually adopted by online VoD service operators with a European strategy. Four European countries are particularly favoured by these international operators: Luxembourg, the United Kingdom, the Czech Republic and Sweden.

Luxembourg has adopted a policy aimed at attracting online electronic services, particularly in the fields of music, video and online gaming, which is promoted by the public body "Luxembourg for business".<sup>4</sup>

The main VoD services based in Luxembourg are:

- iTunes Stores, managed by iTunes SARL: 112 stores aimed at the same number of territories in Europe, North Africa, the Middle East and Asia (except Japan). Each has its own music catalogue. In March 2013, 75 of them also had a film catalogue and three (in Germany, France and the United Kingdom) offered TV programme catalogues and access to studio and network catalogues. In 2011, iTunes SARL generated turnover of EUR 1.5 billion, which unfortunately cannot be broken down by territory or product type;<sup>5</sup>
- six subscription video-on-demand (SVoD) services run by Netflix SARL, aimed at the United Kingdom, Sweden, Denmark, Norway, Finland and, since September 2013, the Netherlands;
- the Xbox Live Services platforms, operated by Microsoft Luxembourg SARL and serving 20 European countries, 13 of which can access different VoD catalogues provided by American studios and some of the major European operators. It should be noted that the Luxembourg authorities do not consider Xbox Live Services as on-demand services, but as platforms for the distribution of such services. No information is provided about the country in which the services distributed via these platforms are based.

The United Kingdom has been a popular base for television channels broadcast in more than one country since the mid-1980s. This is partly due to its extremely conciliatory monitoring of obligations regarding the distribution of European works. However, since it has been unable to attract the iTunes, Xbox and Netflix platforms, the UK finds itself in a novel situation in which the main services targeting its national market are based abroad. The only Europe-targeted VoD services established in the

4) See the page devoted to these services on the "Luxembourg for business" website: <http://ict.investinluxembourg.lu/ict/music-video-and-games-platforms> (viewed on 25 September 2013). The reasons given for establishing electronic music, video and online gaming platforms in Luxembourg are: low latency hub Europe, Luxembourg commercial Internet exchange, Data Center Europe, central location, incubators, business-friendly legal framework, fiscal considerations, and top legal, financial and technical skills. The arguments listed for the business-friendly legal framework include the fact that "Luxembourg regulation is generally based on the principles of open markets, country of origin regulation and free circulation of services". Luxembourg's fiscal policy as a means of attracting foreign investment merits more detailed analysis than is provided in this article. An article in the *New York Times* looked at how Apple was using Luxembourg's low-tax status as part of a more general strategy for minimising its tax bill: Duhhig C. and Kocienewski D., "How Apple Sidesteps Billions in Taxes", *New York Times*, 28 April 2012, available at:

[www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html](http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html)

This article provoked an official response from Schmit G., Executive Director, Luxembourg Trade and Investment Office San Francisco, "iTunes in Luxembourg", *New York Times*, 7 May 2012, available at:

[www.nytimes.com/2012/05/08/opinion/itunes-in-luxembourg.html?partner=rssnyt&emc=rss&\\_r=0](http://www.nytimes.com/2012/05/08/opinion/itunes-in-luxembourg.html?partner=rssnyt&emc=rss&_r=0)

5) According to Ernst and Young's audit report, published in the iTunes SARL annual report, the company does not disclose the breakdown of its turnover by activity and geographical market under the terms of Article 65(1)(8) of the Luxembourg Law of 19 December 2002 concerning the register of commerce and companies as well as bookkeeping and annual accounts of companies and amending certain other legal provisions. According to this article, the annex to company accounts must include "the breakdown of net turnover in the sense of Article 48 by category of activities, and by geographical market, in so far as, from the point of view of the organisation of the sale of products and provision of services corresponding to the company's ordinary activities, there are significant differences between these categories and markets". It is clear that, for iTunes SARL, the sale of music in the People's Republic of China, e-books in Cape Verde, apps in Slovakia and films in the United Kingdom do not constitute significantly different market categories.

United Kingdom are Sony Entertainment Network (nine language versions provided by Sony Network Entertainment Europe Ltd), Vevo (four language versions provided by Vevo UK Ltd, a joint subsidiary of Sony and Vivendi) and the four Viaplay services of Viasat Broadcasting Ltd which, like Viasat's Pay-TV services, are aimed at the Nordic countries.

Sweden has continued to play the same role as a base for VoD services as it has for various television platforms. The Albert Bonnier group has established the four versions of the Cmore service and the four versions of SF Anytime in the country, which is also the home of the four VoD services of specialist retail group CDON.

Finally, the Czech Republic houses nine language versions of HBO OnDemand and the ten language versions of HBO GO, which target central and east European countries and the Netherlands. The Czech Republic seems to have been chosen as the base for these audiovisual services for fiscal reasons.<sup>6</sup>

## International services established in Switzerland and the United States

Two non-EU countries that enable different VoD service operators to benefit from a less restrictive legal framework are Switzerland and the United States.

As Switzerland is not a member of the European Union, it was not required to transpose the AVMS Directive, in particular the provisions of Article 13. In order to participate in the EU's MEDIA Programme (2007-2013), Switzerland transposed, not without difficulty, the provisions of the "Television Without Frontiers" Directive. Switzerland had been expecting to develop its national regulations governing on-demand services in the light of the Council of Europe's planned revision of the European Convention on Transfrontier Television, which was blocked by the European Commission in October 2009.<sup>7</sup> New talks between Switzerland and the European Union are anticipated with a view to the country's participation in the new Creative Europe programme, proposed by the EU as a follow-up to the MEDIA Programme. This is expected to require Switzerland to transpose some of the provisions of the AVMS Directive, which will probably include Article 13.

Although it is difficult to prove that it is the result of the country's more relaxed legal framework, it can be noted that three companies have chosen Switzerland as the home for their European VoD services:

- since 2007, Viewster AG has offered online VoD services in ten different languages, accessible in 18 European countries. The service is also available in app form for tablets and Smart TVs. With some of its content available free of charge, it achieved a breakthrough in the Anglo-Saxon countries in 2013;<sup>8</sup>
- Acetrax AG was founded in 2006, offering online pay-VoD in four different language versions, accessible in nine European countries. The company had signed agreements with the main American studios and the leading manufacturers of Smart TVs, computers and tablets. In June 2012, the service claimed to be accessible in 282 million homes in 48 countries. Bought by BSkyB in June 2012, the service was notified to the British self-regulatory body ATVOD in March 2013.<sup>9</sup> It was closed down on 21 June 2013 and integrated into the SkyGo and Now TV services.<sup>10</sup> There

6) Regarding the advantages of the Czech Republic in terms of investment, see in particular KPMG, *Investment in the Czech Republic*, February 2013, available at: [www.kpmg.com/CZ/cs/IssuesAndInsights/ArticlesPublications/Factsheets/Documents/KPMG-Investment-in-the-Czech-Republic-2013.pdf](http://www.kpmg.com/CZ/cs/IssuesAndInsights/ArticlesPublications/Factsheets/Documents/KPMG-Investment-in-the-Czech-Republic-2013.pdf)

7) Zeller F. and Ramsauer M., "*Nouvelles règles pour les services audiovisuels à la demande : situation bloquée*", OFCOM Infomailing no. 21, 25 May 2010, available at: [www.bakom.admin.ch/dokumentation/Newsletter/01315/03452/03456/index.html?lang=fr](http://www.bakom.admin.ch/dokumentation/Newsletter/01315/03452/03456/index.html?lang=fr)

8) "Viewster breaks into top rankings in the US and UK", Viewster press release, 22 May 2013, available at: [www.corp.viewster.com/news/press/comscore.aspx](http://www.corp.viewster.com/news/press/comscore.aspx). In February 2013, Viewster Media appeared for the first time in ComScore's Video Metrix Top 50 online video sites in the United States and the UK's Top 20 with 8.3 million and 3.7 million unique visitors respectively. According to internal data, the total number of unique visitors worldwide was 29 million.

9) ATVOD Newsletter, June 2013, available at: [www.atvod.co.uk/uploads/files/Newsletter\\_21\\_-\\_June\\_2013.pdf](http://www.atvod.co.uk/uploads/files/Newsletter_21_-_June_2013.pdf)

10) Briel R., "Sky closing down Acetrax Movies", *Broadband TV News*, 28 May 2013, available at: [www.broadbandtvnews.com/2013/05/28/sky-closing-down-acetrax-movies](http://www.broadbandtvnews.com/2013/05/28/sky-closing-down-acetrax-movies)

is little data available about Acetrax's success, but according to Kantarmedia Worldpanel,<sup>11</sup> the service represented 3% of the volume of online rentals in the United Kingdom in 2012;

- the company Transmedia Communication S.A. runs the online music VoD service i-Concert in three languages (French, Italian and English). This service is available online and as an app on certain tablets and Smart TVs. It is also carried by IPTV operators (in France and Latvia in particular).

The United States is the second non-EU country in which many VoD services are established. More than 180 such services targeting one or more European Union member states were based there in September 2013.<sup>12</sup> These particularly include:

- the VoD services of the Google group: Google Play Movies (produced by Google Inc. and accessible in the main European countries<sup>13</sup>) and YouTube Movies (produced by YouTube LLC and accessible in Germany, France and the United Kingdom);
- MUBI services (in English, French, German and Turkish);
- the catalogues of the studios and various networks distributed by the Luxembourg-based XboX platform of Microsoft Luxembourg SARL;<sup>14</sup>
- various subscription VoD services accessible since May 2013 via the YouTube platform (the fact that the subscription price appears in euros demonstrates that they are aimed at the European Union member states).

The establishment of these different services in the United States places them, in principle, outside European jurisdiction and, in particular, exempts them from Article 13. Most of them (except those of MUBI, a service specialising in independent films) are almost entirely composed of American titles. According to the European Audiovisual Observatory's MAVISE database, 32% of VoD services available in the European Union in April 2013 were based in the United States.

## The importance of Luxembourg regulation

If we disregard services based in Switzerland or the United States, the leading online VoD services in Europe (iTunes for sales and Netflix for subscription VoD<sup>15</sup>) are established in Luxembourg, where regulation<sup>16</sup> is therefore extremely important.

It is interesting to note that, according to the Commission's first report on the implementation of Articles 13, 16 and 17 of the AVMS Directive, published in 2012, no on-demand audiovisual media services were registered in Luxembourg in 2009. Nevertheless, film catalogues were available in ten iTunes Stores in December 2008 and Screen Digest considered iTunes as the leader of the online VoD market in Europe by 2008.<sup>17</sup> It is true that Article 13 of the AVMS Directive was not transposed

11) Mentioned in the *BVA Yearbook 2013*.

12) This figure excludes the numerous UGC services based in the United States (such as YouTube, Vimeo, etc.); the "branded channels" of numerous American operators, accessible via the YouTube platform; sports event services, such as those of the National League of Hockey, provided in various European languages; and the numerous adult services, which are usually a mixture of paid content and UGC and account for around 50% of online video audience figures in the main European markets.

13) According to Kantar Worldpanel (mentioned in the *BVA Yearbook 2013*), Google Play Store represented 7.5% of the United Kingdom online VoD market (measured in terms of volume of transactions) in 2012.

14) The companies providing these catalogues lack transparency. We presume that these services are managed directly by the studios' parent companies rather than one of their European subsidiaries. According to Kantar Worldpanel, all the XboX Live Marketplace services represented 4.9% of the UK online VoD market in terms of volume in 2012.

15) On account of the operators' lack of transparency, we do not have any reliable data on market shares in different countries. The information available for the United Kingdom (Kantar Worldpanel), France (GfK/NPA and CNC) and Germany (GfK) is obtained from declaration-based panels rather than precise transaction data. For example, according to Kantar Worldpanel, iTunes cornered the lion's share of the British online VoD sales market in 2012, with 81.9% in terms of value and 74.9% in terms of volume. Even though it did not enter the British market until March 2012, Netflix already represented 42% of the subscription VoD market in 2012. The launch of Netflix in the Nordic countries in October 2012 boosted the subscription VoD market in these countries, but resulted in the closure of the Lovefilm services. See "Netflix Effect Hits Nordic Countries", *eMarketer*, 26 August 2013, available at: [www.emarketer.com/Article/Netflix-Effect-Hits-Nordic-Countries/1010160](http://www.emarketer.com/Article/Netflix-Effect-Hits-Nordic-Countries/1010160).

16) Editor's note: see also Jenny Metzdorf's article in this publication.

17) "iTunes drives online movie sales", *Screen Digest*, London, July 2008.

into Luxembourg law until December 2010.<sup>18</sup> In September 2011, the European Commission asked Luxembourg for additional information on its implementation of the AVMS Directive.<sup>19</sup>

On-demand audiovisual media services based in Luxembourg are registered by the state ministry's *Service des Médias et des Communications* (Media and Communications Service – SMC).<sup>20</sup> iTunes and Netflix are mentioned, but without any details of the various national or language versions of their services, giving the impression that these different versions, even though their respective catalogues vary, constitute one and the same service.

Monitoring of respect for the rules on the promotion of European works is the responsibility of the *Conseil national des programmes* (National Programme Council – CNP). The CNP's ability to fulfil its remit was debated by the Luxembourg Parliament in May 2012<sup>21</sup> and again after the Ministry of Communication published plans to create a regulatory body (ALIA) on 15 October 2012.<sup>22</sup> Under the current system, governed by the amended Law of 27 July 1991 on electronic media, three different bodies carry out monitoring:

- the state ministry's *Service des Médias et des Communications* (Media and Communications Service – SMC) monitors the application of the rules on advertising on television;
- the *Conseil national des programmes* (National Programme Council – CNP) monitors the content of television programmes;
- the *Commission indépendante de la radiodiffusion* (Independent Broadcasting Commission – CIR) monitors radio.

In future, the powers that are currently distributed among these three bodies will be centralised under a single, independent public authority known as the *Autorité luxembourgeoise indépendante de l'audiovisuel* (Luxembourg independent audiovisual authority – ALIA). According to the draft law, the ALIA will particularly be required “to encourage on-demand audiovisual media service providers under its jurisdiction to ensure that the on-demand services that they offer promote, where possible and by appropriate means, the production of and access to European works”.

On 25 February 2013, the National Programme Council published an opinion on the creation of this new authority, recognising that the provisions regarding European programming are transposed at a minimum level<sup>23</sup> and stressing the practical difficulties of its monitoring activities caused by a lack of staff. The law creating the new authority was passed on 27 August 2013 and took effect at the

18) Grand-Ducal Regulation of 17 December 2010 amending the Grand-Ducal Regulation of 5 April 2001 laying down the applicable rules relating to the content of European works and works of independent producers of television programmes presumed to be under Luxembourg regulation in conformity with the European “Television Without Frontiers” Directive, available at: [www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf#page=15](http://www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf#page=15)

Article 7 of this Regulation stipulates that: “After Article 5 of the aforementioned Grand-Ducal Regulation of 5 April 2001, a new Article 5bis shall be inserted as follows: Art. 5bis. Promotion of European works in audiovisual media services.

(1) Providers of on-demand audiovisual media services shall promote, where possible and by appropriate means, the production of and access to European works.

(2) Providers of on-demand audiovisual media services shall present to the Media and Communications Department, by 30 September 2011, and subsequently every four years, a report on the implementation of paragraph (1).”

19) “The Commission is asking eight member states, including Luxembourg, for information on the implementation of the Audiovisual Media Services Directive”, *Europaforum.lu*, 1 September 2011, available at: [www.europaforum.public.lu/fr/actualites/2011/09/comm-directive-sma/](http://www.europaforum.public.lu/fr/actualites/2011/09/comm-directive-sma/)

20) Media and communication portal, On-demand audiovisual media services: [www.mediacom.public.lu/medias/television/concessions\\_programmes/VOD/index.html](http://www.mediacom.public.lu/medias/television/concessions_programmes/VOD/index.html). (last updated on 5 September 2013).

21) “Le Luxembourg paradis audiovisuel”, *Le Quotidien*, 15 May 2012, available at: [www.lequotidien.lu/politique-et-societe/34651.html](http://www.lequotidien.lu/politique-et-societe/34651.html)

22) Presentation of the preliminary draft law on the creation of the new *Autorité luxembourgeoise indépendante de l'audiovisuel* (Luxembourg independent audiovisual authority – ALIA), news article on the Luxembourg Government's website, 15 October 2012, available at: [www.gouvernement.lu/salle\\_presse/actualite/2012/10-octobre/15-biltgen/](http://www.gouvernement.lu/salle_presse/actualite/2012/10-octobre/15-biltgen/)

23) “The same applies to the quotas concerning European productions: the Commission expects the regulators to strengthen the promotion of the production of European works among operators.

Although the government, as has long been its custom, complies with the requirements of the AVMS Directive by limiting itself to the lowest common denominator, it should be noted that many European countries go further in their respective provisions.” “*L'ALIA: l'avis du CNP*”, 25 February 2013, available at: <http://cnpl.lu/fr/2013/02/lalia-lavis-du-cnp/#more-3416>

beginning of December 2013.<sup>24</sup> It remains to be seen whether this new body will be given sufficient means to monitor the implementation of Article 13 by the services under its jurisdiction.

## Conclusions

A European Union member state's implementation of "ease of doing business policies" probably does not, in itself, infringe the rules of the internal market. However, it must be noted that the policy of minimum regulation with regard to obligations to promote European works, fiscal matters or the transparency of accounts relating to the commercial activities of audiovisual services is likely to distort competition, to the detriment of more tightly regulated service providers. Logically, the presence of less regulated foreign competitors (from other European Union countries or elsewhere) in national markets should give such providers a good reason to ask their national regulators to relax their requirements. The practical implementation of objectives linked to the promotion of European works should therefore prove even more difficult for on-demand services than it was for television channels.

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24) Law of 27 August 2013 on the creation of the *Autorité luxembourgeoise indépendante de l'audiovisuel* (Luxembourg independent audiovisual authority – ALIA), Official Journal (Mémorial), 9 September 2013, available at: [www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServingServletImpl/?path=/export/exped/sexpdata/Mag/150/288/124897.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServingServletImpl/?path=/export/exped/sexpdata/Mag/150/288/124897.pdf)



# The Luxembourg Legal Framework: Its Regulatory Model and Culture

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## Introduction

The Luxembourg market for audiovisual media services is peculiar not least due to its geographical, social and demographic situation. Located in the heart of Europe, the country whose name derives from a castle called *Lucilinburhuc*, which literally translates to “little castle”, has traditionally been open towards incomers, a fact which is reflected by a multicultural population and the use of three official languages. These ingredients, among others, have shaped the audiovisual market which manifests diversity of content disseminated in part from neighbouring countries.<sup>2</sup> With a major European television broadcaster, the RTL group, and the globally leading provider of satellite services, SES, being established in Luxembourg, the country has emerged as a media hub. This development has been reinforced by international providers of on-demand services like Apple or Netflix having set up their business in Luxembourg to serve the European market. The presence of these worldwide dominating service providers in Luxembourg raises several questions: what economic implications does the location of these companies in Luxembourg have for other European service providers and nascent business models; what are the effects on cross-border service provision; how to ensure compliance of these providers with European Union law, especially the promotion of the production and distribution of European works as foreseen by Article 13 of the Audiovisual Media Services Directive (AVMSD). This contribution thus sheds some light on the general regulatory framework<sup>3</sup> for audiovisual media services in Luxembourg and more specifically on the transposition of Article 13 AVMSD. It thereby aims at setting policy choices of the Luxembourg Government into context.

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2) See on the regulation of market power in the audiovisual media services market in Luxembourg, Mark Cole/Jenny Metzdorf, country report on Luxembourg, in: *Converged Markets – Converged Power? Regulation and Case Law*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2012, pp. 123-131.

3) See also Mark Cole as country reporter for Luxembourg for the INDIREG Study (Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive), available at: [www.indireg.eu/wp-content/uploads/Annex\\_II-\\_CountryTables\\_Luxembourg.pdf](http://www.indireg.eu/wp-content/uploads/Annex_II-_CountryTables_Luxembourg.pdf)

## I. The regulatory framework for the media: legislation and actors

The cornerstone of the Luxembourg legal framework for the media, the Law on Electronic Media (LEM),<sup>4</sup> was adopted in 1991 and subsequently amended to assimilate the modifications brought about by the Television without Frontiers Directive, the predecessor of the AVMSD. The LEM mandates the executive to issue grand-ducal regulations to specify the details of the regulation of certain aspects such as audiovisual commercial communication. Above all, a grand-ducal regulation was adopted in December 2010 concerning the rules on content in European works and independent productions<sup>5</sup> (hereinafter “the regulation”), which purports to implement Articles 13 and 16-18 AVMSD. In addition, the LEM has created several institutions, two of which are relevant here. The *Service des Médias et des Communications* (Media and Communications Service – SMC) constitutes a body attached to the Luxembourg Government. It is responsible for the regulation of market entry (notifications and licensing), audiovisual commercial communication and promotion of European works.<sup>6</sup> According to Article 23ter LEM, service providers intending to offer on-demand services are required to inform the SMC no later than 20 days before service launch. The obligation to notify includes identification of the service provider and its service as well as a description of the service which will be provided.

Moreover, the *Conseil National des Programmes* (National Programme Council – CNP), which is an independent authority, is charged with the regulation of the content of programmes.<sup>7</sup> Due to limited financial resources and above all, the lack of effective sanctioning powers, the CNP is perceived by some as not powerful enough and has even portrayed itself as a “tiger without teeth”.<sup>8</sup> Hence, it has always favoured reform of the regulatory structures, a topic which has been on the agenda of the government for several years. In 2008, the Luxembourg *Conseil d’Etat* (Council of State) did not approve of the initiative which fused in one bill the implementation of the AVMSD and the establishment of a new regulatory authority. As a result, the bill was retracted.<sup>9</sup> The Luxembourg legislature thus transposed the Directive in a separate act (amending the LEM) and a bill for a new media authority (to be named *Autorité luxembourgeoise indépendante de l’audiovisuel* – ALIA) was drafted in October 2012.<sup>10</sup> By spring 2013, the bill had entered the final stages of the legislative process.<sup>11</sup> ALIA would completely change the regulatory setting and would be endowed with well-defined sanctioning powers. In its opinion on the ALIA bill, the CNP highlights the need for reform and criticises the government’s approach towards the application of the criteria for the definition of an audiovisual media service (with respect to electronic versions of newspapers, for example), media literacy, protection of minors in an online environment and the enforcement of the rules on promotion of European works in on-demand

4) See *Loi du 17 décembre 2010 portant modification de la loi modifiée du 27 juillet 1991 sur les médias électroniques*, *Mémorial A-41 du 24.12.2010*, p. 4024, available at: [www.mediacom.public.lu/institutions/Institutions\\_nationales/smc/loi\\_medias\\_electroniques\\_memorial/Loi\\_m\\_dias\\_texte\\_modif\\_2010\\_M\\_m\\_A\\_241\\_du\\_24\\_d\\_c\\_2010a241.pdf](http://www.mediacom.public.lu/institutions/Institutions_nationales/smc/loi_medias_electroniques_memorial/Loi_m_dias_texte_modif_2010_M_m_A_241_du_24_d_c_2010a241.pdf). For a codified text in French, see [www.mediacom.public.lu/legislation/textes\\_nat\\_vig/loi\\_media\\_coord\\_18\\_mars\\_2010.pdf](http://www.mediacom.public.lu/legislation/textes_nat_vig/loi_media_coord_18_mars_2010.pdf). An English version of the codified law is available at: [www.en.uni.lu/recherche/fdef/droit\\_des\\_medias/audiovisuel\\_media\\_services\\_directive/national\\_execution\\_measures/luxembourg](http://www.en.uni.lu/recherche/fdef/droit_des_medias/audiovisuel_media_services_directive/national_execution_measures/luxembourg)

5) See *Règlement grand-ducal du 17 décembre 2010 portant modification du règlement grand-ducal du 5 avril 2001 fixant les règles applicables en matière de contenu en œuvres européennes et en œuvres de producteurs indépendants des programmes de télévision réputés relever de la compétence du Luxembourg conformément à la directive européenne «Télévision sans frontières»*, *Mémorial A-41 du 24.12.2010*, p. 4037, available at: [www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf#page=15](http://www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf#page=15). An English version of the codified grand-ducal regulation is available at: [www.medialaw.lu](http://www.medialaw.lu) under the button “texts”.

6) See Article 29 LEM and *Règlement grand-ducal du 17 décembre 1991 fixant l’organisation interne du Service des médias et de l’audiovisuel créé par l’article 29 de la loi du 27 juillet 1991 sur les médias électroniques*, *Mémorial A-91 du 31.12.1991*, p. 2011 as amended by *Règlement grand-ducal du 14 novembre 2008 fixant l’organisation du Service des médias et de l’audiovisuel créé par l’article 29 de la loi du 27 juillet 1991 sur les médias électroniques*, *Mémorial A-169 du 24.11.2008*, p. 2368.

7) See Article 31 LEM and *Règlement grand-ducal du 27 février 1992 fixant les dispositions sur le fonctionnement interne du Conseil National des Programmes, créé par l’article 31 de la loi du 27 juillet 1991 sur les médias électroniques*, *Mémorial A-13 du 19 Mars 1992*, p. 657.

8) See *Avis du Conseil National des Programmes du 11.1.2013 concernant Projet de Loi 6487*, para. 3, p. 5, available at: [www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/189/198/118987.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/189/198/118987.pdf).

9) See *Projet de Loi n° 5959 portant modification de la loi modifiée du 27 juillet 1991 sur les médias électroniques*, *dépôt* le 26.11.2008.

10) See Cole M., “Bill on the Creation of a New Media Authority”, in IRIS 2013-1/28, European Audiovisual Observatory, 2013, available at: <http://merlin.obs.coe.int/iris/2013/1/article28.en.html>

11) See *Projet de Loi n° 6487 portant création de l’établissement public “Autorité luxembourgeoise indépendante de l’audiovisuel” et modification 1. De la loi modifiée du 27 juillet 1991 sur les médias électroniques; 2. De la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l’Etat et 3. De la loi du 6 avril 2009 relative à l’accès aux représentations cinématographiques publiques*, *dépôt*: le 15.10.2012, available at: [www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/160/135/115394.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/?path=/export/exped/sexpdata/Mag/160/135/115394.pdf)

services.<sup>12</sup> The CNP thus emphasises significant aspects with which other member states are equally struggling. At the same time, its comments should be considered against the backdrop of a reform process which will absorb the council in its current form.

## II. The promotion of European works in non-linear services

### 1. The transposition of Article 13 AVMSD

Article 13 AVMSD has been transposed in Article 27 LEM in conjunction with Article 5*bis* of the regulation. In line with the first sentence of Article 13 AVMSD, Article 5*bis* of the regulation requires on-demand service providers to “promote, where practicable and by appropriate means the production of and access to European works”. The wording contained in the regulation reflects the formulation of the Directive, which is characterised by imprecision and ambiguity resulting in vague commitments which member states are encouraged to make. When the Directive was adopted, the Commission had discouraged member states from departing much from the letter of the legal act. By implementing the Directive in the LEM which entered into force in December 2010, Luxembourg has generally followed this approach, the rules on promotion of European works in on-demand services not being an exception. The copy/paste style transposition has been mimicked by several other member states, too.<sup>13</sup> In a similar vein, a majority of member states seems to reproduce the first paragraph of Article 13 AVMSD (including its second sentence), thereby refraining from imposing specific (numerical) obligations.<sup>14</sup> By contrast, other member states<sup>15</sup> have gone beyond what is stipulated in the Directive. By virtue of Article 4(1) AVMSD, member states are generally allowed to adopt more detailed or stricter rules in the fields co-ordinated by the Directive. Since the Directive establishes a minimum level of harmonisation, member states do abide by European Union law when they consider the minimum level adequate and do not take additional measures.

Furthermore, the second paragraph of Article 5*bis* of the regulation requires service providers to regularly report on the measures they have taken with a view to promoting European works. The first report of providers was due in September 2011. These reports assist the government in assessing the market and the effectiveness of promotional measures. The absence of data concerning the Luxembourg market in the Commission’s application report of September 2012 is explained by the fact that the latter covers the period of 2009 and 2010 whereas service providers established in Luxembourg were only required to notify their non-linear services as of December 2010 and report on promotional measures by September 2011. Because the amended LEM only entered into force at the end of 2010, data on the Luxembourg market was not included in the Commission’s report. What is more, the Directive does not govern the way member states collect data on promotional measures of non-linear service providers but rather leaves member states a margin of discretion as to the means and methods used. Article 13 AVMSD read in light of recitals 65 and 67 AVMSD merely obliges member states to provide the Commission with a report on the application of the measures. To this end, the SMC has maintained close contacts with service providers, which underpins the pragmatism employed by the government. As in many other member states, Article 5*bis* of the regulation does not oblige the government to publish the reports by service providers. Although their publication would enhance transparency, they may contain sensitive business data.

12) See *Avis du Conseil National des Programmes du 11.1.2013* concerning *Projet de Loi 6487*, pp. 5-8.

13) See for instance section 10 of the Danish Executive Order on Programme Production; Article 16(3) of the amended Finnish Act on Television and Radio Operations; Article 23(5) of the Latvian Law on Electronic Media; Article 40(1) of the amended Lithuanian Law on Provision of Information to the Public; Article 3.29c of the amended Dutch Media Act 2008. The national transpositions are available at: [www.medialaw.lu](http://www.medialaw.lu) under the button “Audiovisual Media Services Directive” and the section “National Execution Measures”.

14) See for instance Article 157 of the amended Decree concerning Radio Broadcast and Television of the Flemish Community of Belgium; Article 40 of the amended Decree on Radio Broadcasting and Cinema Presentations of the German Community of Belgium; Article 19(2), (3) of the amended Bulgarian Radio and Television Act; Article 14 of the Greek Implementing Act; section 11(1) of the Irish Audiovisual Media Services Regulations 2010; Article 44(7) of the amended Italian Legislative Decree no 177/2005 concerning audiovisual media services; section 16N.(2) of the amended Maltese Broadcasting Act; Article 23(1) of the amended Romanian Audiovisual Law.

15) See in particular the contributions of Jean-Francois Furnémont (on the French Community of Belgium) and Alexandre Entraygues (France) in this publication.

## 2. The Luxembourg market for on-demand services

In spite of its limited territorial size, the Luxembourg market for on-demand services is characterised by spill-over services from neighbouring countries and a few rather big players. More concretely, the Entreprise des Postes & Télécommunications, iTunes, Numéricable, Netflix and Tango are active in this field and have notified their services.<sup>16</sup> Pursuant to Article 2(5) LEM a Luxembourg audiovisual media service provider is defined as a provider fulfilling any of the relevant criteria outlined in Article 2*bis* LEM (transposing Article 2(1)-(4) AVMSD) or when he is established in Luxembourg by virtue of Articles 49-55 TFEU. Accordingly, the Luxembourg Government has determined the number of providers established in its territory. In the case of iTunes, for example, it may be questioned whether each iTunes store provided across the European Union and to third countries constitutes an on-demand service in its own right and thus should be individually notified as such. Conversely, due to the relative congruence of the catalogues offered across countries and the lack of a sufficient degree of distinction between different iTunes stores, their notification as one service may equally be justified. Hence, a case-by-case examination of the characteristics of each iTunes store would have to be conducted taking into account the definitions of key terms outlined in Article 2(5), (10), (13), (15) LEM. This assessment would have to be undertaken by the Luxembourg regulatory authorities as they are best placed to evaluate the nature of the service provided. Even if one were to arrive at the conclusion that iTunes provides numerous, self-contained on-demand services, the question would still arise whether all of these would have to comply with Article 27 LEM in conjunction with Article 5*bis* of the regulation. Indeed, “Luxembourg audiovisual media ... services intended exclusively for reception in third countries ... and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States” of the EU are exempted from compliance with Article 27 LEM.<sup>17</sup> It follows that such iTunes stores targeted at the Middle East, Africa or Asia only have to conform to the rules on prohibition of incitement to hatred and those protecting minors.

Moreover, the number of service providers located in Luxembourg may oscillate at different times as business models are evolving rapidly. Microsoft’s Xbox service, for instance, which was launched at the end of 2012 is currently considered as a platform by the SMC and thus falls outside the scope of the LEM. Nevertheless, should the service (particularly its video section which is momentarily in its infancy) become akin to on-demand audiovisual media services, the service would have to be notified. These examples illustrate that the market for on-demand services is still developing and is in actual fact to a large extent characterised by supply of and demand for European works. Service providers naturally offer content which appeals to consumers. In many cases, catalogues therefore feature a myriad of works from various genres and different origins. This is because most providers catering to national (European) markets cannot afford to offer solely Hollywood productions for which copyrights are costly to obtain. Hence, service providers diversify their investment by purchasing rights to “home-made” audiovisual works and funding of own or co-productions. Due to economic realities relating to the tastes and interests of consumers in a given market, international service providers have to satisfy the demand for “local content” by investments in its production and distribution. When taking a global perspective, such “local” or European productions could also be included in catalogues which are essentially devoted to (non-European) third countries (like Asia or South America). As a result, European works can be exported and promoted beyond European borders. In addition, the fact that international companies have established themselves in Luxembourg could also be regarded as an opportunity to influence their policy decisions and economic choices in line with the general principles of the AVMSD and the internal market. If these companies were to set up in third countries and target the European Union’s public, the extent to which member states could “impose” European standards would be limited. It follows that an approach as pursued by the Luxembourg Government is aimed at reconciling the economic freedom service providers enjoy and the need to protect cultural values. In contrast to other member states, regulation in Luxembourg does not solely take the form of legislative or executive rule-making which establish specific indicators for the promotion of European works. Instead, the Luxembourg authorities maintain close ties with industry stakeholders in order to make foreign service providers aware of the “European” demands associated with the quota regulation and the need to ensure in a comparable manner its transferral into the on-demand environment.

16) See the list of on-demand audiovisual media services provided under Luxembourg jurisdiction available at: [www.mediacom.public.lu/medias/television/concessions\\_programmes/VOD/index.html](http://www.mediacom.public.lu/medias/television/concessions_programmes/VOD/index.html)

17) See Article 26(2) LEM which transposes Article 2(6) AVMSD.

In conclusion, the transposition verbatim of Article 13 AVMSD in Luxembourg must be examined against the background of the Luxembourg Government's general approach to the implementation of the AVMSD. Above all, in times of transition due to fundamental restructuring of its regulatory bodies, the Luxembourg Government has not given priority to the field of promotion of European works in on-demand services and the question of how they are measured. Still, the issue is far from being mute and the government is stepping up its efforts as the ALIA bill underlines. ALIA would expressly be mandated to encourage service providers to promote European works where practicable and by appropriate means pursuant to the new Article 35(2)(e) LEM. It will be essential to observe how ALIA, once installed, will respect its statutory missions and whether it will use its sanctioning powers (warning, warning in addition to obligation to transmit a communication, fines of different amounts).<sup>18</sup> On a more general note, the regulation of different aspects of the provision of non-linear services "is still a work-in-progress", not only in Luxembourg.<sup>19</sup> This is exemplified by the phenomenon of convergence of media and associated problems crystallising, *inter alia*, in hybrid services (Connected TV) and the need for effective protection of minors (parental controls or age verification systems).<sup>20</sup> It follows that the current time is best described as an observation phase in which the member states and their competent authorities "experiment" with innovative approaches and the appropriateness of their regulatory models to develop best practices. Luxembourg is not an exception in this respect. In order to respond to these diverse challenges, the Luxembourg authorities have sought a dialogue with the industry on measures which will both contribute to the diversity of European culture and be feasible to be implemented by service providers so as not to stifle innovation of business models and services.

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18) The sanctions are set out in Article 21 of the ALIA bill which will introduce a new Article 35<sup>sexies</sup> LEM.

19) See Gyory M.: Promotion of European works in non-linear services, what is at stakes?, available at: [www.csa.be/documents/1915](http://www.csa.be/documents/1915)

20) See for instance the Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, of the Commission of 24.4.2013, COM(2013)231 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>



# The Impact of the International Legal Framework, in particular the WTO and UNESCO, on the Pursuit of Cultural Diversity Objectives Online

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## I. Interfacing EU media policy and existing international instruments

### 1. The World Trade Organization

The reconciliation of economic and non-economic objectives is a thorny and politically charged task domestically.<sup>1</sup> It is only more so at the international level, where the diverging interests of different states come into play and often collide. In the field of media law and policy, this propensity is well observable and has resulted in the so-called “trade versus culture” clash.<sup>2</sup> Historically, this contention almost turned into a stumbling block of the Uruguay Round of negotiations (1986-1994), which led to the establishment of the World Trade Organization (WTO), and afterwards motivated the international community to look for other suitable venues to address cultural sovereignty issues. Ultimately, such a forum was found in the United Nations Educational, Social and Cultural Organization (UNESCO) and the process culminated with the adoption of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005.<sup>3</sup> When we discuss the available policy space that the European Union (EU) has to pursue its cultural and media policies, also over the Internet, it is indispensable to consider the WTO framework, as well as the UNESCO Convention and the actual relationship between the two legally binding international instruments.

With regard to the former, it can be maintained that the existing wiggle room, which the EU and a number of other WTO members enjoy is vast and intact.<sup>4</sup> First, because of the relative flexibility of the General Agreement on Trade in Services (GATS) and second, because the EU and its member states have made no commitments in the audiovisual sector and tabled substantial exemptions from

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1) Craufurd Smith R., “The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?”, *International Journal of Communication* 1, 2007, pp. 24-55.

2) Voon T., *Cultural Products and the World Trade Organization*, Cambridge University Press, Cambridge, 2007; Burri M., “Trade versus Culture in the Digital Environment: An Old Conflict in Need of a New Definition”, *Journal of International Economic Law* 12:1, 2009, pp. 17-62.

3) Burri, *ibid.*

4) Roy M., “Audiovisual Services in the Doha Round: Dialogue de Sourds, the Sequel?”, *Journal of World Investment and Trade* 6, 2005, pp. 923-952; Burri M., “Trade versus Culture: The Policy of Cultural Exception and the World Trade Organization”, in Pauwels C., Donders K. and Loisen J. (eds), *Palgrave Handbook of Media Policy*, Palgrave Macmillan, Basingstoke, UK, 2013.

the most-favoured-nation (MFN) obligation.<sup>5</sup> This permits the EU and its member states to maintain their cultural policy packages in the media, and also to adopt new measures with regard to both “old” analogue/offline media and “new” digital media. While there is some persisting uncertainty as to the classification of digital products as either goods or services, and then as to the question of the appropriate services category applicable (e.g. value-added telecommunications services, entertainment services, computer and related services, or audiovisual services), the EU vehemently insists on the case for audiovisual services, precisely because it has made the least commitments in this category.<sup>6</sup>

One should note however that the EU’s policy space may be somewhat limited in the future. This is not so much because of real liberalisation efforts made in the Doha round of trade negotiations but because of other developments, which may have spillover effects. Two of these developments unfold under the auspices of the WTO – the most important one is the planned plurilateral Trade in Services Agreement (TISA), which envisages, at least at this stage, further-reaching rules on services trade, including perhaps also subsidies.<sup>7</sup> It has been strongly endorsed by the US and the EU participates fully too. While developing countries are opposed, TISA has already gathered the support of a number of important players; its evolution and definitive relation to the GATS must be closely observed. The extension of the Information Technology Agreement (ITA) may also have certain implications, as some of its most ambitious review proposals suggest the inclusion of some IT services as well.<sup>8</sup>

The other important development, which may have an impact on the opportunities the EU has now to pursue culturally driven policies in new media, is the Digital Agenda of the United States (US). It has become an inseparable part of the US trade policy and since 2002, all free trade agreements (FTAs) of the US contain provisions on e-commerce with a liberal negative list type of committing (in contrast to the GATS positive “pick-and-choose” mode)<sup>9</sup> and a number of detailed regulatory provisions on digitally related intellectual property issues.<sup>10</sup> Noteworthy is that in this exercise, the US has shown some deference to the culturally inspired measures of its FTA partners in the field of audiovisual services and permitted the policy space needed for these measures. With two very important qualifications: the measures are to be “frozen” at their present level, and they could only relate to conventional “offline” technologies.<sup>11</sup> The US FTA strategy may potentially constrain the possibilities that the EU has when striking agreements with some partner countries, which have already committed for certain sectors and/or made other arrangements with the US.

## 2. UNESCO

There has been much speculation as to the relationship between the UNESCO Convention on Cultural Diversity and the WTO Agreements, because one of the key driving forces behind the adoption of the Convention, as noted earlier, was precisely to oppose the arguably economically biased rules of the WTO.<sup>12</sup> The 2009 *China – Audiovisual Products* case seems to have clarified this relationship to the detriment of the UNESCO Convention. In that particular case, China attempted a defence using the Convention, and while the Panel and the Appellate Body accepted this, they said that the UNESCO

5) Sauvé P. and Steinfatt K., “Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?” in Productivity Commission and Australian National University (eds), *Achieving Better Regulation of Services*, AusInfo, Canberra, 2000, pp. 323-346.

6) Wunsch-Vincent S., *The WTO, the Internet and Trade in Digital Products*, Hart, Oxford, 2006.

7) Sauvé P., “A Plurilateral Agenda for Services? Assessing the Case for a Trade in Services Agreement (TISA)”, *NCCR Working Paper* 39, 2013.

8) Lee-Makiyama H., “Future-Proofing World Trade in Technology: Turning the WTO IT Agreement (ITA) into the International Digital Economy Agreement (IDEA)”, *ECIPE Working Paper* 4, 2011.

9) This is a key difference in the approach to liberalisation. While the GATS lists only the sectors and sub-sectors committed for (positive approach), pursuant to the negative (or NAFTA-like) approach, everything is liberalised unless indicated through lists of reservations, which normally cover existing non-conforming and future measures. See Roy M., Marchetti J. and Lim H., “Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?”, *World Trade Organization Staff Working Paper* ERSD-2006-07, 2006.

10) Wunsch-Vincent S., “Trade Rules for the Digital Age”, in Panizzon M., Pohl N. and Sauvé P. (eds), *GATS and the Regulation of International Trade in Services*, Cambridge University Press, Cambridge, 2008, pp. 497-529.

11) Wunsch-Vincent S., “The Digital Trade Agenda of the US: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization”, *Aussenwirtschaft* 1, 2003, pp. 15-16; also Voon T., “A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS”, *UCLA Entertainment Law Review* 14:1, 2007, pp. 25-26.

12) Graber B.C., “The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO.” *Journal of International Economic Law* 9:3, 2006, pp. 553-574; Craufurd Smith, *supra* note 1.

Convention itself stated that nothing in it should alter the rights and obligations of the Parties under other treaties.<sup>13</sup> Thus, WTO law seems to trump the Convention. And although both acts may be of similar, binding legal status, the relationship between them is asymmetrical because of the solid package of obligations embedded in the WTO rules<sup>14</sup> and above all, because of the WTO's advanced quasi-judicial and enforcement mechanisms.<sup>15</sup>

The UNESCO Convention endorses the right of states to adopt and implement cultural policy measures in their internal and external affairs. There is almost no guidance as to what these measures may be – any measure, including one applying to digital media, will be caught by the Convention's extremely widely cast net. Importantly, the Convention has not specified any obligations. In this sense, it is left very much up to the EU and its member states to decide on the ways of implementing the Convention, in particular in their internal affairs, as there are some, although scant, guidelines and obligations as far as international co-operation and relationships with developing countries are concerned (Articles 16 and 17 UNESCO Convention).

In any case, failure to act in any of these directions will not be sanctioned by the institutions set up under the UNESCO Convention.<sup>16</sup> The damage, if any, would be of mere political, reputational nature. Still, the EU can set an example as to appropriate and innovative paths towards protecting and promoting cultural diversity, especially considering its strong commitment to culture and creativity and the EU's recently formulated aspiration to indeed strengthen this in the future.<sup>17</sup>

It is unlikely that the UNESCO Convention will effect culture-related action and change within the law of the WTO. Despite the impressive number of states that have ratified the Convention,<sup>18</sup> it is highly unlikely that a negotiating bloc will form within the WTO to push for more culture-oriented solutions – such as including some sort of “cultural exception”, an express clause for culture in the general exception provisions of the GATT (Article XX) and the GATS (Article XIV), or including cultural diversity as one of the objectives of the WTO in the Preamble of the WTO Agreement. This is evident from the current state of trade talks, as launched under the Doha Development Agenda in 2001.<sup>19</sup> What is expected is above all affirmation of the status quo,<sup>20</sup> which has been characterised by the legacy line of separation between the EU and the US with their respective pro-culture and pro-trade positions, if we are to describe them in a typified manner,<sup>21</sup> and the existence of diverse smaller clusters of countries with less strongly voiced opinions.

Still, the UNESCO Convention is an important instrument. Not so much because of its potential to counteract trade rules but because it has forcefully promoted the concept of cultural diversity – as an overarching policy goal to be taken into account domestically and on the international scene. The implementation patterns, which are now discernible from the 2012 reports submitted by the Convention's parties, including the EU, show mixed results with a comparatively low intensity of implementation activities. There is little innovation and few measures target online media.<sup>22</sup>

13) WTO Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China—Publications and Audiovisual Products)*, WT/DS363/AB/R, adopted 21 December 2009, confirming in most essential points WTO Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China—Publications and Audiovisual Products)*, WT/DS363/R, adopted 12 August 2009, referring to Article 20 of the UNESCO Convention.

14) Burri, *supra* note 2; Craufurd Smith, *supra* note 1.

15) Helfer L. R., “Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking”, *The Yale Journal of International Law* 29 (2004), pp. 1-83.

16) At worst, a state can be criticised by the Intergovernmental Committee or Conference of Parties on the basis of the state's own four-yearly reports. See Article 9(a) UNESCO Convention; Craufurd Smith, *supra* note 1, p. 39.

17) See e.g. European Commission, European Agenda for Culture in a Globalizing World, COM(2007) 242 final, 10 May 2007.

18) As of 25 April 2013, 127 countries have ratified the Convention, see [www.unesco.org/eri/la/convention.asp?KO=31038&language=E](http://www.unesco.org/eri/la/convention.asp?KO=31038&language=E)

19) WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1, 2010.

20) Craufurd Smith R., *supra* note 1, pp. 53-54.

21) See e.g. Moran B. I., “United States’ Trade Policy and the Exportation of United States’ Culture”, *Vanderbilt Journal of Entertainment Law and Practice* 7 (2004), pp. 42-60; Bruner C. M., “Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products”, *International Law and Politics* 40, 2008, pp. 351-436.

22) Burri M., “The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after its Entry into Force”, *NCCR Working Paper* 1, 2013.

One model that stands out for its innovative design and possibly further-reaching effects is that of the Protocols on Cultural Cooperation negotiated by the European Commission on behalf of the EU and its member states. The Protocols are, on the one hand, a direct implementation effort of the UNESCO Convention; on the other hand, they are responses to broader changes in the EU's external policies. These changes relate to the extended competencies of the Union in matters of common commercial policy after the Lisbon Treaty, as well as more specifically to the EU's repositioning with regard to new regional or bilateral agreements having an economic integration dimension.<sup>23</sup> The latter foresees notably that audiovisual services (including the content-related implications of electronic commerce) should be excluded from the scope of such trade agreements, and that audiovisual and other cultural services should receive special treatment under dedicated co-operation frameworks.<sup>24</sup>

Although the EU does not expressly grant new market commitments, in many senses the Protocols improve access to the EU market, especially with regard to the temporary entry of natural persons and the treatment of cultural industries. Important for the present discussion has been the commitment inscribed in the EU-CARIFORUM and the EU-Korea Protocols, whereby co-productions qualify as "European works" in the sense of the EU Audiovisual Media Services Directive (AVMSD),<sup>25</sup> and thus can benefit from the various quota and other support schemes made available in the EU, in particular from the majority broadcasting quota of Article 16 AVMSD. This beneficial treatment applies potentially also to the soft law rule of promoting European productions in non-linear audiovisual media services.

## II. Comments on the current state of affairs and future prospects, in particular for cultural tools online

As evident from the above, the existing international legal framework places few limitations on the EU and its member states as regards their cultural policy programmes for the media. The EU has from the very onset of the trade and culture debate been adamant in preserving its policy space and has purposely over the years taken a variety of steps to ensure this – first, by making almost no commitments for audiovisual services under the WTO, and second, outside the WTO, with the UNESCO Convention, which affirms state sovereignty in cultural matters and enjoys the broad support of the international community. The expansion of cultural measures into digital spaces, for non-linear media services, is thus possible and under no particular pressure, at least legally.

Yet, some pressure may come from the political side – if not immediately now, then down the road. The change is not to be expected soon however, as it should be clearly acknowledged that "cultural exception" policies – that is, the willingness to draw a line between economic and cultural objectives and exempt from trade regulation cultural goods and services – are still well supported.<sup>26</sup> A recent reminder of this path-dependent discourse has been a decision of the EU Parliament with regard to the launch of the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) Agreement between the EU and the US. While the European Parliament did give green light to the TTIP, it expressly asked, under the substantial influence of France, that cultural and audiovisual services, *including* online services, should be excluded from the negotiating mandate in order to safeguard the "cultural exception" and protect the cultural and linguistic diversity of the EU countries.<sup>27</sup> In addition, at the Culture and Education Council that took place in mid-May 2013, fifteen member states signed a letter reiterating the need to exclude culture and audiovisual services from the forthcoming negotiations. The campaign relates also to a well-publicised petition, which had been signed by some 5 000 directors,

23) European Commission, *Global Europe: Competing in the World*, COM(2006) 567 final, 4 October 2006.

24) European Commission, *Quadrennial Periodic Report on Behalf of the European Union on Measures to Protect and Promote the Diversity of Cultural Expressions in the Framework of the 2005 UNESCO Convention*, Accompanying the Document Report on Measures to Protect and Promote the Diversity of Cultural Expressions in the Framework of the 2005 UNESCO Convention. SWD(2012) 129 final, 23 May 2012, p. 24.

25) 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), OJ L 95/1, 15 April 2010.

26) Burri M. "Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects", *Diversity* 2, 2010, pp. 1059-1084; also Burri, *supra* note 4.

27) European Parliament, *Resolution on EU trade and investment negotiations with the United States of America (2013/2558(RSP))*, at paras 11-12. On the cultural exception provision, the majority won with 381 votes to 191, with 17 abstentions.

writers, technicians, producers, distributors and exhibitors across Europe and includes high-profile names like Wim Wenders, Michael Haneke, Mike Leigh, Stephen Frears and Pedro Almodovar.<sup>28</sup>

While the EU Parliament's resolution is non-binding, the cultural carve-out is indicative of the strong political forces in the EU in favour of preserving the status quo of the cultural exception and indeed, expanding it to online services, as well as of the great difficulty of reconciling cultural and commercial interests, even between two industrialised partners and despite the general enthusiasm towards the impending bilateral trade deal.<sup>29</sup>

In light of this path dependency and the high levels of support amongst politicians, the creative industries and the general public, one may wonder why and how policies targeted at the protection and promotion of cultural diversity could change at all. The trigger for change may lie in the new media environment itself.

So far we have seen little innovation in addressing digital media. The measures are still very much thought of as an extension of linear rules;<sup>30</sup> the recommendation for a higher share of European works online of the AVMSD (Article 13) exemplifies this. Yet, the digital space comes with its own specificities, such as new ways of creating, distributing, accessing and consuming content, with discrete characteristics such as unlimited shelf-space, abundance of content and its different organisation.<sup>31</sup> Also, at this stage, we must admit that there is a great deal of fluidity and uncertainty. We seem to know far too little about how changes in the delivery and consumption of news and other media content are affecting public awareness, opinion, civic and cultural engagement. Furthermore, "[t]he ability to quantitatively measure activity and content available on the Internet may obscure both the importance of how audiences combine offline and online media sources and the examination of what information may be absent from the online space. It is also crucial to consider how the information needs of the millions ... who will begin or increase their use of online media in the coming years may differ from those of early adopters".<sup>32</sup>

This intrinsic uncertainty may call for regular reviews of the state of affairs and the insertion of procedural mechanisms, as in fact the AVMSD foresees in Article 13(3), which institutes a four-year check on the implementation of Article 13, "taking into consideration the market, technological developments and the objective of cultural diversity". One element that certainly needs to be carefully looked at and may become less obvious under the conditions of the digital media environment is the causal link between the rule giving preference to European works and the actual consumption of these works and the broader objective of promoting cultural diversity.

This link has not been readily identifiable even under the conventional "hard" cultural quotas for TV services (now in Article 16 AVMSD), although the data continuously proved the high shares of European works, well above the required majority of airtime.<sup>33</sup> Over the years, it could not be shown for instance that, in the absence of Articles 4 and 5 of the Television Without Frontiers Directive<sup>34</sup> (TVWF; now Articles 16 and 17 AVMSD), the trade deficit with the US would have been larger and that the measures to promote the circulation of programmes within the EU have also promoted exports.<sup>35</sup>

28) Rosser M., "MEPs Vote for 'Cultural Exception'", *ScreenDaily*, 24 May 2013.

29) Kanter J., "European Parliament Moves to Limit Scope of Eventual U.S. Trade Deal", *The New York Times*, 23 May 2013.

30) Burri M., "Cultural Protectionism 2.0: Updating Cultural Policy Tools for the Digital Age", in Pager S. and Candeub A. (eds), *Transnational Culture in the Internet Age*, Edward Elgar, Cheltenham, UK, 2011, pp. 182-212.

31) For an overview, see Burri, *ibid.*

32) Miel P. and Farris R., *News and Information as Digital Media Come of Age*, The Berkman Center for Internet and Society, Cambridge, MA, 2008, p. 1.

33) See most recently, European Commission, *First Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 2010/13/EU Audiovisual Media Services Directive*, COM(2012) 203 final, 4 May 2012.

34) 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, OJ L 298/23, 17 October 1989, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202/60, 30 July 1997.

35) David Graham and Associates, *Impact Study of Measures (Community and National) Concerning the Promotion of Distribution and Production of TV Programmes Provided for under Article 25(a) of the TV Without Frontiers Directive*, Final report prepared for the European Commission, 24 May 2005, section 8.5.

Also, as a more recent study by Attentional et al. stresses, “[d]espite repeated analyses over the past 3 studies, no clear correlations between the strictness or flexibility of the implementation of the rules applying to European content and the proportion of European content broadcast in any given Member State could be identified”.<sup>36</sup>

As the impact study further clarifies, there is a significant difference between the online and the offline media space. Above all, it seems that the semi-automatic link between content shown on TV and the viewing of that content is weakening. This is only natural as in the early years of broadcasting, the shelf-space was severely limited – since there was only room for a few channels viewing was strongly conditioned on the available content. Thus, showing more European content also meant viewing more European content. In this line, it also made sense to focus the regulation on distribution as a means to safeguard European works both economically and culturally.<sup>37</sup> The situation is utterly different for non-linear services and in the practical reality of mixing linear and non-linear services where patterns of consumption are distributed across a great variety of outlets and may vary significantly across different age groups, communities, professions and skills.<sup>38</sup> So far, there is scant evidence as to the relationship between online distribution and use and trade barriers.<sup>39</sup>

As the causal link between the greater availability of European works and their consumption can now be lacking, or is at least weakened, there may be a need for a new legal design. There are a vast number of outstanding issues and questions to be addressed. For instance: is there a need to rethink the definition of “European works”? Is there a need to be more specific about the causality relation between the tools applied and the actual diversity achieved? Should policies targeting the new environment of individually pulled content put less stress on the diversity of *supply* and rather focus on diversity in *demand*, and ultimately seek to ensure the so-called “exposure diversity”<sup>40</sup> – that is, diversity of the content actually consumed?<sup>41</sup> While the political will to deal with these uneasy questions appears weak at this point in time, both at the EU and at the member state levels, there may be a need to rethink the existing cultural policy measures in the media towards a modern media policy toolkit, which secures cultural diversity.

To be sure, the present international legal framework does not stand in the way of such a policy renewal exercise, and indeed the UNESCO Convention appears to foster new and efficient cultural policy-making.

36) Attentional et al., *Study on the Implementation of the Provisions of the Audiovisual Media Services Directive Concerning the Promotion of European Works in Audiovisual Media Services*, Preliminary final study report prepared for the European Commission, 7 September 2011, p. 201, footnote 234.

37) Attentional et al., *ibid.*, pp. 194, 200-205.

38) For a general critique of the cultural quotas, see Burri M., “The New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity”, *Common Market Law Review* 44, 2008, pp. 1689-1725.

39) There is one very recent and very interesting study however, which maintains that: (i) the impact of online sharing is augmented by content quotas in the countries that enforce them; (ii) such quotas are a non-desirable status quo if online sharing cannot be blocked or severely penalised due to technical or political reasons; and (iii) online sharing creates a threat to cultural diversity in the long term. See Hervas-Drane A. and Noam E., “Peer-to-Peer File Sharing and Cultural Trade Protectionism”, working paper, available at: <http://ssrn.com/abstract=1793131>

40) See e.g. Helberger N., “Media Diversity from the User’s Perspective: An Introduction”, *Journal of Information Policy* 1, 2011, pp. 241-245; Napoli P. M., “Exposure Diversity Reconsidered”, *Journal of Information Policy* 1, 2011, pp. 246-259; Napoli P. M., “Diminished, Enduring, and Emergent Diversity Policy Concerns in an Evolving Media Environment”, in Pager S. and Candeub A. (eds), *Transnational Culture in the Digital Age*, Edward Elgar, Cheltenham, UK, 2012, pp. 165-181.

41) The AVMSD does not address this parameter but recognizes its importance: “Within the framework of the reports provided for under this Directive, Member States should also take into account, in particular, the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services, and the actual consumption of European works offered by such services” (Recital 69 AVMSD; emphasis added).

## **Part III**

### **Workshop on Promoting European Works in On-demand Audiovisual Media Services: A Summary of the Discussion**



# Workshop on Promoting European Works in On-demand Audiovisual Media Services: A Summary of the Discussion

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## Introduction

Recently, specific challenges in relation to the promotion of European works in on-demand audiovisual media services have been identified by regulators at both national and European level.<sup>2</sup> In order to examine and assess the different methods currently used to promote European works in on-demand services and to consider future challenges to such promotion systems, the Institute for Information Law (IViR) and the European Audiovisual Observatory, with the support of the Institute of European Media Law (EMR), organised an invitation-only expert workshop focusing on the promotion of European works in on-demand audiovisual media services.<sup>3</sup> The workshop participants consisted of representatives of media regulators from a number of member states, representatives from the European Platform of Regulatory Authorities (EPRA), representatives from on-demand service providers and the Federation of European Film Directors (FERA), representatives from the European Commission and public service broadcaster representatives from member states as well as a number of leading academics in the area of media regulation. The workshop was held in Amsterdam at IViR on 18 March 2013.

The first part of the workshop consisted of the presentation of concrete examples of existing obligations imposed on on-demand audiovisual media services from the case studies of five member states: Italy, Slovakia, France, the Netherlands and the French Community of Belgium (hereafter “Belgium (FR)”). The second round of presentations focused on the application of those obligations. Each session was followed by a discussion by all participants. The subject of the afternoon session was “Challenging Principal Assumptions”. During this session, four main issues were addressed:

- 1) Are the current rules detailed enough and are they apt to cope with today’s and tomorrow’s likely forms of offering/consuming content?
- 2) Is there need to shift from supply to demand criteria?
- 3) Issues related to “safe harbours”
- 4) Overarching economic/cultural interests and how they are framed by international law.

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1) The author would like to express her gratitude to Dr Tarlach McGonagle (IViR) for his very instructive comments on earlier drafts of this report. Dr Annabel Brody is a researcher/editor at IViR.

2) See the First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010 Promotion of European works in EU scheduled and on-demand audiovisual media services, COM/2012/0522 final, 24 September 2012, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0522:FIN:EN:PDF>

3) The workshop was chaired by Dr Susanne Nikoltchev, at the time Head of the European Audiovisual Observatory’s Department for Legal Information, and Professor Nico van Eijk, Institute for Information Law (IViR), University of Amsterdam.

This workshop report provides a summary of the country reports, which are available in this publication, and subsequent discussions as well as the key issues raised during the course of the workshop.<sup>4</sup> It does so from a thematic approach.

It became apparent from both the examples provided in the country reports and the subsequent discussions on the principal issues of concern at present, that the regulation of on-demand audiovisual media services is a matter that must be approached with some delicacy. On-demand services are still a nascent market within the digital ecosphere. The country reports show that for the most part regulators are reluctant to impose unduly restrictive obligations on such services for this reason. One of the greatest challenges for the future will be to ensure that however technology evolves, the promotion of European works and other such regulatory goals can still be achieved in an effective manner.

## I. The legal framework

Cultural diversity is protected and promoted through various international and European instruments. European countries agree that their different cultures need to be preserved and therefore take part in international and European agreements that serve to express this policy. Concrete measures to promote European works in on-demand audiovisual media services stem from such agreements. A brief overview of the overarching legal framework for the protection of cultural diversity at both international and European level is therefore provided at this juncture.

### 1. International level

A number of international instruments promote cultural diversity albeit implicitly and they illustrate the range of protection afforded to cultural diversity. Article 27(1) of the Universal Declaration of Human Rights (UDHR) states that: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) states that in "States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right...to enjoy their own culture".

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to participate in cultural life.

Audiovisual media services have a dual nature, i.e. economic and cultural which is reflected in a range of international instruments including the World Trade Organisation General Agreement on Trade in Services (WTO-GATS) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

The WTO-GATS came into force in 1995. The objectives of the WTO-GATS are to create a reliable system of international trade rules, to ensure fair and equitable treatment of all participants, to stimulate economic activity and to promote trade and development.

The promotion of cultural diversity is of central relevance to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005. The objectives of the Convention include: the protection and promotion of the diversity of cultural expressions, the promotion of intercultural respect, the development of cultural interaction, awareness raising of the value of diversity of cultural expressions at local, national and international levels and the reaffirmation of the sovereign rights of states to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions in their territory.

The impact of the WTO-GATS and UNESCO Convention on cultural diversity objectives in Europe in on-demand services is examined in this report.

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4) The general purpose of the workshop was to provide an open forum for discussion of the ways in which European works can be promoted in on-demand audiovisual media services without opinions being attributable to individual participants.

## 2. European level<sup>5</sup>

A number of regulatory provisions at European level also promote cultural diversity.

### 2.1. Council of Europe

The European Convention on Human Rights (ECHR) does not explicitly provide for the protection of cultural rights although it does, in practice, offer them a considerable degree of protection. This is evident from an examination of the jurisprudence of the European Court of Human Rights (the Strasbourg Court) in this area. The Court has repeatedly found that the state is the “ultimate guarantor” of the principle of pluralism, including “in relation to audiovisual media”.<sup>6</sup> The Court has also consistently held that all members of the public must be able to receive a wide range of information.<sup>7</sup>

The European Cultural Convention also promotes cultural diversity and was designed “to safeguard and encourage the development of European culture” and “to foster among the nationals of all members...the study of languages, history and civilisation of the others and of the civilisation which is common to all.”<sup>8</sup>

Cultural diversity is also promoted at European level through the protection and promotion of cultural heritage and audiovisual heritage. Two Council of Europe treaties, the Framework Convention on the Value of Cultural Heritage for Society<sup>9</sup> and the European Convention for the Protection of the Audiovisual Heritage deal specifically with such issues.<sup>10</sup>

Article 10(1) of the European Convention on Transfrontier Television (ECTT) promotes cultural diversity at European level, particularly in relation to European works. Article 10(1) requires states to ensure that broadcasters under their jurisdiction reserve a majority proportion of transmission time for European works, excluding the time appointed to news, sports events, games and advertising, teletext services and teleshopping. Article 10(3) calls on states to “look together for the most appropriate instruments and procedures to support, without discrimination between broadcasters, the activity and development of European production, particularly in countries with a low audiovisual production capacity or restricted language area.”

### 2.2. European Union

#### 2.2.1. EU Treaties

Cultural diversity is promoted in a number of EU treaties.

Article 3(3) of the Treaty on European Union (TEU), states that the Union: “shall respect its rich cultural and linguistic diversity and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.

5) For more detailed discussion of the promotion of cultural diversity at European level see McGonagle T., “The Promotion of Cultural Diversity via New Media Technologies: An Introduction to the Challenges of Operationalism”, in Nikoltchev S. (ed.), *IRIS plus* 2008-6, European Audiovisual Observatory, Strasbourg, 2008.

6) See *Informationsverein Lentia & Others v. Austria*, Judgment of the European Court of Human Rights of 24 November 1993, Series A No. 276, para. 38. For further discussion of this issue see McGonagle T., *Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas*, Intersentia, UK, 2011, p. 497.

7) See *Khurshid Mustafa & Tarzibachi v. Sweden*, Judgment of the European Court of Human Rights (Third Section) of 16 December 2008, para. 44. For further discussion see McGonagle; 2011. See also Voorhoof D., “Case of Khurshid Mustafa and Tarzibachi v. Sweden”, IRIS 2009-4/1, European Audiovisual Observatory, Strasbourg, 2009, available at: [http://merlin.obs.coe.int/cgi-bin/article.php?iris\\_r=2009%204%201](http://merlin.obs.coe.int/cgi-bin/article.php?iris_r=2009%204%201)

8) European Cultural Convention, ETS No. 18, 19 December 1954 (entry into force: 5 May 1955), Preamble (Recitals 4 and 5).

9) Council of Europe Framework Convention on the Value of Cultural Heritage for Society, ETS No. 199, 27 October 2005 (entry into force: 1 June 2011). Council of Europe Framework Convention on the Value of Cultural Heritage for Society, ETS No. 183, 8 November 2001 (entry into force: 1 January 2008).

10) Council of Europe European Convention for the Protection of the Audiovisual Heritage, ETS No. 183, 8 November 2001 (entry into force: 1 January 2008).

Article 151 of the Treaty establishing the European Community (TEC) which is now, post-Lisbon Article 167 of the Treaty on the Functioning of the European Union protects cultural heritage and diversity. In accordance with Article 167(1): “The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”. Article 167(4) goes on to state that: “The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”

Article 22 of the Charter of Fundamental Rights of the European Union is entitled “Cultural, religious and linguistic diversity” and states that: “[t]he Union shall respect cultural, religious and linguistic diversity”.

### 2.2.2. Audiovisual Media Services Directive

Articles 16 and 17 of the Audiovisual Media Services Directive<sup>11</sup> (hereafter AVMSD) deal with the promotion of European and independent productions in relation to linear services and are designed with the objective of protecting cultural values, for example media pluralism and diversity. In accordance with Article 16, broadcasters are required to reserve “where practicable and by appropriate means” a majority proportion of their transmission time for European works. Article 17 requires broadcasters also “where practicable and by appropriate means” to reserve at least 10% of their transmission time or at least 10% of their programming budget for European works created by *independent producers*. Under both Article 16 and 17, the transmission time excludes the time appointed to news, sports events, games, advertising, teletext services and teleshopping. Member states must also provide the Commission with a report on the application of Articles 16 and 17 every two years. In 2011, the European Commission published guidelines for member states for monitoring the application of Articles 16 and 17 of the AVMSD. The guidelines stipulate that since the wording “where practicable” used in Articles 16 and 17 “leaves to the Member States a certain degree of flexibility in applying the obligations set out in these provisions, on specific and justified grounds, the national authorities might exempt, upon request of the channels concerned, small channels having objective difficulties in complying with the reporting obligation.”<sup>12</sup>

The scope of the AVMSD was extended in response to convergence of all audiovisual media to include non-linear services. Article 13 of the AVMSD provides that non-linear (on-demand) services shall promote the production of and access to European works. In accordance with Recital 24 AVMSD: “[i]t is characteristic of on-demand audiovisual media services that they are ‘television-like’, i.e. that they ... would lead the user reasonably to expect regulatory protection within the scope of this Directive”. Recital 27 AVMSD further stipulates that:

“video-on-demand ... is an on-demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.”<sup>13</sup>

In accordance with Article 13:

“Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works.”

11) 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 (codified version), OJ L 95/1 of 15 April 2010.

12) See Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services Directive, Doc CC AVMSD (2011)2, July 2011, available at: [http://ec.europa.eu/avpolicy/docs/reg/tvwf/eu\\_works/guidelines\\_2011\\_en.pdf](http://ec.europa.eu/avpolicy/docs/reg/tvwf/eu_works/guidelines_2011_en.pdf)

13) The definition of non-linear services is much more complex but not the focus of this IRIS Special. See Nikoltchev S. (ed.), *The Regulation of On-demand Audiovisual Services: Chaos or Coherence*, IRIS Special, European Audiovisual Observatory, Strasbourg, 2011.

Article 13 sets out some examples of how European works can be promoted in on-demand services:

“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.”

Recital 69 of the AVMSD gives some further examples of how on-demand audiovisual services can promote the production and distribution of European works. The recital states that:

“[s]uch support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. It is important to re-examine regularly, the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports provided for under this Directive, Member States should also take into account, in particular, the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services and the actual consumption of European works by such services.”

Article 13 also requires member states to provide reports to the Commission every four years. Article 13(3) provides for a two-tiered evaluation process on the part of the Commission based on information provided by member states and an independent study. The information provided by member states and independent studies must take into account “the market and technological developments and the objective of cultural diversity.”

The European Commission published its first report on the application of Articles 13, 16 and 17 of the Audiovisual Media Services Directive.<sup>14</sup> The report covered, for the first time, the application of Article 13 concerning the promotion of European works in on-demand services by member states. The assessment of the application of Article 13 by the European Commission was based on an independent study<sup>15</sup> and on the data supplied by member states. One of the objectives of the study was to analyse the implementation of Article 13 in member states. The study showed that during the period covered (2009-2010) a very low number of member states had transposed the Directive, i.e. introduced obligations to promote European works in on-demand services.<sup>16</sup> The study found that the data provided by the national reports was incomplete and not systematically checked by the national authorities. Reliable conclusions on the application of Article 13 could therefore not be made.<sup>17</sup>

The legal frameworks of the European countries discussed in the workshop have all placed obligations on on-demand service providers, in varying degrees, in order to transpose Article 13 AVMSD. However, the focus of the workshop was not limited to these measures and what a “proper” transposition should look like, but rather to explore what approaches are possible to achieve the overall goal of promotion.

As the existing legal mechanisms for promoting European works are applicable to both linear and non-linear services, it is interesting to look at the regulatory challenges posed by the rapidly evolving on-demand media. One of the greatest challenges for the future, as identified at the workshop, will be to ensure that existing laws and regulations keep up to date with technological advancements.

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14) *Supra* note 3.

15) See Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services- SMART2010/0002, available at: [http://ec.europa.eu/avpolicy/docs/library/studies/art\\_13/final\\_report\\_20111214.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/art_13/final_report_20111214.pdf)

16) By May 2012, 25 member states had notified complete transposition of the Directive. See [http://europa.eu/rapid/press-release\\_MEMO-12-306\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-12-306_en.htm?locale=en)

17) See Jasserand C., “Report on Promotion and Distribution of European Works and Independent Productions”, IRIS 2012-9/9, European Audiovisual Observatory, Strasbourg, 2012, available at: [http://merlin.obs.coe.int/cgi-bin/article.php?iris\\_r=2012%209%209](http://merlin.obs.coe.int/cgi-bin/article.php?iris_r=2012%209%209)

## II. Country reports

### 1. Existing obligations imposed on on-demand audiovisual media services

Session one consisted of the presentation of concrete examples of existing obligations imposed on on-demand audiovisual media services from the case studies of the five EU member states.<sup>18</sup> The aim of the presentations was to give examples of different options that can be used to ensure that European works are promoted on on-demand services. The examples include 1) quotas, 2) prominence, 3) financial investment obligations and 4) indicators.<sup>19</sup>

In Italy, France and Belgium (FR) more than one obligation applies to on-demand services. Under the Italian system, on-demand services must comply with either a quota system or a financial obligation. The French system imposes financial obligations as well as quota and prominence obligations on on-demand service providers. Finally, the system in Belgium (FR) imposes both financial investment obligations and prominence obligations on on-demand services.

In Slovakia, on-demand services must only comply with a quota system. The system in the Netherlands operates through the use of indicators.

#### 1.1. Quotas

The introduction of quotas, as a means of ensuring promotion of European works has been implemented in different ways in three of the five member states, i.e. Italy, Slovakia and France.

In Italy, the AVMSD has been implemented by Legislative Decree no. 44/2010 which amended the Italian AVMS Code.<sup>20</sup> Pursuant to Article 44 of the AVMS Code, the *Autorità per le garanzie nelle Comunicazioni* (AGCOM) is responsible for regulating the promotion of European works by on-demand audiovisual media services through co-regulatory measures. In April 2011, AGCOM issued a resolution on the promotion of production of European works by on-demand audiovisual media service providers, Resolution 188/11/CONS, which came into force in May 2011.<sup>21</sup> Under the Italian system, on-demand services are given the choice of whether to comply with a content quota obligation or a financial investment obligation. On-demand services have lower obligations than linear services, which are subject to both content and investment duties.<sup>22</sup> In accordance with the quota obligation, on-demand services must reserve a minimum of 20% of on-demand catalogues for European works. This content quota is calculated on the basis of the total number of hours provided on a yearly basis. Obligations on on-demand services do not apply to services which are not in competition with TV broadcasting; this includes services with annual revenues of under EUR 100 000.

In Slovakia, a minimum monthly quota of 20% for on-demand services was introduced in an amendment to Act No. 308/2012 Coll. on broadcasting and retransmission (the Slovakian Broadcasting Act)<sup>23</sup> in October 2012. The provision came into effect in January 2013. The calculation is based on the combined length of all programme time in the catalogue of the service. The amendment also provides that this quota must be fulfilled each month (instead of yearly). This stipulation was included to prevent service providers from scheduling European works during months with lower viewer ratings such as the summer period. In contrast to the Italian example, there is no alternative option for on-demand service providers to promote European works such as a financial investment. According to Mr Polák, the quota system was introduced because it was believed that such a system would be easier to enforce than a system of prominence or the imposition of a financial obligation on on-demand service providers.<sup>24</sup>

18) Italy, Slovakia, France, the Netherlands and Belgium (FR).

19) See articles on the five case studies in this publication.

20) See article by Ernesto Apa in this publication. See also Mastroianni R. and Arena A., "Draft Decree Implementing the Audiovisual Media Services Directive", IRIS 2010-2/25, European Audiovisual Observatory, Strasbourg, 2010, available at: [http://merlin.obs.coe.int/cgi-bin/article.php?iris\\_r=2010%202%2025](http://merlin.obs.coe.int/cgi-bin/article.php?iris_r=2010%202%2025)

21) For more information see article by Ernesto Apa in this publication.

22) Ibid.

23) See article by Juraj Polák in this publication. See also Polák J., "Promotion of EU Works in On-demand Audiovisual Media Services", IRIS 2013-2/36, European Audiovisual Observatory, Strasbourg, 2013, available at: [http://merlin.obs.coe.int/cgi-bin/article.php?iris\\_r=2013%202%2036](http://merlin.obs.coe.int/cgi-bin/article.php?iris_r=2013%202%2036)

24) See article by Juraj Polák in this publication.

In accordance with *Décret no 2010-1379 du 12 novembre 2010 relatif aux service de médias audiovisuels à la demande* (2010 Decree), the French system imposes a quota obligation on on-demand services whereby the catalogue of on-demand service providers must feature at least 60% of European works and 40% of French-speaking works.<sup>25</sup>

In Belgium (FR), the parliament opted against the imposition of a quota system for on-demand services, believing that a share of audiovisual works does not make sense in the non-linear world due to the fact that service providers can potentially drown that share in a part of their catalogue that is not easily available or promoted. Secondly, the government found that a quota system would be unduly burdensome on providers and could potentially stifle the development of new services thereby becoming a counterproductive measure.<sup>26</sup>

The constitutionality of imposing quotas on on-demand services was considered by participants from the perspective of freedom of expression. In Slovakia, the constitutionality of the imposition of quotas on on-demand services was raised during the consultation process. It was decided, however, that the use of quotas in this regard was reasonable as it followed a specific purpose in the public interest. One participant added that the question should be: is the quota system working? If not, then there may be a constitutional problem with regard to the justification of the implementation of a quota system.

### 1.2. Prominence

A system of prominence for European works, as a means of ensuring the promotion of European works, has been established in two of the five countries studied, i.e. France and Belgium (FR).

In France, in accordance with the 2010 Decree, on-demand service providers must display a substantial proportion of European or French-speaking works. This can be achieved by both displaying the title of the works in a prominent place and by showing visuals and trailers of the works.<sup>27</sup>

In Belgium (FR), the *Décret sur les services de médias audiovisuels* 2009 (the 2009 Decree),<sup>28</sup> states that video-on-demand providers shall give prominence to European works by putting forward “an attractive presentation of European works”, which is the same wording used in recital 69 of the AVMSD.<sup>29</sup> Other examples of prominence are set out in the explanatory memorandum to the 2009 Decree and by the *Conseil supérieur de l’audiovisuel* (CSA – hereafter CSA (BE)) and are outlined in the Belgian (FR) article in this publication.

In Belgium (FR), a co-regulatory approach to the system of prominence has been adopted. The collaboration between the CSA (BE) and on-demand service providers has proved to be successful in ensuring the promotion of European works. This approach is strongly influenced by the importance placed on cultural diversity, particularly in relation to French-language works in Belgium (FR).<sup>30</sup>

In relation to the issue of prominence, one participant pointed out that since there is a limited amount of space in which to promote European works on on-demand services, service providers cannot promote all content. The question was posed to participants: how do service providers determine what works to promote?

In response to this question, one participant stated that in order to determine what works to promote, the CSA (BE) has adopted a trial and error approach. For example, the CSA (BE) would ask service providers to promote three or four smaller European works alongside a big blockbuster movie and see what the results are through their system of assessment. If the assessment shows that the measure has not worked then the CSA (BE) and the service provider will try another method.

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25) It was pointed out that the 40% quota of French-speaking works may account for the 60% quota of European works.

26) This issue was raised by participants on several occasions. See section entitled “nascent market” below.

27) See article by Alexandre Entraygues in this publication.

28) See article by Jean-François Furnémont in this publication.

29) Ibid.

30) Ibid.

### 1.3. Financial investment obligations

Financial obligations have been imposed on on-demand services in three of the five countries, i.e. Italy, France and Belgium (FR). In all cases, a minimum threshold in relation to the annual revenue of the on-demand service provider is applied (see II.1.1.).

As previously stated, under the Italian system, on-demand services can choose whether to comply with quota obligations or investment obligations. In order to comply with the investment obligations, on-demand services must invest an annual contribution of at least 5% of the revenues recognised for the provision of on-demand services within the same catalogues in the preceding year.

In France, the financial obligation system is quite complicated. On-demand service providers are subject to financial obligations only where their annual turnover is over EUR 10 million. This threshold does not apply to catch-up TV service providers who are only subject to the financial obligation if they offer more than 10 feature movies per annum.<sup>31</sup> The 2010 Decree establishes three different systems in relation to obligations on service providers for catch-up TV, pay Video-on-Demand (VoD) and subscription VoD. These systems are outlined in the French article in this publication. Financial obligations consist of a contribution to European and French cinematographic works.<sup>32</sup> According to the Decree, three quarters of the financial obligation must be dedicated to independent works. As well as this, there are two different financial obligations, one is for European works and the other is for French language works.<sup>33</sup>

In Belgium (FR), all media service providers have a financial obligation to contribute to audiovisual production in accordance with the 2009 Decree.<sup>34</sup> This obligation also applies to on-demand services. During the transposition of the AVMS Directive, however, a threshold was introduced whereby any on-demand service with a revenue of less than EUR 300 000 falls outside the scope. The purpose of this measure is to ensure that new services are not unduly burdened with obligations.

### 1.4. Indicators

The Dutch approach to ensuring the promotion of European works on on-demand services is through the use of indicators drawn up by the *Commissariaat voor de Media* (CvdM). The concept of the use of indicators for the purpose of ensuring the promotion of European works on on-demand services originates from the reporting guidelines of the European Commission,<sup>35</sup> which were originally drafted for the promotion of European works in linear services. The guidelines set out a series of questions and indicators for member states to use in monitoring the application of Article 13. The questions and indicators can be used by member states to identify the non-linear services under their jurisdiction; the share of European works in the total catalogue of a service; the share of spending invested in European works, and to estimate the effectiveness of the prominence of European works.<sup>36</sup>

The CvdM chose four indicators from the reporting guidelines that were the least burdensome on on-demand media service providers. Pursuant to the *Mediawet 2008* (the Dutch Media Act),<sup>37</sup> media service providers are asked four questions in order to determine access to and prominence of European works. Service providers can simply answer yes or no to the questions. The questions posed are as follows:

- 1) Can the user search within the catalogue for videos labelled as European works? For instance are tags or labels regarding nationality/origin used?
- 2) Has the service provider developed tools in order to recommend European works to users?
- 3) Is there in the catalogue, website or EPG a special section dedicated to European works?
- 4) Does the service provider use any other instruments to facilitate access to European works?

31) See article by Alexandre Entraygues in this publication.

32) Ibid.

33) Ibid.

34) See article by Jean-François Furnémont in this publication.

35) See article by Marcel Betzel in this publication.

36) Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services- SMART2010/0002, available at: [http://ec.europa.eu/avpolicy/docs/library/studies/art\\_13/final\\_report\\_20111214.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/art_13/final_report_20111214.pdf)

37) See Gerritsen J., "Media Act 2008", IRIS 2009-18/29, European Audiovisual Observatory, Strasbourg, 2009, available at: [http://merlin.obs.coe.int/cgi-bin/article.php?iris\\_r=2009%203%2029](http://merlin.obs.coe.int/cgi-bin/article.php?iris_r=2009%203%2029)

Overall, the five country reports give a detailed illustration of the different ways in which European works can be promoted. The reports also show that regulators are, for the most part, unwilling to impose restrictive obligations on on-demand service providers in the interest of allowing the still emerging on-demand market to develop.

## 2. Enforcement mechanisms

The second round of presentations focused on how the obligations outlined in the previous presentations are being enforced, whether through monitoring compliance, the application of fines or through a system of collaboration. The presentations also outlined some of the strengths and weaknesses of these systems.

### 2.1. Monitoring

In Italy, AGCOM monitors the implementation of the quota obligations on on-demand service providers.

In Slovakia, the *Rada pre Vysielanie a Retransmisiu* (Council for Broadcasting and Retransmission), does not monitor the quota system due to budgetary constraints. The regulator relies on the service provider's own records. Service providers have a legal obligation to keep records of the implementation of the quota system and submit them to the regulator upon request.

Under the French system, the *Conseil supérieur de l'audiovisuel* (CSA, hereinafter "CSA (FR)"), the French regulator, has general powers to supervise service operators. This power includes making random checks and requesting information. On-demand service providers must also provide the CSA (FR) with a yearly report regarding their compliance with obligations.

In the Netherlands, a system of indicators is used by the CvdM, the Dutch regulator, to determine the results of the promotion of European works by on-demand service providers.

A collaborative approach to monitoring the implementation of obligations in Belgium (FR) has been adopted by the CSA (BE). The approach has been implemented in four stages. Firstly, a recommendation was adopted in June 2010 on the way in which the CSA (BE) would evaluate audiovisual media service providers' efforts to implement the objective of promoting European works, set out by the legislator. Secondly there was an initial evaluation, in early 2011, of the measures taken by the on-demand providers to promote European works. Thirdly, a second evaluation was made at the end of 2011 on the first results achieved both in terms of promotion and consumption of European works. Finally, a third evaluation was made in June 2012 in order to help the lawmaker to assess the decisions made during the transposition process in 2008 and 2009.<sup>38</sup> This evaluation process is now integrated into the yearly report which service providers are obligated to provide to the CSA (BE).<sup>39</sup>

### 2.2. Fines

In Italy, AGCOM has the power to impose fines of up to EUR 250 000 in cases of non-compliance with obligations. To date, this power has not been exercised.<sup>40</sup>

In Slovakia, the regulator also has the power to issue warnings and impose fines on service providers who have not reached their respective target quotas of 20%.<sup>41</sup> The fines for non-compliance with the quota obligation range from EUR 100 to EUR 10 000 maximum.

There is no system of fines in either the Netherlands or Belgium (FR) for non-compliance with obligations. In these countries, a collaborative approach with service providers has been favoured.

38) See Avis no. 11/2012- *Evaluation du dispositif de mise en valeur des oeuvres européennes et de la Fédération Wallonie Bruxelles dans les services de vidéo à la demande- article 46 du décret SMA*. See in particular p. 23.

39) See article by Jean-François Furnémont in this publication.

40) See article by Ernesto Apa in this publication.

41) See article by Juraj Polák in this publication.

### 2.3. Collaborative approach

One of the participants requested an elaboration on the practices used in the collaborative approach of Belgium (FR), in particular the practice of benchmarking for promotional strategies. The participant provided the example of the Creative Diversity Network<sup>42</sup> in the UK where the network makes certain commitments to work towards the promotion of diversity. The network has a type of no-roll-back clause, which means that if you do something one year and it is successful, you build on that in the following year.<sup>43</sup> The system is therefore progressive. The participant asked whether the Belgian (FR) approach is similar to that system.

In response to the questions, it was stated that in Belgium (FR) the regulator has built a relationship of trust with the service providers which enables both parties to come around the table together, share figures and trust conventionality. In turn, the CSA (BE) monitors the promotional tools. The providers can then match those promotional tools with their results. The process thereby creates a win-win situation for all involved as it helps the CSA to assess the implementation of a public policy tool while at the same time helping service providers to assess the way in which they promote European works. It was stated that it would be counterproductive to set bottom lines or to fix goals for service providers. The main question that should be asked is whether or not prominence is working.

## III. Challenging principal assumptions

The theme of the second half of the workshop was “challenging principal assumptions”. A presentation by Mr Alexander Scheuer, from the Institute of European Media Law, focused on the suitability of today’s rules for European works promotion in non-linear audiovisual media services. In assessing this issue, he considered the AVMSD’s perception of the online environment in 2006 when the Directive was drafted and how the environment has changed since that time. The speaker highlighted challenges posed by new platforms and new products,<sup>44</sup> which were then discussed by participants. For the purposes of clarity, the themes of the challenges discussed by participants have been categorised as follows: 1) consumer behaviour; 2) scope and definitions; 3) economic value and 4) value chain.

### 1. Consumer behaviour

After Mr Scheuer’s presentation, the discussion turned to user habits. The point was raised by one participant that the focus should still be on the promotion of European works on linear TV due to the fact that the majority of the population of Europe still predominantly view linear TV services as opposed to on-demand services. In the Netherlands, for example, only 3% of consumers view on-demand or catch-up TV, the vast majority still primarily view linear television services, which is indicative of the European average.<sup>45</sup> These statistics were surprising to some of the workshop participants. The participant explained that the majority of people still stick to old viewing habits and that the survey conducted in the Netherlands showed that there is a divide between young and old members of the public in their viewing behaviours. It was pointed out by another participant that if time shifting viewing of linear content such as the use of recording devices were included in these surveys, the figures would be much higher.

Another participant commented that the focus should be on how the viewer experiences media when determining the level of regulation of certain on-demand services. Trans-generational consumption patterns should be assessed to see whether they are changing in parallel to the increase of on-demand offers or whether false assumptions are being made about the fluidity of this on-demand environment and how it will change in the future.

The further point was added that when regulating on-demand services online, it must be borne in mind that everyone can participate in the online market and that this is a very strong shift in paradigm compared with the linear world.

42) See website of the Creative Diversity Network at: <http://creativitydiversitynetwork.com/>

43) See the Creative Diversity Network pledge, available at: <http://creativitydiversitynetwork.com/resource/diversity-pledge/>

44) See article by Alexander Scheuer in this publication.

45) See article by Jeroen Verspeek in this publication.

## 2. Scope and definitions

The question regarding the scope of the Directive was raised by Mr Scheuer in his presentation and on a number of occasions by participants throughout the workshop. The problem with applying strict definitions to services which are in a constant state of flux is a major cause of concern at present and it makes it even more difficult to determine what service provider is under what concrete obligation with regard to promoting European works. Many on-demand services, for example, can include a mixture of user-generated content, semi-professional content, editorial content controlled by third parties and editorial content controlled by regulation and linear broadcasts online.

The discussion then turned to problems with regulating catch-up TV. Firstly, as pointed out by Mr Scheuer in his presentation and as seen from the country reports, catch-up TV services are treated differently in member states primarily due to the fact that the definition of catch-up services is unclear. Examples of the regulatory approach to catch-up TV services were outlined in the country reports. Some of the reasons for such approaches were elaborated on: the Italian rationale is that since catch-up TV does not require authorisation from the regulatory body, no obligations are imposed on such services. Due to the fact that the programmes provided on catch-up services have already been broadcast under a different authorisation, the assumption is that these broadcasts already comply with the regulation of the linear service where the programmes were first aired.

A problem identified with this approach was highlighted by one participant in relation to the nature of catch-up TV services. The point was made that not everything that appears in the linear service will be selected for the catch-up service and that, as far as the non-profitable argument is concerned, revenues are likely to increase and on-demand services might therefore meet the threshold for financial obligations. The AVMSD states that on-demand services have the potential to partially replace television which would appear to suggest that threshold regulation should apply to catch-up services as well.

The different concepts of catch-up TV services were then addressed by one of the participants. The participant gave the example of BBC i-player, which is identified as a unique product, a service that you go to directly. He argued that this is not the case with regard to most catch-up services that are more or less hidden. Catch-up TV is, for the most part, not marketed as a stand-alone service that should be governed alone, it is a service whereby you can watch a recording of a linear broadcast. Another participant added that non-European content is generally not accessible on catch-up TV as broadcasters will mainly use their own locally produced programmes on catch-up TV services. It was argued by another participant that non-European programmes such as popular American programmes are available free of charge on certain catch-up TV services. The programmes broadcast on both linear and catch-up services depend on the buying power of the broadcaster.

Overall, several problems regarding the exclusion of catch-up services from obligations to promote European works were identified by the participants. Firstly, there is no clear definition of catch-up TV; as pointed out by a number of participants there are very different kinds of catch-up services as well as different types of business models. In some member states, such as Slovakia for example, catch-up TV is very much underdeveloped. Broadcasters will only include a very small number of their own programmes due to difficulties in acquiring rights for use on the Internet of other programmes. On the other hand, there are much more developed catch-up TV services in other member states which show all kinds of programmes including non-European works. Secondly, from a legal point of view, catch-up TV services clearly fall under the definition of on-demand audiovisual media services for the purposes of the AVMSD. The point was also made that with regard to the perspective of the consumer, watching catch-up TV on connected TV is the same environment for the consumer as watching linear TV services. The participant further stated that if catch-up TV is not regulated then this would be incompatible with the objective of tools for promoting European works such as quota and prominence obligations.

## 3. Economic value

Another participant added that the monitoring of catch-up TV would be problematic for both broadcasters and regulators due to the fact that it is constantly being renewed. The participant added that the regulation of catch-up services would not add any market value or bring any benefit to the European industry due to the fact that the majority of catch-up services to date in Europe are not profitable. Such services are generally either offered by the public broadcasters free of charge or by the

commercial broadcasters where incremental advertising is so minuscule that any form of investment obligation imposed on a catch-up service would be infinitesimally small. The participant made the further point that since there were no catch-up TV services when the AVMSD or national regulations were being negotiated, regulators must transpose the Directive on something that did not exist at the time. The first catch-up services were launched approximately two years after the Directive came into force.

One participant compared the value of catch-up TV and video-on-demand services which generate approximately EUR 250 million in advertising per annum, with that of the EUR 12 billion generated by linear TV advertising. The participant was of the opinion that it will be five to seven years before there is any significant change in these figures. These facts may have an impact on decisions to impose obligations on catch-up TV services.

#### **4. Value chain**

In his presentation, Mr Scheuer argued that regulation of service providers as opposed to regulation of individual services might be a more appropriate regulatory approach in light of an ever-changing media environment. Mr Scheuer asked that if viewer expectations towards regulation and level of protection by regulation are taken into consideration in some fields of the Directive, then why not here? The guiding question should be: "How does a media service platform present itself to the viewer or user in reality?" One participant pointed out that the common problem faced by regulators is how to treat the same services over different platforms, i.e., the differences between catalogues online and in the Electronic Programme Guides (EPGs) of cable operators and Internet Protocol Television (IPTV) service providers, portals of smart TVs and mobile applications. It was stated that if the same media service provider is providing a number of different services it would make more sense to regulate by provider rather than by service.

There was general agreement with this opinion among the participants. One participant added that viewer services will inevitably change over the coming years, therefore it is important to ask what will this viewer service look like in five years time? The participant also highlighted the problem with applying strict definitions to services that are ever evolving in the media environment. The participant's view was that a service-by-service regulatory approach is seriously problematic for these reasons.

Another participant who was also in agreement with the opinion that the value chain was more important than the individual component, added that regulatory initiatives, such as the promotion of European works, are mainly aimed at individual elements of the value chain. In a converging audiovisual sector, different players are involved at various stages along the value chain – from when programmes are broadcast on linear television up until when programmes are finally available on-demand for viewers. As such, he argued, the regulation in place at the moment, to a certain degree, will always miss the point because it ignores this value chain and the fact that there is substitution between services.

It was concluded that in this rapidly changing media environment, the main challenge will be to keep existing laws and regulation up to date in order to achieve regulatory goals such as the promotion of European works. Assumptions should therefore not be made regarding on-demand services and strict definitions should not be imposed. Regulatory approaches to on-demand services should not stifle this still developing market and they must be flexible enough to facilitate the evolution of on-demand services.

### **IV. Is there a need to shift from supply to demand criteria?**

The next issue that was addressed during the afternoon session was the question of whether there is a need to shift from supply to demand criteria whereby the promotion of European works would be based on consumer trends. This discussion can be categorised under the following headings: promotion of European content and the increasing power of the viewer.

#### **1. Promotion of European content**

A presentation was then given by Mr Thomas Roukens from Telenet, one of Belgium's largest cable TV providers. Mr Roukens provided the group with information on a number of important consumer

trends.<sup>46</sup> Mr Roukens gave details of the solution of the Flemish Community of Belgium (hereafter referred to as “Belgium (NL)”) to promoting European works in on-demand services. In Belgium (NL), the *Decreet betreffende de radio omroep en de televisie van 27 maart 2009* (the “Media Decree”) does not place strict legal obligations on on-demand service providers to promote European works.<sup>47</sup> The system in Belgium consists of a commercial collaboration between broadcasters and distribution platforms whereby European works are promoted across different platforms. Mr Roukens also referred in his presentation to a voluntary scheme promoting local content whereby Telenet invests almost EUR 10 million per annum in the production of film, audiovisual works and independent production. The approach taken by Telenet was to follow consumer trends and to provide and promote local content as much as possible on different platforms.<sup>48</sup>

Following Mr Roukens’ presentation, a number of participants pointed to the need to look at the purpose of regulation. The importance of including on-demand service providers and platforms in the value chain was further highlighted as a means of ensuring that European works remain in demand. The point was made that if you link the obligation to invest with prominence there is a natural reflex to want to promote something that you have invested in. The effectiveness of prominence as a tool for ensuring the promotion of European works was again emphasised. New ways of using prominence for such goals were briefly alluded to and included editorial selection over the catalogue, curating content and connection of European works to other more popular works.

## 2. Increasing power of the viewer

The discussion then turned to the subject of editorial control over catalogues and the trend towards the formation of catalogues based on users’ viewing histories whereby there is no editorial control over catalogues, i.e. a type of echo chamber.<sup>49</sup> The Amazon service, which provides an on-demand service for books, was given as an example of how users’ viewing history can be used to form personal catalogues. In its system, Amazon advertises books based on the users’ viewing history. Data is collected on the users’ viewing habits on the Amazon website as well as on other websites visited by the user. The Amazon system does not use promotional schemes and instead the viewing habits of its users are used to ensure that advertisements reflect the interests of individual users.

Serious concerns regarding diversity of content were raised by participants. In recent academic discussion, solutions to this issue were investigated which included the idea of public service navigators,<sup>50</sup> an institution that could curate and connect different public service content in order to create a diverse media experience.

## V. Issues relating to safe harbours

Issues relating to safe harbours was the next topic. The discussion of this issue was categorised as follows: “ease of doing business” policies and nascent markets.

### 1. “Ease of doing business” policies

The third presentation of the afternoon session on “Issues related to safe harbours” was given by Mr André Lange from the European Audiovisual Observatory. Mr Lange’s presentation focused on “ease of doing business” policies in the field of audiovisual services and their impact on the promotion of audiovisual works. The objective of ease of doing business policies is to facilitate national or direct foreign investments. A country may be considered as proposing an ease of doing business policy in the field of audiovisual services if it provides a less demanding regulatory framework with regard to one

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46) See article by Thomas Roukens in this publication.

47) Ibid.

48) Ibid.

49) An echo chamber is a situation in which people restrict themselves to receiving information reflecting their own preferred points of view. For more on echo chambers see Sunstein C. R., *Republic.com 2.0*, Princeton University Press, USA, 2009.

50) A public service navigator is an idea which provides a navigational/sign-posting function for public service media content.

or more of the following issues: content regulation, requirements in terms of promotion of European works, advertising, protection of minors, protection of intellectual property rights or monitoring. Such a policy may be reinforced by other types of doing business policies such as fiscal policies, easy company registration and accountability regulation and the creation of favourable Information and Communication Technology (ICT) infrastructure.<sup>51</sup> In his presentation, Mr Lange used the case study of Luxembourg as an example of a country with an ease of doing business policy in the field of audiovisual services.<sup>52</sup> Audiovisual regulation in Luxembourg is generally based on the principles of open markets, country of origin and free circulation of services. Mr Lange's presentation gave examples of the impact of ease of doing business policies on the promotion of European works including issues such as the absence of transparency of the various national markets, absence of comparable data on catalogues and the creation of de facto market distortion in other countries where national providers of services face competition from less or non-regulated services.

The case study of Luxembourg as a country with an ease of doing business policy was expanded on by Ms Jenny Metzdorf from the University of Luxembourg.<sup>53</sup> In her article, Ms Metzdorf gives details of the effect of this ease of doing business policy on the Luxembourg market for audiovisual media services. The policy has attracted a major television broadcaster, the RTL group, and SES, a globally leading provider of satellite services, to establish a base in Luxembourg. As well as this, international providers of on-demand services like Apple or Netflix have set up their businesses in Luxembourg to serve the European market. Ms Metzdorf's article highlights several issues such as implications of this policy on other European service providers and nascent business models; the effects of cross-border service provision and how to ensure compliance with European Union law, particularly in relation to Article 13 of the AVMSD.

## 2. Nascent markets

The effect of imposing obligations on a nascent market, i.e. on-demand audiovisual media services, in member states was then addressed by Mr Heiko Zysk of ProSiebenSat.1 Media Group. Mr Zysk argued that the imposition of obligations will have a negative impact on European service providers due to the fact that they will be at a disadvantage compared to non-European service providers in the same market that are not subject to the same regulatory constraints. Mr Zysk warned that any tighter EU regulation for on-demand services will lead to a closure of their EU headquarters where they exist, and a transfer of operations to a non-EU base, typically to the US. Mr Zysk warned that any rules which cannot be universally enforced could damage European on-demand services and strengthen competitors domiciled outside the European Union. The fact that on-demand services are still in the stage of an emerging market was reiterated by Mr Zysk who stated that such markets still amount to less than 5% share of the total video market in Germany. Mr Zysk concluded that statutory regulation by strict quotas and rules on prominent positioning of European works are an inappropriate means of achieving promotion of European works on on-demand services.

## VI. Overarching economic/cultural interests and how they are framed by international law

The final topic that was discussed was the overarching economic/cultural interests and how they are framed by international law. This topic is divided into two sections based on the discussion by participants: the impact of the WTO-GATS and the UNESCO Convention and the lack of innovation in approaches to regulation of on-demand services.

### 1. The impact of the WTO-GATS and the UNESCO Convention

A presentation was made by Emmanuel Joly from the European Commission, speaking in a personal capacity, on the topic of overarching economic/cultural interests and how they are framed by inter-

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51) See article by André Lange in this publication.

52) Ibid.

53) See article by Jenny Metzdorf in this publication.

national law. Mr Joly pointed out that audiovisual media services have a dual nature, i.e. economic and cultural, which justifies the creation as well as the distribution of European works. Promotional systems in Europe therefore have the dual goal of strengthening the audiovisual industry and fostering cultural objectives. In his presentation, Mr Joly considered the impact of the World Trade Organisation General Agreement on Trade in Services (WTO-GATS) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions on cultural diversity objectives in Europe. Ms Mirra Burri from the World Trade Institute, University of Bern, provided the group with details on the impact of the WTO and UNESCO on the pursuit of cultural diversity objectives online. Ms Burri discussed the available policy space that the EU has to pursue its cultural and media policies online under the WTO-GATS and UNESCO Convention. The WTO-GATS is flexible enough to allow its members plenty of “wobble room” to pursue such goals. The EU and its member states have made no commitments in the audiovisual sector and have tabled substantial exemptions for the most-favoured-nation (MFN) obligation.<sup>54</sup> Member states are therefore permitted to maintain their cultural policy initiatives and to adopt new measures in relation to both the “old” analogue/offline media and “new” digital media.<sup>55</sup> Ms Burri warned, however, that the EU’s policy space may be more limited in the future due to developments under the WTO which may have a spillover effect. Ms Burri gave details of certain agreements which may have implications on EU audiovisual policy initiatives which are outlined in her article in this publication. In her article, Ms Burri also gives details of the effect of the UNESCO Convention on EU audiovisual policy. The UNESCO Convention endorses the right of states to adopt and implement cultural policy measures in their internal and external affairs. The Convention gives almost no guidance as to what these measures should be. Measures on implementing the Convention, such as promotion of European works, are left up to the EU and its member states.<sup>56</sup>

## 2. Lack of innovation in tackling the problem

A major problem identified by Ms Burri is the lack of innovation in addressing regulation of the digital media. The approach so far has been to take models of regulatory approaches to analogue, offline media and try to transpose them to new media. The focus should be on the causal link between the measure and the goal. The question should not be how to transpose the Directive but whether the Directive is the right tool to achieve the goal. Let us assume the public interest objective of having a cultural media objective. Ms Burri pointed out that the causal link has always been quite weak in relation to linear services. Previous records have shown that it is unclear whether quotas are linked to availability and consumption of European content. It is also unclear whether quotas lead to less US influence. The importance of establishing a causal link with regard to regulatory approaches to the on-demand media was emphasised.

When asked what kind of innovative approaches should be applied to the on-demand media, one participant answered that the imposition of quotas as a means of achieving the goal of promotion of European works was not the correct approach. Quotas, she explained, are too rigid in terms of trying to reconcile trade and cultural thinking. Ms Burri recommended the use of subsidies to ensure the promotion of European works. The use of subsidies, she argued, is the least market distortive measure in promoting certain public interest content and also in terms of international trade.

## Conclusions

The country reports provided at this workshop illustrated the diverse range of national solutions with regard to the promotion of European works in on-demand audiovisual services. The reports also highlighted application and enforcement problems in relation to the solutions used at national level. The presentations on key issues of concern at present and subsequent discussions identified a number of challenges posed by regulation of the on-demand media.

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54) See article by Mira Burri in this publication.

55) Ibid.

56) Ibid.

On-demand services are in a state of flux and as such the application of strict definitions on such services is futile. Assumptions therefore, should not be made in relation to on-demand services. A major problem which was highlighted during the workshop is the lack of innovation in addressing regulation of the on-demand media. The approach so far has been to take models of regulatory approaches to linear media and apply them to the on-demand media. The country reports show a reluctance to impose restrictive obligations on on-demand service providers and a willingness to use regulatory methods which allow on-demand services to compete with other on-demand services outside Europe that are not subject to regulation. The reports also show a reluctance to impose sanctions on service providers who fail to adhere to obligations. The country reports, as well as the example provided by Telenet, show a shift towards a collaborative regulatory system in which co-operation with media providers is essential.

During the discussion, the need to focus on the purpose behind the regulation was stressed. In this ever-changing media environment, the main challenge will be to keep existing laws and regulations up to date in order to achieve public policy objectives such as the promotion of European works. Regulatory approaches to on-demand services should not stifle this still developing market and must be flexible enough to facilitate the evolution of on-demand services.



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL  
EUROPEAN AUDIOVISUAL OBSERVATORY  
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

## Information services for the audiovisual sector

It is the task of the European Audiovisual Observatory to improve transparency in the audiovisual sector in Europe. It does this by collecting, processing and publishing up-to-date information about the various industries concerned.

The Observatory has adopted a pragmatic definition of the audiovisual sector in which it works. Its principal areas of interest are film, television, video/DVD, on-demand audiovisual media services and public policy on film and television. In these five areas, the Observatory provides information in the legal field as well as information about the markets and financing. As far as its geographical scope is concerned, the Observatory monitors, records and analyses developments in its member states. In addition, data on non-European countries is also made available when judged appropriate. The various stages involved in providing information include the systematic collection and processing of data as well as its final distribution to our users in the form of print publications, information on-line, databases and directories, and our contributions to conferences and workshops. The Observatory's work draws extensively on international and national information sources and their contributions of relevant information. The Observatory Information Network was established for this purpose. It is composed of partner organisations and institutions, professional information suppliers and selected correspondents. The Observatory's primary target groups are professionals working within the audiovisual sector: producers, distributors, exhibitors, broadcasters and other media service providers, international organisations in this field, decision-makers within the various public bodies responsible for the media, national and European legislators, journalists, researchers, lawyers, investors and consultants.

The European Audiovisual Observatory was established in December 1992 and is part of the Council of Europe thanks to its status as a "partial and enlarged agreement". Its offices are in Strasbourg, France. The Observatory's membership currently comprises 40 States and the European Union, which is represented by the European Commission. Each member appoints one representative to its board, the Executive Council. An Executive Director heads the international Observatory team.

### The Observatory's products and services are divided into four groups:

- Publications
- Information on-line
- Databases and directories
- Conferences and workshops

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## Video on Demand and the Promotion of European Works

The promotion of European audiovisual productions, particularly European films, has long been an important objective of cultural policy in Europe. The significance of such promotion is clearly expressed in the Audiovisual Media Services Directive and was recently highlighted again when the European Parliament specifically called for the exclusion of cultural and audiovisual services at the start of negotiations on the Transatlantic Trade and Investment Partnership between the EU and the USA – Europeans consider that cultural assets do not fall under the same economic rules as other goods and services.

The instruments used to promote European works in linear audiovisual services are well known and have been used in many different ways. However, the increasing popularity of on-demand non-linear services (e.g. video-on-demand services) raises the question of how European works can be effectively promoted by these new types of service. This edition of *IRIS Special* deals with this question.

The first section considers concrete examples of existing obligations to promote European works imposed on on-demand services in five EU member states: Italy, Slovakia, France, the Netherlands and the French Community of Belgium. The examples cover four types of possible measures: quotas, prominence, financial invest-

ment obligations and indicators. Various mechanisms for implementing these measures are also discussed.

The second part deals with the question of promotion in a broader politico-legal and economic context. What does the overall context of promotion in Europe look like (WTO, UNESCO)? To what extent are the regulations on promotion of European works in non-linear audiovisual media services adequate and appropriate? Do the rules on promotion put EU-based stakeholders at a disadvantage compared to their non-EU competitors? How strong is the trend towards on-demand media services?

The third section summarises the results of a workshop at which the contents of this *IRIS Special* were discussed. The workshop was attended by experts from industry, regulatory bodies, the Observatory and its partner organisations, who provided the expertise that is essential – as the report explains – for an instructive and constructive examination of this specialist subject.

This *IRIS Special* provides a comprehensive overview of current measures to promote European works in non-linear audiovisual media services and thereby makes a valuable contribution to the discussion of how they might develop in the future.

### The European Audiovisual Observatory has published other titles relevant for the promotion of European works:

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44 pages - May 2012 - EUR 24,50  
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