
On-demand programme services (“ODPS”) guidance

Guidance for ODPS providers on obligations relating to European works

Contents

Section

1. Overview	3
2. Background and legislative context	4
3. European works requirements	7

Annex

A1. European Commission guidelines	13
------------------------------------	----

1. Overview

This document sets out Ofcom’s guidance to providers of on-demand programme service (“ODPS”) on regulatory requirements with respect to European works under section 368CB of the Communications Act 2003 (“the Act”)¹, on the applicable exemptions provided for by that section and on the steps Ofcom will take to secure providers’ compliance.

The guidance reflects changes to the regulatory framework which came into force on 1 November 2020 which require ODPS providers to ensure that in each year, on average at least 30% of the programmes included in their services are European works and to make this content prominent. It also sets out the steps Ofcom will take to secure compliance with these requirements. These changes result from the UK’s transposition of the revised Audiovisual Media Services Directive 2018 into UK law, as required under the terms of the EU Withdrawal Agreement. They impose requirements on ODPS providers to ensure that in each year, on average at least 30% of the programmes included in their services are European works and to make this content prominent.

The guidance should be read alongside Ofcom’s [Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services \(ODPS\)](#) which sets out in full the statutory requirements with which providers of ODPS must comply and guidance on the administrative rules and those concerned with sponsorship and product placement.

¹ As amended by the Audiovisual Media Services Directive Regulations 2020.

2. Background and legislative context

- 2.1 This document sets out Ofcom’s guidance to providers of on-demand programme services on requirements with respect to European works under section 368CB of the Communications Act 2003 (“the Act”).
- 2.2 The guidance reflects changes to the regulatory framework which came into force on 1 November 2020 and sets out the steps Ofcom will take to secure compliance with the requirements set out in section 368CB of the Act. These changes result from the UK’s transposition of the revised Audiovisual Media Services Directive 2018 into UK law, as required under the terms of the EU Withdrawal Agreement. They impose requirements on ODPS providers to ensure that in each year, on average at least 30% of the programmes included in their services are European works and to make this content prominent.

Legal framework

- 2.3 On-demand programme services (“ODPS”) are a category of video on-demand (“VOD”) service regulated under Part 4A of the Communications Act 2003 (“the Act”). Part 4A has been amended to reflect revisions made to the EU framework for on-demand services under the Audiovisual Media Services Directive 2018 (the “AVMSD” or “the Directive”)². The AVMSD governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services, and now also extends to video-sharing platforms (“VSPs”)³.
- 2.4 The AVMSD regulatory framework under Part 4A of the Act has been retained in UK law following the UK’s withdrawal from the EU, although the criteria for establishing jurisdiction have been amended to clarify when an ODPS will fall under UK jurisdiction⁴.
- 2.5 Section 368CB of the Act sets out the responsibilities of ODPS with regard to European works. These, together with the definition of European works, stem from Article 13 of the AVMSD⁵.
- 2.6 Under section 368CB(1) and (2) of the Act ODPS providers are required to:
- a) secure that, in each year, on average at least 30% of programmes included in the service are European works; and
 - b) ensure the prominence of European works in the service.
- 2.7 Section 368CB(3) of the Act clarifies that these obligations do not apply in relation to any period throughout which:
- a) the service has a low turnover or a low audience; or

² Part 4A was amended by the Audiovisual Media Service Directive Regulations 2020 which came into force on 1 November 2020.

³ More information about [VSP regulation](#) is available on our website.

⁴ See: [The Broadcasting \(Amendment\) \(EU Exit\) Regulations 2019](#).

⁵ See paragraphs 3.3 to 3.5 below for further information on Ofcom’s approach to European works policy.

- b) it is impracticable or unjustified for the requirements to apply because of the nature or theme of the service.
- 2.8 Section 368CB(4) of the Act sets out that the second of these exemptions (i.e. where it is impracticable or unjustified) is at Ofcom’s discretion.
- 2.9 Section 368CB(7) of the Act clarifies that “programmes” in the context of the 30% quota requirement does not include advertisements, news programmes, sports events, games, teletext services or teleshopping.
- 2.10 Ofcom has a duty to take steps to secure providers’ compliance with the requirements⁶, including:
- a) the power to demand information⁷; and
 - b) the power to issue an enforcement notification and/or impose a financial penalty of up to 5% of a provider’s annual turnover or £250,000, whichever is greater⁸.

Definition of European works

- 2.11 ‘European works’ are defined in section 368CB(7) of the Act by reference to Article 1 of the AVMSD as meaning:
- a) works originating in European Union Member States;
 - b) works originating in other European States party to the European Convention on Transfrontier Television of the Council of Europe (“the ECTT”)⁹; and
 - c) works co-produced within the framework of agreements related to the audiovisual sector concluded between the European Union and third countries and fulfilling the conditions defined in each of those agreements.
- 2.12 The application of (b) and (c) is conditional on works originating from European Union Member States not being the subject of discriminatory measures in the third countries concerned.
- 2.13 The works referred to in (a) and (b) above are works mainly made with authors and workers residing in one or more European Union Member States or ECTT States provided that they comply with one of the following three conditions:
- a) they are made by one or more producers established in one or more of those States;
 - b) the production of the works is supervised and actually controlled by one or more producers established in one or more of those States;
 - c) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

⁶ Section 368C(1) of the Act.

⁷ Section 368O of the Act.

⁸ Sections 368I and 368J of the Act.

⁹ The UK is a signatory to the ECTT.

- 2.14 Works that do not meet the criteria referred to in paragraph 2.11 but that are produced within the framework of bilateral co-production agreements concluded between European Union Members States and third countries are deemed to be European works provided that the co-producers from the European Union supply a majority share of the total cost of production and that the production is not controlled by one or more producers established outside of the EU.

European Commission guidelines

- 2.15 In accordance with section 368CB(8) of the Act, the European works requirements and exemptions are to be interpreted in accordance with the [European Commission's guidelines](#) on the calculation of the share of European works in ODPS catalogues and on the definition of low audience and low turnover ("Commission guidelines"). Our guidance therefore follows the Commission guidelines and refers to them where appropriate.

3. European works requirements

Guidance to providers

- 3.1 Section 368CB of the Act requires ODPS providers to ensure that in each year, on average at least 30% of the programmes included in their services are European works and to make this content prominent. It also sets out applicable exemptions where a service has a low turnover, a low audience, or where requirements are impracticable or unjustified because of the nature or theme of a service. Ofcom must take steps to secure compliance with these requirements.
- 3.2 The Act states that the requirements under Section 368CB must be interpreted in accordance with the Commission guidelines on European works, included as [Annex 1](#).¹⁰ This guidance has therefore adopted the recommendations made by those guidelines. Providers may find it helpful to refer to the guidelines for further detail.

Definition of European works

- 3.3 'European works' are defined in section 368CB(7) of the Act by reference to Article 1 of the AVMSD as meaning:
- a) works originating in European Union Member States;
 - b) works originating in other European States party to the European Convention on Transfrontier Television of the Council of Europe ("the ECTT")¹¹; and
 - c) works co-produced within the framework of agreements related to the audiovisual sector concluded between the European Union and third countries and fulfilling the conditions defined in each of those agreements.

Calculation of the share of European works

A person providing an on-demand programme service must secure that, in each year, on average at least 30% of the programmes included in the service are European works.

"Programmes" in this context does not include advertisements, news programmes, sports events, games or teleshopping.

- 3.4 The Commission guidelines state that it is appropriate to calculate the European works quota on the basis of the total number of titles in a catalogue, and that every film should be understood as constituting a title in a catalogue. To ensure similar treatment of TV series, the Commission guidelines reason that one season of a series should correspond to one title. This is because a series is usually the work of a single and continuous creative effort made by the same group of professionals with a single budget and over a unitary

¹⁰ European Commission, July 2020, [Guidelines on the method of calculation of the share of European works and the exemptions for low audience and low turnover](#).

¹¹ The UK is a signatory to the ECTT.

period of time, and because TV series also tend to be marketed and advertised by the release of a new season.

3.5 Accordingly, a “title” corresponds to:

- a) **one feature or TV film**, Where a franchise consists of different films, **each film in the franchise** should be understood as constituting a separate title.¹²
- b) **one season of a TV series**. Where a TV series is not commissioned by season, for example in the case of continuing series (e.g. soap operas or quiz shows), one European works title corresponds to one year of production.

3.6 The Commission guidelines recognise that it is increasingly the case for some television programmes to have a duration and production cost similar to those of films. In such cases, it may be appropriate for an individual programme in a TV series to be given higher weighting in calculating the share of European Works. Specific episodes of a TV series may be considered a standalone European works title only on an exceptional basis and where the following apply:

- a) The episode roughly corresponds to the typical length of a feature film
- b) The cost of an episode roughly corresponds to the mean budget of a UK feature film¹³

3.7 Compliance with the 30% quota should be calculated by the share of European works titles out of the total number of titles on the service, as an average over the calendar year. Providers should calculate the share of European works in their service as follows: summation of the number of European works titles over the course of the calendar year, divided by the total number of titles over the course of the calendar year. So, if a provider has 450 unique titles made available over the course of a calendar year, at least 135 of these should be European works. This calculation should not include advertisements, news programmes, sports events, games, teletext services or teleshopping.

Prominence

A person providing an on-demand programme service must ensure the prominence of European works in the service.

3.8 Recital 35 of the Directive clarifies that prominence here means promoting European works through facilitating access to such works.

3.9 In Ofcom’s view, there is no one-size-fits-all solution for securing prominence of European works. This requirement should therefore be met in ways that are relevant to the nature of a service and its user interface. It is important to note that the ways in which viewers encounter content has become more complex in an online environment. Viewers can access content through apps on connected TVs; by clicking through other websites; or through increasingly sophisticated search functions. ODPS providers therefore will not

¹² Short films that qualify as European works should be considered films and so separate titles for the purpose of calculating the share of European works.

¹³ For example, from industry statistics published annually by the BFI the average budget for a UK feature film in 2021 was approximately £10m. <https://core-cms.bfi.org.uk/media/17243/download>

always have full control over all elements of the user interface that contribute to prominence of content. We encourage providers to be innovative in how they comply with this requirement, and to make use of new techniques and tools as they develop¹⁴.

Exemptions

These rules do not apply to a person providing an on-demand programme service in relation to any period throughout which —

- the service has a low turnover or a low audience; or
- it is impracticable or unjustified for these rules to apply because of the nature or theme of the service.

Low turnover

- 3.10 The Commission guidelines recommend that providers should be exempt from requirements if they meet the turnover criteria in the definition of micro-enterprises set out by the “[Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium sized enterprises](#)”. According to this definition, to qualify as a micro-enterprise a provider must have an annual turnover of no more than 2 million euros.
- 3.11 As required under s.368CB(8), this guidance interprets “low turnover” in accordance with the approach set out in the Commission guidelines. However, micro-enterprises are not defined in the UK in a way that corresponds to this Commission Recommendation. In order to make the Recommendation definition practicable, we have converted the turnover element of that definition to the rounded equivalent in pounds sterling.
- 3.12 Accordingly, a provider is exempt from European works requirements if it has an annual turnover of no more than £1.7m, or if the provider can demonstrate that it should be exempt from its requirements in relation to a specific service where that service has a turnover under this amount per annum.
- 3.13 This figure in pounds sterling should broadly correspond to the exchange rate with the Euro for the value of €2m and may be updated by Ofcom from time to time as appropriate.

Low audience

- 3.14 The Commission guidelines advise that until an industry-standard audience measurement is developed, audience should be established as the number of sales of a service. Accordingly, and as required under s.368CB(8), this guidance interprets “low audience” in accordance with that approach.
- 3.15 In the VOD market, active users serve as a proxy for sales of a service. The meaning of active users should take into account the different ways that ODPS providers sell their

¹⁴ Providers may wish to refer to the [report on transposition of Article 13\(1\) from the European Regulators Group for audiovisual Media Services \(ERGA\)](#) for information on how European works content is being made prominent in other countries.

services, which includes for example, by means of subscription (SVOD), advertising (AVOD), and individual transactions (TVOD)¹⁵.

- 3.16 Taking each example in turn, sale of service should be taken to mean the number of active users, understood as:
- a) SVOD: the average number of paying subscribers per month, in a given calendar year
 - b) AVOD: the average number of unique users per month in a given calendar year
 - c) TVOD: the average number of unique customers or unique accounts used (that have acquired at least one title in the service) per month in a given calendar year
- 3.17 Where an ODPS does not fit exclusively into any of the categories above, or where ODPS providers cannot provide audience measurement in the suggested format, they should define “active users” in a way that is most relevant to their service, and explain this methodology to Ofcom.
- 3.18 Some ODPS are bundled together with other services, and not all paying customers will be active users of the ODPS. Where this is the case, active users should be understood to mean the average number of unique users who access the video content of the service per month in a given calendar year.
- 3.19 Audience share for an ODPS is the share of active users attained by a service out of the total number of active users of VOD in the UK¹⁶.
- 3.20 “Low audience” should be understood to mean less than 1% of the audience share. Providers are exempt from European works requirements for any period throughout which they have an audience share of less than 1%.
- 3.21 Ofcom will provide the estimate of total monthly VOD active users in the UK that providers should use in determining whether they qualify for this exemption. We will do so when requesting information from providers for the purposes of monitoring compliance with the requirements. For example, for 2020 this figure would be 42.1m people aged 15+. 400,000 unique viewers therefore represents 1% monthly VOD users. Providers with fewer than 400,000 monthly users for a period would be exempt from European work requirements for that period.
- 3.22 Ofcom plans to update the calculation of total active users of VOD in the UK annually prior to requesting data from providers for monitoring compliance with European works requirements in the Spring of every year.

Impracticable or unjustified due to the nature or theme of the service

- 3.23 As the European works requirements apply only to programmes (defined in section 2), where an ODPS offers exclusively content that does not meet the definition of

¹⁵ We refer to these three categories of ODPS because they are used by the Commission guidelines. This is not an exhaustive or static list of ODPS categories.

¹⁶ Where an ODPS notified to Ofcom targets a foreign market, low audience may be established in relation to the total audience in that market. In such cases providers must explain their methodology to Ofcom, as is set out in 3.17.

programmes, for example advertisements, news programmes, sports events, games, teletext services or teleshopping, then European works requirements do not apply.

- 3.24 In addition, providers should not be subject to European works quotas and prominence obligations where it is impracticable or unjustified due to the nature or theme of their service. These grounds for exemption could plausibly cover a wide range of circumstances, and so we consider it appropriate that this exemption be applied at the discretion of the regulator. This is similar to the approach Ofcom takes with the European works requirements for linear broadcasters, where Ofcom assesses the reasons provided by broadcasters for why requirements are impracticable and will advise if any remedial measures are necessary.
- 3.25 Ofcom will accept exemptions on these grounds on a case-by-case basis. For example, it seems reasonable for ODPS specialising in types of content that are not widely produced in Europe, to be exempt from European works requirements. This could include, for example, ODPS specialising in Japanese anime content.

Ofcom's approach to securing compliance

General approach

- 3.26 We will take a proportionate approach to securing compliance with ODPS European works requirements that is consistent with the approach we take for related obligations on linear broadcasters. This centres on collecting data from providers on how they are meeting their requirements, while being prepared to use enforcement powers where necessary. We propose also to encourage providers to exchange best practices for making European works content prominent, for example, through discussions at the Television On-Demand Industry Forum.
- 3.27 We will ask providers to share information on: European works on their services; how they are making this content prominent; and, where relevant, reasons for why exemptions apply. We set out a draft list of questions we will ask of providers below.
- 3.28 We will ask providers for this information in Spring 2023 and yearly thereafter. We will ask for this information in respect of the preceding calendar year. For example, when we ask providers for this information in Spring 2023 our questions will cover the calendar year 2022.
- 3.29 To deliver on the policy intention of increasing the production of a diversity of European content, we encourage providers to fill their quotas with content originating from across Europe. This could also contribute to plurality of media in the UK.

Provision of information

- 3.30 We propose to ask providers annually for information on:
- a) the type of service (i.e. "catch up" or "archive" or "mixed");
 - b) the nature of access (i.e. "free to view" or "conditional on user payment" or "mixed");

- c) the nature of funding (i.e. “subscription” or “pay per view” or “advertising” or “public grant” or “mixed”);
- d) the number of titles of “European works” made available;
- e) the percentage of total titles of programming comprising “European works”.
- f) if a provider believes they are exempt from the requirements, the grounds for the exemption along with reasons and supporting evidence (for example on audience share or annual turnover); and
- g) if a provider has counted individual programmes in a TV series as individual titles for the purposes of calculating the share of European works, the relevant programme title(s) and the provider’s rationale for doing so.

3.31 The information provided to us will be treated as confidential and used by Ofcom only to monitor compliance with the requirements.

Failures to meet requirements

3.32 We will use the information provided to assess compliance with the requirements. This includes consideration of a provider’s view that they are exempt from the requirements, or their decision to count individual episodes of a series as individual titles for the purposes of calculating share of European Works.

3.33 Where we have concerns that a provider has contravened or is contravening their obligations, we have powers to open an investigation, to issue an enforcement notification and, where appropriate, to impose a financial penalty that is proportionate to the contravention and not exceeding 5% of annual turnover or £250,000 (whichever is the greater amount). We will generally seek to work with providers to secure compliance, but this will not fetter our discretion to use our enforcement powers if we judge appropriate.

3.34 Any investigation opened into compliance with these requirements would follow [Ofcom’s procedures for investigating breaches of rules for on demand programme services](#).

3.35 If, following investigation, Ofcom finds that an ODPS provider has seriously, deliberately, repeatedly or recklessly breached a relevant requirement Ofcom can consider the imposition of a statutory sanction. In such circumstances, we would follow [Ofcom’s procedures for the consideration of statutory sanctions arising in the context of on-demand programme services](#).

A1. European Commission guidelines

Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover

(2020/C 223/03)

I. BACKGROUND

The Audiovisual Media Services Directive [\(1\)](#) (hereinafter ‘the AVMSD’) lays down reinforced rules on the promotion of European works. Article 13(1) establishes that providers of on-demand audiovisual media services (hereinafter ‘on-demand’ or ‘video on demand (‘VOD’) services’) must ‘secure at least a 30 % share of European works in their catalogues and ensure prominence of those works’.

Article 13(2) of the AVMSD stipulates that ‘where Member States require media service providers under their jurisdiction to contribute financially to the production of European works (...), they may also require media service providers targeting audiences in their territory, but established in other Member States to make such financial contributions’. Such contributions ‘shall be proportionate and non-discriminatory’.

Article 13(6) of the AVMSD provides for mandatory exemptions for companies with a low turnover or a low audience from the obligations under Article 13(1), as well as from the possible requirements under Article 13(2). The aim of the exemptions, as clarified in Recital 40, is to ensure that the obligations relating to the promotion of European works do not undermine market development and do not inhibit the entry of new market players.

Pursuant to Article 13(7) of the AVMSD, the present document aims to provide 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 in the context of the above-mentioned exemptions.

The guidelines are not binding. In the process of drafting these guidelines, the Commission has duly consulted the Contact Committee, as required by Article 13(7). To the extent that the guidelines may interpret the AVMSD, the Commission’s position is without prejudice to any interpretation by the Court of Justice of the European Union.

II. CALCULATION OF THE SHARE OF EUROPEAN WORKS

1. Calculation per titles

In the market for linear audiovisual media services (television broadcasting), the share of European works in broadcasters’ programming schedules is calculated by reference to the transmission time. Article 16 of the AVMSD provides that broadcasters must reserve a

majority proportion of their transmission time for European works. This clearly reflects the time-bound nature of linear services, where only a limited number of programmes can be broadcast at the same time and during a determined period. The duration element is thus specifically linked to the intrinsic characteristics of television broadcasting (linear) services that base their programming on daily (24 hours) schedules.

Such constraints do not apply to on-demand audiovisual media services (VOD) providers. For on-demand services, the inclusion of a certain programme is not dependent on the availability of a time slot in a programming schedule. Moreover, the inclusion of a particular programme of a specific duration in a catalogue does not imply the exclusion/substitution of another programme of a similar duration. In other words, VOD providers do not create their catalogues based on time-related considerations, but on the attractiveness of a potentially large number of individual programmes placed at users' disposal.

Similarly, from a user perspective, the choice of watching a programme available in the on-demand catalogues is not constrained time-wise, in the sense that watching a certain programme does not imply renouncing to watching all the other programmes available at the same time. The essence of VOD services lies precisely in the freedom of the user to select and watch an individual programme from a catalogue at the chosen time and as many times as the user wants.

Since the relevant choices of both VOD providers and their users are centred around the individual programmes (based e.g. on the perceived quality, attractiveness, tastes), the Commission considers that, in the case of VOD services, due to their characteristics, it is more appropriate to calculate the share of European works in catalogues based on titles and not on transmission (viewing) time.

The choice of titles in catalogues as the relevant unit of measurement, as opposed to time/duration of content, is supported by additional considerations. Firstly, the calculation of the share of European works by titles, for both films and television ('TV') series, is more neutral as regards the choice of programmes to be included in the catalogues by the VOD providers. The calculation by duration could create an incentive for providers to favour European works of long overall duration (e.g. series with a high number of episodes) in order to easily attain the 30 % share. By being more neutral, the calculation based on titles is likely to facilitate the creation of a more diversified offer of European works.

Secondly, the calculation by titles is likely to be less burdensome for VOD providers than the calculation by duration. VOD providers are more likely to have an account of the number of European titles out of the total number of titles available in their catalogues rather than an account of the total viewing time of European works out of the total viewing time of all the works included in their catalogues.

Thirdly, the calculation by titles is also likely to facilitate monitoring and supervision by the relevant national authorities, as titles are easier to track and verify than the total viewing times.

In view of the above, the Commission considers that it is appropriate to calculate the 30 % share of European works in on-demand catalogues based on the (total) number of titles in the catalogue.

2. What constitutes a title

In the case of feature and TV films, every film should be understood as constituting a title in a catalogue. Different films in a franchise ⁽²⁾ should also be understood as constituting different titles in a catalogue.

The identification of what constitutes a title is more complex for television series or other formats presented in a serialised manner (i.e. episode by episode). Episodes of television series are often grouped into different seasons. In such cases, the question arises whether one title should correspond to the whole series, to one season or to one individual episode.

The Commission takes the view that one season of a series should correspond to one title. The calculation of series by seasons would ensure a similar treatment with feature or TV films. A season of a series is usually the result of a single and continuous creative effort made by the same group of authors/audiovisual professionals, with a single budget and over a unitary period of time. Furthermore, the release on the market and related promotional activities often concern individual seasons. For these reasons, the work carried out in order to produce a season of a series could be considered similar to the work normally required to produce a film.

Furthermore, the calculation by seasons would reduce possible incentives for providers to favour European works of overall long duration (e.g. series or other formats with a high number of episodes) for the purpose of achieving the share to the detriment of shorter works with higher potential of circulation among Member States (e.g. feature films and high end TV series) ⁽³⁾.

On the other hand, some audiovisual productions may have higher production costs compared to other items in the catalogue, for instance in cases of significant direct investment or licencing costs for high-end fiction, where an episode has a duration and production cost similar to a feature film. In these cases, where justified, the national authorities could envisage to give a higher weighting to these works, for example, based on a provider's substantiated request.

3. Calculation per national catalogues

Some VOD providers operating within the Union have multiple national catalogues, which have a different composition, depending on the national market (Member State) 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 ⁽⁴⁾. Thus, it is necessary to determine how the share of European works should be calculated in such cases.

The essence of Article 13(1) of the AVMSD is to ensure that VOD providers actively contribute to the objective of promoting cultural diversity within the Union by providing a minimum share of European works in their offers. The Commission takes the view that this objective

can only be effectively achieved if the 30 % share of European works is secured in each of the national catalogues offered by multi-country VOD providers. This will ensure that viewers in every Member State where the provider offers national catalogues have the required exposure to European works. This approach also presents the advantage that it is likely to incentivise the circulation and availability of European works across the Union.

It is important to keep in mind that it is for the country of origin to ensure that on-demand providers under its jurisdiction comply with the obligation to ensure the share of European works in their catalogues. If a VOD provider falling under the jurisdiction of a Member State offers different national catalogues in other Member States, it is the responsibility of the Member State of jurisdiction (i.e. the country of origin) to enforce the obligation related to the share of European works with regard to all the various national catalogues.

4. Temporal dimension

The actual share of European works in VOD catalogues can vary on a day-to-day basis. For example, when a VOD adds a new non-European TV series into its catalogue, this could have an effect of temporarily decreasing the overall share of European works until further European works are subsequently included. This raises the question at which point in time the compliance with the 30 % share should be ensured. Providers may be required to ensure compliance at every point in time or on average over a pre-determined period. The latter approach would allow temporary fluctuations to take place.

The AVMSD does not provide any indications with regard to which of these two methods should be preferred. Both methods could achieve the desired goal to promote cultural diversity in VOD catalogues. Accordingly, the Commission considers that Member States may freely decide what method to adopt in monitoring compliance with Article 13(1) of the AVMSD. When deciding on the monitoring method, Member States should nevertheless take due account of the need to reduce the administrative burden associated with compliance and enforcement and to ensure, as well, transparency and legal certainty for the VOD providers.

III. DEFINITION OF LOW AUDIENCE AND LOW TURNOVER

1. Preliminary remarks

According to recital 40 of 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’. While the above considerations are common for both Article 13(1) and Article 13(2), these provisions present some specific differences that need to be considered:

—It is for the Member State of origin to ensure that on-demand providers under its jurisdiction comply with the obligation to secure the share for European works under Article 13(1); it is for the same Member State of origin to apply the exemptions under Article 13(6) to such providers.

—The situation is different for Article 13(2). This provision recognises the possibility for any Member State to impose non-discriminatory and proportionate financial contribution obligations on providers established in another Member State and targeting audiences in its territory. In this case, it is for the ‘targeted’ Member State to apply both its legislation imposing such contributions and the exemptions under Article 13(6).

In view of these different legal contexts, it is appropriate to consider the specificities of these obligations when considering guidance on the exemptions set in Article 13(6). In particular, it is recalled that, as clarified by recital 36, Member States are allowed to impose financial obligations on media service providers targeting their territory, in view of ‘the direct link between financial obligations and Member States’ different cultural policies’.

When defining low audience and low turnover, it is thus important to find a right balance between the objectives of preserving a necessary innovation space for smaller audiovisual players and that of promoting cultural diversity through adequate financing for European works under Member States’ cultural policies. Therefore, while the guidelines envisage that companies with a low turnover or a low audience as defined below are exempted from the obligations under Article 13, some additional safeguards in specific cases may be needed, particularly for the application of financial contributions in view of ensuring sustainability of audiovisual and film financing systems.

2. Distinction between exemptions established by Union and national law

Article 13(2) of the AVMSD does not harmonise the obligations to contribute financially to the promotion of European works. This provision merely recognises that Member States have the option to apply also to cross-border providers that target audiences in their territory the obligations to contribute through direct investments and levies, in compliance with the principles of non-discrimination and proportionality. It is thus the competence of the Member State that decides to avail itself of this possibility to define and apply the corresponding obligations.

In this sense, if a Member State has in place or introduces obligations for media service providers to contribute financially to the production of European works and these obligations are limited to providers established in that Member State, the present guidelines do not apply. They become relevant if that Member State also applies such requirements to providers targeting audiences in its territory but established in other Member States. In any case, the aim of the exemptions provided in Article 13(6) AVMSD is not to replace the exemptions established at the national level, which define the scope of the obligations to contribute, but to provide safeguards for cross-border providers.

Therefore, the guidance set in this section is without prejudice to the freedom of the targeted Member State to establish different thresholds at national level applicable to providers under its jurisdiction.

It is important to note that Member States applying the financial contribution obligations to providers established in other Member States need to respect the principle of non-discrimination. Therefore, if they have exemptions in place or introduce exemptions at

national level applicable to providers established in their territory, these exemptions also need to be applied in a non-discriminatory manner to cross-border providers, even if the thresholds are higher than the ones indicated in these guidelines.

3. Low turnover

As regards the threshold of low turnover, which should serve as a basis for an exemption under Article 13(6), the Commission refers to the Recommendation 2003/361/EC concerning the definition of micro, small and medium sized enterprises ⁽⁵⁾.

Following an established policy-making approach, micro enterprises should a priori be excluded from the scope of the proposed legislation, unless the necessity and proportionality of them being covered is demonstrated ⁽⁶⁾. Therefore, the Commission considers that the threshold for low turnover could be identified by reference to the concept of microenterprise developed in the above-mentioned Commission Recommendation, specifically based on the turnover threshold used in the definition of micro enterprise (i.e. enterprises with a total annual turnover not exceeding EUR 2 million). The annual turnover of the enterprise should be determined in accordance with the provisions of the above-mentioned Commission Recommendation, thus taking into account also the turnover of partner and linked enterprises ⁽⁷⁾.

Due to their limited size and scarce resources, microenterprises may be particularly affected by regulatory costs. Excluding microenterprises from the application of the obligations to promote European works (Article 13(1) and Article 13(2)) avoids hampering the access of new entrants into the market. This approach is therefore consistent with the objective of incentivising the creation of new businesses and promoting market development.

At the same time, recital 40 of the AVMSD provides that ‘the determination of low turnover should take into account the different sizes of audiovisual markets in Member States’. For example, in some Member States, the size of the national markets is in the order of a few million EUR. In several cases, such markets are significantly below ten million EUR. In these markets, even microenterprises may be considered to have a significant market presence.

In view of the above, the Commission considers that Member States with smaller national audiovisual markets should be able to determine lower turnover thresholds. Based on the overall market characteristics, such lower thresholds could be justified and proportionate provided they exempt enterprises that have a share of less than 1 % of the overall revenues in the national audiovisual markets concerned.

4. Low audience

4.1. Video on demand services

4.1.1. Methodology

According to recital 40 of the AVMSD, ‘low audience can be determined, for example, on the basis of a viewing time or sales, depending on the nature of the service (...)’. In linear services, audience is traditionally measured by reference to viewing time. The concept of audience for

VOD is not an established one and no standardised industry measurements are available across Member States. Thus, there is no data available on audience, verified by a third party, against which one could check if the audience of a specific VOD provider is low. While this situation might change in the future, it is nonetheless necessary at this stage to define a practical method to determine a low audience for the purposes of Article 13 of the AVMSD for VOD providers.

As explained in recital 40, the concept of audience can be associated 'for example' with the sales of the services. In the absence of established industry measurements, the Commission considers this currently to be the most appropriate method for measuring audience in the VOD sector.

While the Directive does not prohibit, in principle, Member States from using alternative criteria, the present guidelines therefore focus on a method for determining the audience of VOD providers based on the sales of the services.

In a VOD environment, the number of users/viewers of a particular service is a proxy for such sales. In particular, the audience could be determined on the basis of the number of active users of a particular service, e.g. the number of paying subscribers for Subscription Video on Demand (SVOD), the number of unique customers/unique accounts used for acquisition of works for Transactional Video on Demand (TVOD), and the number of unique visitors for Advertising Video on Demand (AVOD).

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

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

Since audience shares constitute a good proxy for sales and reflect the market position of the service concerned in this sector, providers with a low number of active users would have no significant presence in the market, thus justifying the application of the exemption set in Article 13(6). This method is also close to the notion of TV audience share, which refers to actual TV set holders tuned to particular channels in a given period of time compared to the total number of TV sets in the sample.

4.1.2. Threshold

The Commission considers that providers with an audience share of less than 1 % within a given Member State should be deemed to have a low audience. This threshold reflects a limited uptake of the services of such providers compared to the relevant national markets. This may be, for instance, because a provider is a new entrant on that national market. Based on the available data, the main SVOD providers in Europe ⁽⁸⁾ tend to have a share that goes well beyond 1 % in the national markets where they are present.

In view of the above, the Commission considers it appropriate, in principle, to exempt from the obligations under Article 13 those providers that have an audience share of less than 1 % in the Member State concerned.

With regard to Article 13(1), this means that these providers are exempted by their Member State of origin from the share obligation in those catalogues (directed to the Member State of origin or to other Member States) for which their audience share is below the above-mentioned threshold. With regard to Article 13(2), this means that these providers are exempted by the targeted Member State from the obligation to contribute financially to the production of European works.

4.2. Linear audiovisual media services

For linear services, audience is an established concept and audience measurement services exist in several Member States. The definition of low audience should therefore be based on indicators that are already accepted and used in the context of the AVMSD, namely the daily audience share ⁽⁹⁾ calculated for the reference year.

In terms of presence of non-domestic providers, the linear services market is different from the VOD market. For VOD, national markets are largely dominated by non-domestic providers; this is not the case for linear services. The top players are usually TV groups that in general attain the entire or large parts of their audience share in their domestic markets. According to a recent study, the EU audiovisual market is characterised by a limited number of TV channels that capture a large part of the audience. 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 Union have an audience of 2 % or less ⁽¹⁰⁾.

The threshold for low audience should be determined by taking into account the presence and positioning of the channels on the market for linear audiovisual media services in terms of audience. Therefore, taking into account the characteristics of the market for linear services, cross-border channels with an individual audience share below 2 % in a given targeted Member State should be considered to have low audience in the sense of Article 13(6) of the AVMSD ⁽¹¹⁾. Particularly in case of providers with multiple targeting channels, Member States may consider the overall position of the provider in the national market when applying the exemption ⁽¹²⁾.

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

Article 13(2) of the AVMSD refers to two types of financial contribution obligations for the production of European works, namely direct investments in audiovisual content and contributions to national funds (levies). The Commission considers that, when determining

the appropriate thresholds, the different impacts of these types of obligations on cross-border providers should be taken into account. The direct investment (e.g. production, co-production, acquisition of rights in works) generally implies 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 Commission understands that in some Member States, depending in particular on the size and structure of the audiovisual market, it may be considered important to apply financial contribution obligations also to on-demand services with a turnover lower than 2 million EUR or with an audience share of less than 1 % as well as cross-border linear services with an audience share below 2 %, in particular pay TV services, as their presence on the national markets may still be deemed important. In order to cater for such situations, Member States may, decide to apply lower thresholds, in duly justified cases and in line with their cultural policy objectives, including the objective to ensure the sustainability of national audiovisual and film funding systems.

These thresholds and the financial contributions imposed should take into account the financial capacity of the service, respect the principles of non-discrimination and proportionality, should not undermine market development and should allow for the entry of new players on the market.

As regards cross-border direct investment obligations, the Commission invites Member States, in particular those with larger audiovisual markets, to consider also exempting enterprises having a total turnover above EUR 2 million ⁽¹³⁾, by setting a higher threshold, or at least make them subject to less onerous investment obligations taking account, in particular, of the possible difficulties to find audiovisual productions to invest in with the available resources in the Member States concerned.

IV. PROCEDURAL REMARKS

While the implementation of Article 13(1) and 13(2) of the AVMSD lies with the national authorities, they are encouraged to cooperate actively with their counterparts in other Member States in the areas covered by the present guidelines. This cooperation might be warranted especially with a view to gathering relevant data or information and to limit the risks of divergent interpretations by national authorities. The European Regulators Group for Audiovisual Media Services (ERGA) could be an appropriate forum to facilitate such cooperation.

In view of the above, national regulatory authorities are invited to exchange information, data and best practices within ERGA and to discuss any issues faced in the application of the present guidelines. In this context, ERGA should bring significant issues in the approaches taken by national regulatory authorities to the attention of the Commission. The Commission will keep the AVMSD Contact Committee informed about such developments.

In the framework of the reporting obligations under Article 13(4) of the AVMSD, Member States should inform the Commission about the application of the present guidelines.

⁽¹⁾ For the purposes of these guidelines, the references to the ‘AVMSD’ shall be understood as references to Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) ([OJ L 95, 15.4.2010, p. 1](#)), as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 ([OJ L 303, 28.11.2018, p. 69](#)).

⁽²⁾ Franchise is to be understood as a succession of related films sharing the same fictional universe.

⁽³⁾ According to a study of the European Audiovisual Observatory, mostly short formats (TV fiction titles with 26 episodes or fewer) are produced in the EU. More specifically, 90 % of all TV fiction titles have 26 episodes or fewer, out of which 44 % are TV films (1-2 episodes). However, they account for a limited proportion, i.e. 33 % of the total. On the contrary, long format TV fiction programmes represent only 10 % of the number of titles produced but they account for 67 % of all TV fiction hours produced. The same study highlights that shorter formats can be considered to be ‘high-end’ TV fiction, with a potential for co-productions and exports, while long formats generally have lower production costs and a stronger national background and, probably, less potential for cross-border exploitation. From this perspective, the calculation by titles and seasons could have a positive impact on the circulation of European works with genuine cross-border exploitation potential. See G. Fontaine, TV fiction production in the European Union, European Audiovisual Observatory, Strasbourg, 2017.

⁽⁴⁾ C. Grece, Films in VOD catalogues – Origin, Circulation and Age – Edition 2018, European Audiovisual Observatory, Strasbourg, 2018.

⁽⁵⁾ Commission Recommendation 2003/361/EC 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](#)).

⁽⁶⁾ http://ec.europa.eu/smart-regulation/impact/key_docs/docs/meg_guidelines.pdf.

⁽⁷⁾ See in particular Article 3 and 6 of the Recommendation.

⁽⁸⁾ See, for example, ‘Main OTT SVOD groups in Europe by estimated number of subscribers’ (December 2018), published as part of the European Audiovisual Observatory Yearbook 2019, Strasbourg, December 2018.

⁽⁹⁾ 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, p. 3.

⁽¹⁰⁾ A. Schneeberger, The internationalisation of TV audience markets in Europe, European Audiovisual Observatory, Strasbourg, 2019, p. 16.

⁽¹¹⁾ Such markets are characterised by very significant shares of a few channels (typically 80 % of the audience share is covered by the top 20 % of the channels) and a high number of channels with small audience (on average 80 % of TV channels in Europe have an audience share of 2 % or less).

⁽¹²⁾ They may assess if overall the provider is one of the top providers covering 80 % of the audience share in that country.

⁽¹³⁾ Calculated in accordance with the provisions of the Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium sized enterprises, cited above.