Society of Audiovisual Authors
Société des Auteurs Audiovisuels

Targeted consultation on the method of calculation of the share of European works and the exemptions for low audience and low turnover (Art. 13.7 Directive EU 2010/13)

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Introduction

As part of the rules on the promotion of European works set out in the Audiovisual Media Services Directive ('the AVMSD'), the Commission is required to provide, after consulting the Contact Committee, guidelines regarding:

(a) the calculation of the share of European works in the catalogues of on-demand providers and

(b) the definition of 'low audience' and 'low turnover' for the purposes of exemptions to the obligations concerning the promotion of European works.

The Commission has consulted the Contact Committee on possible approaches on several occasions. It also organised a dedicated public hearing with stakeholders, to which Contact Committee representatives were invited.

The present consultation aims to complement the process by gathering stakeholders' input on specific technical issues.

SAA's answers and comments are in blue.

I. Calculation of the share of European works

1. Method of calculation

The calculation of the share of European works may be based on the duration of the works or on the number of titles (i.e. individual items) present in a video-on-demand (VOD) catalogue.

When calculating the share by duration, the provider would secure that European works account for at least 30% of the total playing time (in minutes) of all the works in the VOD catalogue. When calculating the share by titles, the provider would ensure that European works account for at least 30% of the total number of titles present in a VOD catalogue.

If the calculation is based on titles, a question arises as to what constitutes a title. This is relatively easy to answer for feature and TV films: each of them would constitute a title in a catalogue. However, it is more complex for TV series or other formats that are presented in a serialised manner (i.e. episode by episode). Episodes of TV series are often grouped into seasons. In such cases, a question arises as to whether one title should correspond to the whole series, one season or individual episodes.

These different ways to count TV series could imply giving similar weight to different audiovisual productions or different weight to comparable productions. For example, calculating by episodes could imply equating one episode of short duration or one episode of a low budget format with one long / high budget feature film/documentary. Calculating by seasons could imply giving higher weight to one long / high budget feature film/documentary than one episode of a high-end TV series with similar duration and production costs (as the entire season would be counted once). In such cases, a solution could be to allow national regulatory authorities to give a higher weighting to relevant works (e.g. a feature film could count as three titles and correspond to three episodes of a TV series), for example based on a provider's substantiated request.

What would be the market and practical implications of calculating the share of European works by (a) duration (minutes), (b) titles/seasons or (c) titles/episodes, with and without a weighting system?

Please provide reasons and evidence/data for your answers.

In its last year's contribution, the SAA supported the calculation method of the share of European works by title/episode as being more favorable to European series compared to US series which tend to have more episodes. A service therefore would need more European works to balance the presence of US series in a catalogue. However, this calculation method would risk giving equal weight to European works of different value, for example encouraging services to buy back catalogue European TV series or short format series with many episodes. To mitigate this risk and value creative projects of their own, we would like now to propose to adopt the calculation method of **title/season**. We think that it is the best method for VOD catalogues to reflect the diversity of European works across all genres.

2. Relevant catalogue or catalogues

Some VOD providers operating within the EU have multiple national catalogues. Such catalogues have different composition, depending on the national market they target. Domestic film titles can be found in a specific national catalogue of a multi-country provider and not be available (or available to a very limited extent) in the catalogues that the same provider offers in other Member States.

One approach would be to calculate the 30% share of European works for each of the national catalogues offered by multi-country VOD providers. Another approach would be to look at the average of the respective shares of European works in all the catalogues offered by the VOD provider in all the Member States concerned.

What would be the market and practical implications of calculating the share of European works for, respectively, each national catalogue and as an average of the respective shares in all the catalogues offered within the EU?

Please provide reasons and evidence/data for your answers.

The SAA supports the approach of calculating the 30% share of European works for each of the national catalogues offered by multi-country VOD providers. The objective of Art 13.1 is to ensure the availability and access to European works in each EU country.

A calculation based on the average of the shares of European works in all the catalogues of a service in the EU would risk major disparities with some countries (usually the smallest ones) being neglected with very low level of European works being made available. The 30% share is a minimum that needs to be respected by every catalogue.

3. Time / period of calculation

The actual share of European works in VOD catalogues can vary on a day-to-day basis. For example, when a VOD includes a new non-European TV series into its catalogue, this could have an effect of temporarily decreasing the share of European works until further European works are subsequently included. This raises the question when the verification of compliance should be carried out. Providers may be required to ensure compliance at every point in time or on average over a pre-determined period (e.g. one year).

What would be the market and practical implications of verifying the share of European works, respectively, at any point in time and on average over a pre-determined period of time?

Please provide reasons and evidence/data for your answers.

The compliance with the requirement of having a minimum share of 30% of European works in a catalogue should be ensured at **every point in time** by the VOD providers. The authorities in charge of monitoring this obligation should be allowed to make random checks. In addition, VOD providers should be required to report to these authorities on a quarterly basis.

II. Definition of low turnover and low audience

According to the AVMSD, providers with no significant presence on the market should not be subject to the requirements to promote European works, “in order to ensure that obligations relating to the promotion of European works do not undermine market development and in order to allow for the entry of new players in the market” (see Recital 40 of the Directive 2018/1808/EU).

1. Low turnover

An established policy making approach is based on the premise that in particular micro enterprises should be a priori excluded from the scope of the proposed legislation, unless the necessity and proportionality of them being covered is demonstrated. According to the Recommendation concerning the definition of micro, small and medium sized enterprises (see Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ L 124, 20.5.2003, p. 36–41), micro enterprise are companies with a total annual turnover or annual balance sheet not exceeding EUR 2 million and with a staff headcount that is below 10 persons. Due to their limited size and scarce resources, micro enterprises may be particularly affected by regulatory costs.

What would be the market and practical implications of defining ‘low turnover’ on the basis of the concept of micro enterprises as set out in the Commission Recommendation?

Please provide reasons and evidence/data for your answers.

The SAA does not support a definition of low turnover on the basis of the concept of micro-enterprises as defined by the EC Recommendation of 6 May 2003. National audiovisual markets are too different to apply a uniform solution across the EU. **It should be left to each Member State to define an appropriate threshold considering the size of its market**. This is indeed highlighted in recital 40: “(…) the determination of low turnover should take into account the different sizes of audiovisual markets in Member States”. It is also consistent with the requirement that the financial contribution that Member States can impose on media service providers shall be based only on the revenues earned in the targeted Member States (Art 13.3).

Another argument against a uniform approach with the concept of micro-enterprises is that a threshold of € 2 million for a total turnover of a company (calculated on all territories) is too high for small countries. It could end up exempting all the providers of a given country, which is not the purpose of an exemption. In this context, the SAA would like to reiterate its proposal made in its last year’s contribution to ensure that the concept of exemption is respected: in parallel to the freedom left to each Member State to define the adequate threshold for its own market, a European rule would apply that such a threshold shall not have the effect of excluding more than 10% of the services (this rule is inspired by the 2011 guidelines for monitoring the application of Articles 16 and 17 of the former AVMSD which allowed channels with very low audience share to be exempted from reporting).

2. Low audience

a. On demand services

The concept of audience for on demand (VOD) services is not an established one, and no standardised industry measurements or consistent / independently verified data are available across Member States.

One approach to defining audience for VOD would be to associate it with the 'reach' of a particular service, i.e. the number of users/viewers of a particular service compared to the total number of potential users/viewers. In particular, the reach could be determined by looking at the number of active users of a particular service, i.e. the number of paying subscribers for Subscription Video on Demand (SVOD), the number of unique customers/unique accounts used for acquisition for Transactional Video on Demand (TVOD) and the number of unique visitors for Advertising Video on Demand (AVOD). The number of active users would then be compared to the potential user population for that particular service, represented by the number of households having the capacity to access VOD services in the Member State concerned (i.e. the number of households with fixed or mobile broadband connection).

Alternatively, the audience of a service could be determined in terms of its "VOD user market share", by comparing the number of users (active subscribers/account holders) of a provider with the total number of users of (similar) VOD services in the Member State concerned.

What would be the market and practical implications of defining the audience of a particular VOD service in terms of, respectively, 'reach' and 'market share'? What thresholds would indicate low reach and low market share?

Please provide reasons and evidence/data for your answer.

A low audience is an alternative criterion to a low turnover for defining the exemption provided in Art 13.6. It therefore important to remind that the directive leaves it to Member States to decide which criteria they use for the exemption and then how they define it, taking into account the size of their markets.

As far as the concept of audience for VOD services is concerned, it is indeed rarely used. If Member States want to use it, whether in terms of reach or market share, they must explain it clearly and provide the data on which they base their calculation. However, like for the low turnover criterion, two European rules should apply:

- The basis for calculating the audience should be the jurisdiction of the Member State. It should only take into account the audience of a service in this territory, including for multi-territory services.
- The threshold should not have the effect of excluding more than 10% of the services.

b. Broadcasting

For broadcasting services, audience is an established concept, and audience measurement services exist in several Member States. The definition of low audience could therefore be based on the 'daily audience share' calculated for the reference year - a widely accepted indicator that is used in the context of the AVMSD (See Revised Guidelines For Monitoring The Application Of Articles 16 And 17 Of The Audiovisual And Media Services (Avms) Directive, Doc CC AVMSD (2011) 2, page 3).

In terms of the presence of non-domestic providers, the broadcasting market is different from the VOD market. While for VOD, national markets are largely dominated by non-domestic providers, the top broadcasting players are usually TV groups that attain the entire or large parts of their audience share in their domestic markets. The EU audiovisual market is characterised by a limited number of TV channels that capture a large part of the audience, while the vast majority of channels have low audience shares: only 5% of TV channels have an audience share above 10%, and around 80% of TV channels in any given country in the EU have an audience of 2% or less (see The internationalisation of TV audience markets in Europe, European Audiovisual Observatory, Strasbourg, 2019, p. 16).

What thresholds would indicate low 'daily audience share' for broadcasting services? What approach would be appropriate in the case of pay-TV channels and providers of multiple channels?

Please provide reasons and evidence/data for your answers.

Here again, the SAA is of the opinion that defining the thresholds for the audience criterion for broadcasting services should be left to Member States, taking into account the specificities of the TV market in each Member State. However, two European rules may apply:

- The basis for calculating the audience should be the jurisdiction of the Member State. It should only take into account the audience of a service in this territory, including for multi-territory services.
- The threshold should not have the effect of excluding more than 10% of the services.

3. Possible adjustments for financial contributions

The AVMSD refers to two types of financial contribution obligations for the production of European works - direct investments in audiovisual content and contributions to national funds (levies) - and recognises that Member States may extend their respective national obligations to cross-border providers targeting audiences in their territories.

These obligations have different impacts on cross-border providers. The direct investment (e.g. production, co-production, acquisition of rights in works) could imply a higher entrepreneurial effort than the payment of a levy, due to a different degree of financial involvement and the associated risks. The fulfilment of the investment obligation also depends on the availability of European works, including production projects in which a provider may invest with the available resources.

The question may arise whether Member States are entitled to apply, in duly justified cases and in line with their cultural policy objectives, including the objective to ensure the sustainability of national film funds, lower turnover / audience thresholds for exemptions from cross border levies.

What would be the market and practical implications of lower turnover / audience thresholds for exemptions from cross border levies? What thresholds would be appropriate?

Please provide reasons and evidence/data for your answers.

In principle, if Member States extend their requirements for financial contribution to media service providers targeting their territory but established in other Member States, the same rules shall apply to all operators established in their territory and in another Member States. Art 13.2 emphasises that such financial contributions shall be proportionate and non-discriminatory.

The specific question of the exemption for low turnover and low audience for services established in other Member States only arise when Member States do not provide for such an exemption for the services established in their territories. In this case, it seems that Art 13.6 requires that such an exemption be established, and the logic would lead for the same exemption to apply to all services, whether established in the territory or in another Member State but targeting the former.

In this context, we do not understand why a lower threshold for exemption would need to apply to cross-border levies.

The only possible explanation would be that the Commission intends to impose a European threshold to all Member States, whatever the size and specificities of their markets and would like to give them some leeway only for the specific aspect of cross-border levies.

Here again, we reiterate our opposition for such a one-size-fits-all approach, in particular the micro-enterprises concept for defining a low turn-over and insist on the definition of exemptions to be left to Member States.

Final comments:

The guidelines of the Commission on the method of calculation of the share of European works should recommend the use of an **international identifier such as ISAN** to ensure easy, automated and effective identification of the works and thus the calculation of the share of European works in the catalogues of VOD operators. VOD operators are an essential link in the audiovisual value chain. This would also help the monitoring of the compliance with the requirement by national authorities.

The guidelines should also require VOD operators to communicate publicly basic data on their services and activities, such as their number of subscribers, revenues and consumption data on works, per country, in order to provide **transparency** to all and allow Member States to develop a sound legal framework and make informed decisions.