

This is an Open Access document downloaded from ORCA, Cardiff University's institutional repository:<https://orca.cardiff.ac.uk/id/eprint/146612/>

This is the author's version of a work that was submitted to / accepted for publication.

Citation for final published version:

Komorowski, Marlen , Iordache, Catalina, Kostovska, Ivana, Tintel, Stephanie and Raats, Tim 2021. Investment obligations for VOD providers to financially contribute to the production of European works, a 2021 update. *Studies on Media, Information and Telecommunication (SMIT)*. Available at: <https://researchportal.vub.be/en/publications/d059...>

Publishers page: <https://researchportal.vub.be/en/publications/d059...>

Please note:

Changes made as a result of publishing processes such as copy-editing, formatting and page numbers may not be reflected in this version. For the definitive version of this publication, please refer to the published source. You are advised to consult the publisher's version if you wish to cite this paper.

This version is being made available in accordance with publisher policies. See <http://orca.cf.ac.uk/policies.html> for usage policies. Copyright and moral rights for publications made available in ORCA are retained by the copyright holders.



Investment obligations for VOD providers to financially contribute to the production of European works, a 2021 update

June 2021

Prof. Dr. Marlen Komorowski

Catalina Iordache

Ivana Kostovska

Stephanie Tintel

Prof. Dr. Tim Raats

© 2021, imec-SMIT, Vrije Universiteit Brussel

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or made public in any form or by any means, electronic or mechanical, by photocopying, recording or any other means, without the prior written permission of the publisher.

Reference

Komorowski, M., Iordache, C., Kostovska, I., Tintel, S. & Raats, T. (2021). Obligations for VOD providers to financially contribute to the production of European works, a 2021 update. Brussel: imec-SMIT-VUB.

Contact: marlen.komorowski@vub.be

Table of contents

About this study	5
1. Background – The VOD market in the EU	7
1.1. VOD services in the EU	7
1.2. Limitations of domestic audiovisual markets in the EU	7
1.3. Revision of the AVMSd	8
2. Findings – Comparing financial investment obligations of VOD across the EU	11
2.1. An historical overview: Changing legal practices	11
2.2. The status quo: Comparison of legislation in the EU	19
2.3. What financial obligations exist across Europe?	21
2.4. What criteria to determine the scope of application?	24
2.5. What are the applicable procedures in place?	29
2.5. What is the motivation to impose investment obligations?	31
2.6. Summary of findings and recommendations	32
3. Case studies	35
3.1. Austria (AU)	35
3.2. Belgium (Flemish-speaking Community) (BE NL)	38
3.3. Belgium (French-speaking Community) (BE FR)	41
3.4. Croatia (HR)	43
3.5. Czech Republic (CZ)	45
3.6. France (FR)	47
3.7. Germany (DE)	51
3.8. Italy (IT)	53
3.9. Poland (PL)	55
3.10. Portugal (PT)	56
3.11. Slovenia (SL)	60
3.12. Spain (ES)	62
4. Annexes	66
4.1. Full list of sources per Member State analysed	66
4.2. List of experts	67
4.3. About imec–SMIT–VUB	68

List of Tables

Table 1: Overview of financial obligations to promote European or local work for VOD providers in the applicable legislation of all EU Member States, March 2021 (Source: authors).	20
Table 2: Overview of forms of financial investment obligations for VOD providers, March 2021 (Source: authors).	22
Table 3: Overview of criteria to determine which VOD providers are captured or exempted, March 2021 (Source: authors).....	28

About this study

The latest revision of the **Audiovisual Media Services directive (hereafter referred to as AVMSd) came into force in autumn 2018**. The European Commission set the deadline for transposition of the new AVMSd into national legislation for 19 September 2020. Based on data from the European Audiovisual Observatory, 11 of the 27 Member States have, as of March 2021, completed revisions of their legal texts.¹ This study updates our previous report from summer 2018, which was coordinated by Prof. Dr. Karen Donders, and looked at the existing state of regulation regarding investment obligations for on-demand audiovisual media services (hereafter 'VOD') providers in the European Member States.²

While currently 16 Member States are still working on the transposition, **since 2018, much has already changed in the European media policy landscape**. Compared to our study from 2018, we have identified two new Member States with financial investment obligations for VOD providers, namely Poland and Austria. Four Member States have amended regulations since 2018 to change calculations for investment obligations and/or to also capture foreign VOD providers for financial obligations, including Belgium (both the French and Flemish Communities), Croatia, Italy, and Portugal. Five Member States have drafted laws, that are currently undergoing legislative procedure, that will amend relevant legislation possibly this year or the next, including Croatia, the Czech Republic, France, Slovenia, and Spain. Therefore, compared to our study from 2018, changes for 8 Member States could be identified (however, possible changes are in discussion for other Member States as well, more details in section 2.1). The revised directive aims to strengthen European culture and clarifies the rules for investment obligations, i.e., the obligations for VOD providers to contribute financially to the production of European works. **This study gives a comprehensive overview of new investment obligations that have been put into place, or are being developed, in Europe, in recent years**. While the AVMSd aims to harmonise national practices, to some extent, there are considerable differences among the Member States, which are investigated in this report. In order to explore these differences, special emphasis is placed on the following questions:

- Where can the basic provisions for investment obligations for VOD providers be found in MS's law?
- What are the criteria to determine which VOD providers are subject to the obligation?
- How are the investment obligations calculated?
- What procedures do VOD providers need to follow?

The findings of this report³ are largely based on desk research and expert consultations. Insights were gathered through **the Member States' applicable laws** (including decrees, media laws and other legal documents).⁴ Other sources, including information provided by the European Platform of Regulatory Authorities, the AVMS Database published by the European Audiovisual Observatory, and different studies were consulted in order to ensure accurate and comprehensive information. The findings were also **checked with experts** from the Member States (a full list of all the sources and expert consultations can be found in the Annex). The study report consists of 3 parts:

- Part 1 provides a brief contextualisation, including an overview of the VOD service market in Europe and the impact on new legislation for VOD investment obligations.
- Part 2 gives an overview of existing legislation and discuss key findings based on the analysed cases.
- Part 3 presents the case studies of countries and regions included in the analysis.

The following case studies are included in this report: Austria; Dutch-speaking Community of Belgium; French-speaking Community of Belgium; Croatia; Czech Republic; France; Germany; Italy; Poland; Portugal; Slovenia; and Spain.

¹ <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>

² Find the full study report from 2018 via <https://smit.vub.ac.be/wp-content/uploads/2018/12/VUB-VOD-report-2018-.pdf>

³ Special thanks to Amanda Bastos Lazaroni for supporting the research for this report.

⁴ Throughout the research process from February to May 2021, the financial obligations for VOD providers in some Member States may have already changed or could not be identified. We are still confident that the findings in this report give the most up-to-date comparative information on financial obligations for VOD providers in the EU.

Part 1

Background – The VOD market in the EU

1. Background – The VOD market in the EU

1.1. VOD services in the EU

The **global market for VOD services has grown** substantially over the last decades. So-called over-the-top (OTT) services (distributed via the Internet), which VOD services are part of, have become increasingly popular (including VOD that are advertising-supported - AVOD, financed through subscription - SVOD, or paid for per transaction - TVOD).

Recent research shows that the global OTT market is expected to reach USD 194.20 billion in revenues in 2025, presenting a compound annual growth rate of 13.87%.⁵ According to the European Audiovisual Observatory, revenues from VOD providers in the EU amounted to EUR 11.6 billion in 2020. Of those, EUR 9.7 billion came from SVOD alone, representing 84% of the revenues. **The VOD market showed a vast uptake in recent years with a compound annual growth rate of 40% from 2010 to 2020 in Europe.** This was driven by the strong shift in consumer preferences to watch VOD services, as well as by the high number of new services entering the market, and their significant investments in content.⁶

At the same time, European VOD markets are increasingly **dominated by US-based companies**. The top five global players that compete across multiple markets and collectively control approximately half of the annual world-wide OTT market revenues are Facebook, YouTube, Hulu, Netflix, and Amazon Prime Video. In 2020, Netflix achieved USD 25 billion in annual revenue. The company reached over 200 million paying subscribers worldwide in the last trimester of 2020, according to their most recent shareholder letter.⁷

In 2020, **the top four SVOD services in terms of country presence in the EU were Netflix, Amazon Prime Video, YouTube Premium (each present in the EU27 Member States), Apple TV+ (in 25 Member States).** This is not to say that there are no relevant VOD services offered by European companies. Viaplay, which is part of the Nordic Entertainment Group, is the second most popular SVOD service in Denmark, with 23% of market share; Sweden, with 19%; and Finland, with 16%.⁸ In the United Kingdom, BritBox was launched in 2020, operating as a joint venture of the BBC and ITV plc, aiming to compete against international players in the market. Similar VOD services are being developed throughout Europe, with the aim of building a strong local or regional presence (Videoland in the Netherlands; Salto in France; Streamz in Flanders).

1.2. Limitations of domestic audiovisual markets in the EU

The European audiovisual market is, in fact, a collection of diverse markets, with different languages, cultures and market sizes. Many EU Member States are small media markets with a limited number of media companies. This means that they only have limited revenues from their own market and therefore smaller budgets, which in turn translates into limited exploitation opportunities beyond their own borders. Apart from **the structural market factors, cultural factors and language also make it more difficult to make audiovisual content in Europe profitable.**⁹ A smaller market also means that there is limited revenue from VOD. European broadcasters, both public and private, take up most of the investment opportunities in original content. VOD players have also increased content investments for their streaming services in recent years, ushering in a new era of “peak TV” and a large availability of premium content in Europe.¹⁰ All in all, this creates a somewhat paradoxical situation whereby watching

⁵ <https://www.businesswire.com/news/home/20201130005438/en/194.2-Billion-Over-the-Top-OTT-Market---Global-Growth-Trends-and-Forecasts-to-2025---ResearchAndMarkets.com>

⁶ <https://rm.coe.int/trends-in-the-vod-market-in-eu28-final-version/1680a1511a>

⁷ https://s22.q4cdn.com/959853165/files/doc_financials/2020/q4/FINAL-Q420-Supplier-Letter.pdf

⁸ <https://rm.coe.int/trends-in-the-vod-market-in-eu28-final-version/1680a1511a>

⁹ Based on: Berg, C.E. (2011), 'Sizing Up Size on TV Markets. Why David would Lose to Goliath'. In: G.F. Lowe & C.S. Nissen (eds.), *Small Among Giants: Television Broadcasting in Smaller Countries*, Göteborg: Nordicom, pp. 57-89; Bielby, D.D. & L. Harrington (2008), *Global TV: Exporting Television and Culture in the World Market*. New York: NYU Press; Bondebjerg, I., Redvall, E. N., & Higson, A. (Eds.) (2015), *European Cinema and Television: Cultural Policy and Everyday Life*. Houndmills: Palgrave Macmillan. Palgrave European Film and Media Studies; Burgelman, J.-C. & C. Pauwels (1992), 'Audiovisual policy and cultural identity in small European states: the challenge of a unified market'. In: *Media, Culture and Society*, 14(2): 169-183; Raats, T., Evens, T. & S. Ruelens (2016), 'Challenges for sustaining local audiovisual ecosystems. Analysis of financing and production of domestic TV fiction in small media markets'. In: *Journal of Popular Television*, 4(1): 129-147.

¹⁰ <https://rm.coe.int/trends-in-the-vod-market-in-eu28-final-version/1680a1511a>

audiovisual content has never been more popular, while its valorisation within domestic media markets has never been more difficult. This precarious situation is driven by several factors:

- **The increase in VOD, and especially SVOD, platforms and services** has led to greater challenges for traditional broadcasters, who must now compete with the substantial sums that foreign players invest in big-budget productions.
- **Existing advertising models are under strong pressure**, due to the shift of advertising revenues to international platforms such as Google, YouTube, and Facebook. And, while local players reinvest advertising revenues in local content, major foreign platforms are hardly known to do the same.
- **The increase in ad-skipping and deferred viewing causes** a decline in advertising revenues for private broadcasters. At the same time, it is still difficult for private broadcasters to make use of new forms of online or “targeted” advertisements. Ironically, the most expensive genres, such as local fiction, are also the genres most subject to time-shifted viewing.^{11 12}
- **The increase in operating windows (through VOD) also means tighter competition**, which makes it more difficult for broadcasters to acquire foreign rights. They are increasingly inclined to finance lower shares in local productions, because their exclusivity must be shared with other financing partners.

This combination of factors is putting considerable pressure on the production of European audiovisual content. In order to **overcome the limitations of small markets, various countries have developed a range of support measures** in the form of direct subsidies or indirect assistance via fiscal measures, levies and quota systems, or support for promotion and distribution. According to a 2016 European Audiovisual Observatory study, a total of more than 240 audiovisual funds in Europe invest more than EUR 2.5 billion in audiovisual content annually.¹³ In 2019, 23 EU Member States had at least one fiscal incentive in place.¹⁴ And, at European level, Eurimages and Creative Europe (the latter through the MEDIA programme), by the Council of Europe and the European Commission respectively, provide key support for the development, production, distribution and promotion of films, series and cross-media audiovisual content.¹⁵

While public support mechanisms seem to make audiovisual production in Europe more sustainable, recent trends have further increased the precarious situation of European audiovisual ecosystems. This, in turn, points to **the need for legislative support to sustain Europe’s audiovisual market**. Investment is falling in several countries, which has, of course, triggered several EU Member States to look for funding in the pockets of foreign providers of VOD services.

1.3. Revision of the AVMSd

Given the pressure European audiovisual markets are under, the **EU institutions decided to further harmonise and offer the Member States new opportunities** to support their local audiovisual markets. The result was the revised AVMSd in 2018. Article 13 of the current AVMSd foresees the following:¹⁶

"1. Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 % share of European works in their catalogues and ensure prominence of those works. 2. Where Member States require media service providers under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds, they

¹¹ See o.a. Caudron, J., Neels, L. Wellens, G. & D. Wauters. (2014). Het nieuwe TV-kijken: een positieve kijk op televisie in Vlaanderen: het model Vlaanderen inc. Leuven: Lannoo Campus; Econopolis (2017). Doorlichting Vlaams audiovisueel beleid. Wilrijk: Econopolis; Lowe, G. F. & Nissen, C. S. (2011). Small among giants: Television broadcasting in smaller countries. Göteborg: Nordicom; Puppis, M. (2009). 'Media Regulation in Small States'. In: The International Communications Gazette, 71 (1-2): 7-17; Wauters, D. & Raats, T. (2018). Public service media and ecosystem sustainability: towards effective partnerships in small media markets. In Lowe, G. F., Van den Bulck, H. & K. Donders (eds.), Public Service Media in a networked society (pp. 175-191). Gothenburg: Nordicom.

¹² <https://www.bcg.com/publications/2016/media-entertainment-technology-digital-future-television-impact-ott-video-production.aspx>

¹³ <https://rm.coe.int/public-financing-for-film-and-television-content-the-state-of-soft-mon/16808e46df>

¹⁴ <https://rm.coe.int/mapping-of-film-and-audiovisual-public-funding-criteria-in-the-eu/1680947b6c>

¹⁵ In the new timeframe of the Creative Europe program, which goes from 2021 to 2027, the European Commission will destine EUR 1.081 billion to the funding of audiovisual projects through MEDIA, stimulating competitiveness in the European audiovisual market. In March of 2021, the Board of Management of Eurimages, on its turn, announced that it would support 24 feature film projects, for a total amount of EUR 5.822 million (https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3950 and <https://rm.coe.int/02-2021-162nd-board-of-management-decisions-en/1680a1dc73>).

¹⁶ <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>

may also require media service providers targeting audiences in their territories, but established in other Member States to make such financial contributions, which shall be proportionate and non-discriminatory. 3. In the case referred to in paragraph 2, the financial contribution shall be based only on the revenues earned in the targeted Member States. If the Member State where the provider is established imposes such a financial contribution, it shall take into account any financial contributions imposed by targeted Member States. Any financial contribution shall comply with Union law, in particular with State aid rules." (AVMSd Article 13)

Article 13 stipulates that Member States may require the providers of VOD services under their jurisdiction to contribute financially to the production of European works. This can be achieved through direct investments in content (acquisition of rights, co-productions) and/or by the payment of contributions to national funds (tax or levy based).

Moreover, Member States may also oblige the providers of VOD services, who target audiences in their territories but are established in another EU Member State, to likewise make such investments and/or financial contributions. In that case, the calculation of the investment or contribution will be based on the revenues earned in the targeted Member State (see section 2.3). The Member State in question should also take into account financial contributions imposed on this provider in other Member States. Member States are entitled to waive the requirements of Article 13 for providers with a low turnover or low audience, or if they are small or micro enterprises. Member States can also waive the obligations for companies for whom the imposition of an investment obligation would be impracticable or unjustified by reason of the nature or theme of the VOD offered to end-consumers (see also section 2.4). Member States had to report on the transposition of both paragraphs 1 and 2 of Article 13 into their national legislation no later than 19 September 2020. Subsequent regular reporting is also foreseen.

While different Member States already had similar measures in place before the revised AVMSd, many **additional countries have either introduced financial obligations in the last two years, or are planning to introduce them** (see section 2.1). The motivations for introducing these measures are different in the different Member States (see section 2.5). We can also find that the Member States have considerable freedom in whether and how much VOD providers have to contribute financially to the production of European works.¹⁷ This has led to fragmentation and different Member States to:

- Impose different kinds of financial obligations for VOD providers (see section 2.3);
- Calculate the financial obligations differently (see section 2.3); and
- Include different exemptions in the regulations (see section 2.4).

Therefore, while the AVMSd is supposed to govern EU-wide coordination of national legislation on all audiovisual media, there is a high degree of heterogeneity in national regulation. **The following sub-chapters summarise the findings of our study and compare the Member State legislations with regards to the transposition of Article 13 of the AVMSd in relation to financial obligations imposed on VOD providers.**

¹⁷ Also because AVMSd is minimum harmonisation Directive

Part 2

Findings – Comparing financial investment obligations of VOD across the EU

2. Findings – Comparing financial investment obligations of VOD across the EU

2.1. An historical overview: Changing legal practices

Today, there seems to be an emerging consensus within the EU that companies that benefit from content should also contribute to content production, regardless of the market in which they are based or the types of services they are offering. Obviously, investment obligations existed already before the new AVMSd. The Television Without Frontiers directive (TWFd) imposed obligations for outsourcing 10% of the programme offer or production budget to local independent producers, with 50% of the television offer reserved for European works, while the 2007 AVMSd already introduced measures for on-demand players. In several Member States, public broadcasters are obliged to invest more heavily in independent productions than the quotas imposed in the TWFd, and later AVMSd. In addition, many Member States have imposed various charges, often with the aim of contributing towards the financing of audiovisual productions (levies on advertising revenues, sales from cinema tickets or DVD/Blu-Ray, etc.) or towards funding the operations of regulatory authorities (the payment of a license fee to be operational in a market).

The novelty of the 2018 AVMSd follows measures in a number of countries, with the aim of **encouraging or obliging domestic and non-domestic VOD providers to contribute financially to original production in Europe**. The 2018 AVMSd not only introduced a 30% quota for players targeting an EU market but being based in another market, but also introduced this derogation to the Country of Origin principle for imposing investment obligations in Member States. Whereas various Member States already had investment obligations for on-demand players (such as Belgium), obligations that also capture global players based outside the receiving country, have only been introduced gradually since 2016 across Europe.

The following section gives an historical overview of the development of this type of legislation.

FRANCE TAKING THE LEAD ON INVESTMENT OBLIGATION LEGISLATION FOR NON-DOMESTIC VOD PROVIDERS

In Europe, **France (see case study in section 3.6 for more information) was the first country to introduce an investment obligation for VOD providers** when the film levy was extended to capture the sale and rental of online films in 2009. In part, this can be explained by France's long tradition of participatory financing, where the funding for the Centre National du Cinéma et de l'image animée (CNC) comes from different forms of financial contribution from various players in the value chain.

In 2014, a first text for a new regulation was drafted that would extend the tax to companies targeting the French market but established outside of France. At the end of **2016, the tax was finally formalised for the purpose of taxing the so-called GAFA (Google, Apple, Facebook, Amazon) companies**. The idea was that all proceeds from the tax would be paid to the CNC, up to a certain maximum per annum. The draft legislation was adopted by the French Parliament but, at first, did not receive the support of the Valls Government, which rejected the idea as being too complex. Opponents also feared that French companies, such as Daily Motion, would be disadvantaged. In contrast, defenders of the legislation pointed to the need to send a strong message to the GAFA companies. In the end, the obligation to invest did gain a **legal basis, allowing it to be extended to VOD providers established outside of France, such as Netflix, and video sharing platforms, such as YouTube, based on the Video and VOD Tax in effect since January 2018**.

As of 2020, the rate of this tax **increased from 2% to 5.15%**.¹⁸ In December 2020, France announced that it planned to also increase the rate of its direct investment obligation for VOD services to 20%-25%.¹⁹ This new rate would be applicable from 1 July 2021, making France the Member States with the highest contributions for VOD service offers. Recently (17 March 2021),²⁰ the Conseil supérieur de l'audiovisuel (CSA) advised the introduction of even higher rates. The rate of the contribution should be set at 20%, or at 25% when the service annually offers at least one long-running cinematographic work (film) within a shorter period than 12 months after its theatrical release in France and in the event that the rate of 25% is applicable, the contribution could be increased to 30%. The CSA further specifies that the implementation of this mechanism is conditional on the accompanying evolution of the rules relating to the chronology of the media (release windows regulation). However, the new decree has not yet been adopted. At least until 1 July 2021, the current provisions are still applicable.

THE COURT CASE IN GERMANY: PAVING THE WAY FOR THE AVMSD

Also in 2014, **Germany (see case study in section 3.7 for more information) decided to extend its parafiscal levy to VOD services, including providers established outside Germany** who distributed films via the Internet in the German language to customers in Germany, and therefore including players such as Netflix and Amazon. Netflix started offering services to German consumers in 2014. **The Dutch company Netflix International and its US parent company Netflix Inc. initiated a lawsuit against the German State**, arguing that the German Film Law was based on a misinterpretation of the AVMSd (before the 2018 revision) and violated the freedom to provide services, the freedom of establishment, and EU's State Aid regulations.²¹ Netflix lost the lawsuit in May 2018. The European Court of Justice²² argued that Netflix was not concerned "*individually*" and that "*(...) an aid scheme must be accompanied by a substantial effect on their market position*" to be contestable.

Based on this decision by The Court of the Justice of the European Union, Netflix and other VOD providers who are not established in Germany have to retroactively pay the levy on all income generated in Germany from 2014 onwards. While Amazon had already been paying the levy since 2014, Netflix disputed its legality until the suit was dismissed as inadmissible by the European Court of Justice. Netflix has also been paying since 2019. **The court case paved the way for the new AVMSd revision in 2018, allowing all Member States to establish similar measures** for financial obligations of foreign VOD players.

FROM DOMESTIC TO FOREIGN VOD PROVIDERS: CURRENT CHANGES IN MEMBER STATE LEGISLATIONS

VOD services were already obliged to make financial contributions or investments into European content in some EU Member States, before the 2018 revision of the AVMSd. We have found that this was mostly the **case for domestic VOD services (except for Germany and France as described above). This was especially due to the introduction of the AVMSd 2010/13/EU in 2010.** The 2010 AVMSd foresaw, for the first time, regulations for all "audiovisual media services", which means either television broadcasts or VOD providers and services. This opened up the possibility to apply obligations that so far, based on the TWFD, only applied to broadcasters but could now also extend to VOD providers.

Member States that applied investment obligations to domestic VOD providers after the introduction of the AVMSd in 2010 include, for example, Austria, where since 2010 domestic VOD services are obliged

¹⁸ Legifrance, 'Loi n° 2019-1479 du 28 décembre 2019 de finances pour 2020 (1)', <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000039793407/2019-12-30/>

¹⁹ 20 Minutes, 'Netflix et Amazon devront investir 20 à 25% de leur chiffre d'affaires dans la création française'. Available at: <https://www.20minutes.fr/arts-stars/culture/2937783-20201222-netflix-amazon-devront-investir-20-25-chiffre-affaires-creation-francaise>

²⁰ CSA. (2021). 'L'avis du CSA sur le projet de décret relatif aux services de médias audiovisuels à la demande (SMAD)'. (PDF, p. 14) <https://www.csa.fr/Informer/Espace-presse/Communiqués-de-presse/Le-CSA-publie-son-avis-sur-le-projet-de-décret-relatif-aux-services-de-médias-audiovisuels-a-la-demande-SMAD>

²¹ slashCAM, 'Netflix, Amazon und Co sollen mindestens 30% europäische Filme zeigen', <https://www.slashcam.de/news/single/Netflix--Amazon-und-Co-sollen-mindestens-30--europ-14343.html>

²² InforCuria, 'Action for annulment - State Aid - Aid planned by Germany to fund film production and distribution - Decision declaring aid compatible with the internal market - Act not of individual concern - Regulatory act entailing implementing measures - Inadmissibility', <http://curia.europa.eu/juris/document/document.jsf?text=&docid=202021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=279527>

to contribute to the financing of the local film fund RTR-GmbH (see section 3.1) (however only indirectly supporting European content production as the levy in Austria is used by RTR-GmbH for other purposes). In Croatia, similar legislation for local VOD players has existed since 2011 (see section 3.4). In 2010 and 2012, the Czech Republic introduced direct investment obligations and the payment of a levy to the Czech Film Fund, respectively (see section 3.5). Since the revision of the AVMSd in 2018, several Member States have included similar measures as France or Germany, and thus created **new financial obligations for non-domestic VOD providers as well**. Italy was the third country in the EU to introduce investment obligations for foreign VOD players in 2018, followed by the Dutch-speaking Community in Belgium in 2019, Poland in 2020, and the French-speaking Community in Belgium in 2021 (see also section 3). We present here a short overview of recent developments in some Member States.

Italy (see case study in section 3.8) introduced investment obligations that also captured foreign VOD providers in 2017, which came into force in January 2018.²³ The Consolidated Law for Audiovisual and Radio Media Services,²⁴ sets down the obligations imposed on VOD providers. The investment obligations were introduced and extended to foreign VOD providers through Law no. 220/2016 and Decree Law no. 204/2017. The draft law to transpose the revised AVMSd is still being discussed by the Italian Government. The most recent modifications to the Consolidated Law have been introduced by Decree Law no. 59/2019,²⁵ which was later converted into Law no. 81/2019.²⁶ The text maintains the previous obligation for VOD services, including foreign ones, for direct investments in audiovisual works through pre-purchase, purchase, production, and co-production, but amends the percentage and some of procedures.

In Poland (see case study in section 3.9), from July 2020, both VOD providers established in the country and those with seats in another EU Member State have to pay a levy to the Polish Film Institute (PISF). The collected levy, introduced as part of an anti-crisis relief programme, aims to help the Polish film industry recover from the Covid-19 crisis.²⁷ According to a government assessment,²⁸ the investment obligation is justified by the estimation that the levy would bring revenue of approximately EUR 3.3 million (PLN 15 million) by the end of 2020 and at least EUR 4.4 million (PLN 20 million) annual revenue in subsequent years.²⁹ A total of 19 VOD services paid a levy to PISF in the fourth quarter of 2020. The Institute received EUR 1.09 million (PLN 4.9 million) in Q4, with the contributors including Netflix, Amazon, Google, Canal+ Polska, HBO, and Orange. Amazon and VIMN Poland were two of the five providers who contributed for the first time in the fourth quarter.³⁰ According to the information provided by the PISF, in the first six months after the introduction of the investment obligation (July-December 2020), they received over EUR 1.9 million (PLN 9 million) from VOD providers. Yet, the collected amount is below the original estimation.

In the French-speaking Community of Belgium (see case study in section 3.3) we can find the most recent changes, similar to the ones in the Dutch-speaking Community of Belgium. On 4 February 2021, the Government of the French-speaking Community enacted a new version of the AMS Decree transposing Directive 2018/1808, in which also foreign VOD providers are

²³ Parlement de la Communauté Française. (January 12, 2021). Projet de décret relatif aux services de médias audiovisuels et aux services de partage de vidéos. <http://archive.pfwb.be/1000000020cb071>

²⁴ <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005;177-art45>

²⁵ https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5IVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5IVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5IVOIXoE_assetEntryId=14067681&_101_INSTANCE_FnOw5IVOIXoE_type=document

²⁶ <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2019-08-08;81>

²⁷ See case-study on Poland

²⁸ See: <http://orka.sejm.gov.pl/Druki9ka.nsf/0/C684B92443AA2086C1258558002D9D50/%24File/344.pdf>

²⁹ <https://www.broadbandtvnews.com/2020/04/29/poland-set-for-vod-tax/>

³⁰ <https://www.wirtualnemedia.pl/artykul/9-mln-zl-podatku-vod-w-polsce-wsrod-platnikow-amazon-netflix-google-i-fratria>

included.³¹ The new decree transposes three European texts and guarantees the contribution of “external services” to audiovisual production. Hence, it requires foreign operators targeting the French-speaking Community of Belgium, whether linear (e.g. TF1, RTL, TMC) or non-linear (e.g. Netflix, Amazon, Disney+), to pay. The Parliament of the Wallonia-Brussels Federation (FWB) approved the new SMA Decree in February 2021.³²

A dispute currently exists between the CSA (Conseil Supérieur de l'Audiovisuel) and RTL over the rules defining the territorial jurisdiction to which the broadcaster must be attached. Established in Luxembourg,³³ the mother company CLT-UFSA nevertheless owns several affiliate companies including RTL Belux & cie s.e.c.s. and RTL Belgium. The latter is established in the territory of the French-speaking community of Belgium and, according to the factual CSA analysis, this company is exercising effective editorial control on the programmes. Moreover, RTL Belgium employs a staff of 450 people who are dedicated to the editorial activity of the broadcaster in the French-speaking Community. The litigation relates then to the application of either article 2, paragraph 3 a) or b) of the revised AVMS Directive. Under these provisions, the jurisdiction of the CSA should be acknowledged either on the ground that RTL Belgium is the decision-maker and established in Belgium, or because a significant part of the workforce involved in the pursuit of the programme-related audiovisual media services activity operates in the French-speaking territory of Belgium. In neither case, it could be considered that the RTL Group would be targeting the French-speaking Belgian audience as from the Grand Duchy of Luxembourg. Along these lines, the new AVMSd is not providing a solution to this dispute, except if we consider that the newly adopted definition of the editorial decision concept is actually strengthening the analysis which leads to recognising the territorial jurisdiction of the CSA. The new definition provides indeed that *“editorial decision means a decision which is taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of the audiovisual media service.”*

The French-speaking part of Belgium has a particularly vulnerable audiovisual industry, as it faces competition from imports from France, a large neighbouring country producing content in the same language. In 2017, French television chains accumulated an average of 35% of the audience market share, followed by the Luxembourg-based RTL-TVi (19.2%) and La Une (Belgium) (16.8%).³⁴ 69% of the television advertising market is captured by private chains. As a matter of fact, the litigation referred above between the CSA and RTL chains leads to a lack of enforcement of the specific rules laid down by the Parliament in relation to audiovisual matters. With regard to the regulation of services targeting the Belgian French-speaking market from the jurisdiction of another state, the AVMSd has provided - in the case of TF1 (France) - for the possibility that the CSA can negotiate on ad hoc basis with the French State, or with the relevant authority of its regulatory framework, in order to enforce stricter compliance with the requirements and to create the conditions for fair competition throughout the territory. These procedures, provided for by the AVMSd, have, however, proved difficult to implement, and few European countries have managed to put them into practice.³⁵ In its 2017 annual report, the CSA stated that one of its key projects focussed on the regulation of audience targeting practices by linear actors, such as TF1, but also of non-linear actors like GAFA (Google, Apple, Facebook and Amazon), and in particular on their associated advertising revenues, since these activities seem to be destabilizing local actors to a significant degree.³⁶ Since then, the CSA has been contributing to several ERGA projects aiming at on the one hand strengthening the cooperation between European regulators with a view to better enforce new rules as regards cross-border targeting.³⁷

³¹ Decree related to audiovisual media services and video sharing platforms services as published on 26 March 2021, at Moniteur belge: <https://www.csa.be/wp-content/uploads/2021/03/Nouveau-decret-SMA-du-4-fevrier-2021-Publication-au-MB.pdf>

³² RTBF.be. (February 3, 2021). FWB : le décret Services de médias audiovisuels définitivement approuvé. https://www.rtb.be/info/belgique/detail_fwb-le-decret-services-de-medias-audiovisuels-definitivement-approuve?id=10689717

³³ Broadband TV News, 'RTL Belgium refuses to be ruled by CSA', <https://www.broadbandtvnews.com/2017/07/09/rtl-belgium-refuses-to-ruled-by-csa/>

³⁴ Statista, Audience market share television channels French-speaking Belgium in 2017, <https://www.statista.com/statistics/543973/market-share-tv-channels-french-speaking-belgium/>

³⁵ CSA annual report 2017, p. 11, http://www.csa.be/system/documents_files/2829/original/CSA%20Rapport%20annuel%202017.pdf?1528878822

³⁶ CSA annual report 2017, p. 8, http://www.csa.be/system/documents_files/2829/original/CSA%20Rapport%20annuel%202017.pdf?1528878822

³⁷ The ERGA Memorandum of Understanding: https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_I.pdf

LEGISLATION OUTSIDE OF THE EU: CANADA, AUSTRALIA, AND SWITZERLAND

Similar regulations, arrangements or plans for financial obligations for foreign VOD services have also been put into place outside of the EU. We identified Canada, Australia, and Switzerland as interesting cases, which we present and discuss here in more detail. In some of the countries, digital taxes are planned or introduced including different rules for taxation of the digital economy.

In 2017, the Ministry of Canadian Heritage and Netflix announced an agreement called the Investment Canada Act, through which Netflix agreed to invest at least EUR 340 million over the next five years in original English- and French-language productions in Canada, and to collaborate with Canadian production houses, broadcasters, and creative talent.³⁸ This was followed by the Fall Economic Statement from November 2020, which introduced taxes on foreign VOD services. The Canadian Government announced that any foreign-based company selling digital services to consumers in Canada will be subject to the Goods and Services Tax (GST) or Harmonized Sales Tax (HST):³⁹ *“The government therefore proposes to implement a tax on corporations providing digital services, with effect from January 1, 2022, which would apply until such time as an acceptable common approach comes into effect. On a provisional basis, it is estimated that the new measure would increase federal revenues by USD 3.4 billion over 5 years, starting in 2021-22. Further details will be announced in Budget 2021.”*⁴⁰ The provinces of Saskatchewan and Quebec already introduced a 5% GST on streaming services like Netflix in early 2020.⁴¹ The Broadcasting and Telecommunications Legislative Review Panel are worried that the digital taxes are likely to get passed down to consumers and recommend against the tax, supporting instead requirements to invest in Canadian programming as this *“would ensure a meaningful contribution to Canadian cultural policy objectives and the production sector.”*⁴²

In Australia, the government published its Media Reform Green Paper (Green Paper)⁴³ in 2020 which proposes a new local content investment obligation for SVOD and AVOD service providers. The Green Paper outlines a figure of 5% of Australian revenue as a guide to the potentially appropriate minimum level of expenditure on new Australian content for SVOD and AVOD providers. SVOD and AVOD providers would need to invest in content that is "Australian" and is characterised as "new" content.⁴⁴ The Green Paper lists potential eligibility test for the investment obligation and refers to eligible investments falling into the categories of "commissions, co-productions and acquisitions" of new Australian content as well as "licensed" content. As an alternative to meeting their Australian investment expectation by spending the required amount on producing or acquiring new Australian content, service providers could choose to contribute an equivalent amount of money to CAST. The proposal is intended to *“guarantee a minimum level of investment by these services in new Australian content and provide a more equitable regulatory framework where Australian screen content obligations apply to the wider market, rather than only to traditional broadcasters”*. After the consultation process that ended in May 2021, the government develops the final reform proposal.

Australia also imposed a 10% Goods and Services Tax (GST) on the sales of imported services and digital products to Australian consumers, through an amendment to A New Tax System (Goods and Services Tax) Act No. 55, 1999.⁴⁵ This took effect on 1 July 2017 and The Government’s motivation for capturing foreign streaming services was *“to maintain the integrity of the tax system and offer a level*

38 https://www.canada.ca/en/canadian-heritage/news/2017/09/launch_of_netflixcanadaarecognitionofcanadascreativetalentandits.html

39 The harmonized sales tax (HST) is a consumption tax, used in provinces where both the federal goods and services tax (GST) and the regional provincial sales tax (PST) have been combined into a single value added sales tax.

40 <https://www.budget.gc.ca/fes-eea/2020/drleg-apl/ita-lir-1120-en.html>

41 <https://www.retailcouncil.org/resources/quick-facts/sales-tax-rates-by-province/>; <https://www.revenuequebec.ca/en/businesses/consumption-taxes/gsthst-and-qst/basic-rules-for-applying-the-gsthst-and-qst/>

42 <https://www.ic.gc.ca/eic/site/110.nsf/eng/00012.html#Toc26977874>

43 <https://www.communications.gov.au/have-your-say/new-rules-new-media-landscape-modernising-television-regulation-australia>

44 See also: <https://viewpoints.bakermckenzie.com/post/102glke/the-streaming-wars-on-australian-shores-local-investment-requirements-for-intern>

45 <https://www.legislation.gov.au/Details/C2014C00008>

playing field for domestic suppliers".⁴⁶ The amendment required international businesses earning more than EUR 50,000 per year from Australian consumers to charge GST on their products and services. It was claimed that Netflix got ahead of the GST by increasing the price of its plans from 28 June 2016.⁴⁷ At the same time, Netflix increased its investments in Australian content in 2019 and 2020, through original productions, co-productions, and acquisitions.⁴⁸

Switzerland currently plans to introduce investment obligations that would also apply to VOD services with headquarters in other countries that target Swiss audiences. The legal text was still in legislative procedure at the time of research. So far, there was a disagreement on the fee for VOD services. The National Council of the Federal Assembly of Switzerland made interventions and decreased the fee proposed by the Swiss government.⁴⁹ According to the legislative procedure, the proposed law is currently with the Council of States and suggests that the levy be 4% of the gross revenue according to Art. 24b from the Proposal of Federal Act on Film Production and Film Culture (Film Act, FiG).⁵⁰ Based on this, VOD services could choose between a direct investment obligation and a levy. The same article stipulates that the obligation applies to companies that have headquarters abroad and target Swiss audiences, but not to the Swiss Broadcasting Corporation (SRG SSR). The changes that will be introduced to the Film Act are expected to come into force in 2022 in Switzerland.

WHAT CHANGES TO EXISTING INVESTMENT OBLIGATIONS FOR VOD PROVIDERS WILL COME NEXT IN THE EU?

Countries inside and outside the EU have already passed legislation for financial obligations for (foreign) VOD services. **There are Member States who have already introduced such legislation and announced or plan to revise as of March 2021.** For example, the Czech Republic (see case study in section 3.5 for more information) has currently two new draft bills in legislative procedure, which could change the financial obligations soon. The renewal of the Film Funding Act in Germany (see case study in section 3.7) is also initiated already but has been stalled due to possible changes taking into account the impact of Covid-19 on the film sector in Germany. A first draft for the renewal was published in January 2021, which could change financial obligations starting in 2022.⁵¹ Next to these, we identified several of our case studies described in section 3, which could change legislation fairly soon. **We can therefore expect further changes to financial investment obligations for the contribution to European work in the coming months and years.** The cases of the Dutch-speaking Community of Belgium, Croatia, Slovenia, and Spain are discussed here in more detail.

In the Dutch-speaking Community of Belgium (see case study in section 3.2) following just two years after a new investment obligation was introduced in 2019, which captured foreign VOD providers, the Minister of Media and Department of Culture, Youth and Media have announced a review of the current investment obligation. The motivations to review were threefold. First, in September 2020, a Flemish SVOD initiative was launched by Telenet and DPG. The former player is already subject to the Incentive Scheme of 2014, whereas the new player would be subject to the new investment obligation. The launch of this SVOD initiative also puts pressure on existing rules with regard to opportunities to acquire rights. Second, various players have been lobbying for an extension of the existing investment obligation to video sharing platforms as well. And third, stakeholders have argued that the current levels of investment obligation made by non-linear broadcasting organisations such as Netflix are considered too low to compensate for the disruption, they are said to cause in the Flemish audiovisual ecosystem. Following the results of a study commissioned by the Department of Culture,

⁴⁶ https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/digital

⁴⁷ <https://www.finder.com.au/netflix-tax>

⁴⁸ <https://www.afr.com/companies/media-and-marketing/netflix-s-australian-tax-bill-revealed-20210125-p56woa>

⁴⁹ https://cinebulletin.ch/de_CH/news/lex-netflix-la-commission-du-conseil-des-etats-valide-la-taxe-de-4

⁵⁰ The National Council decreased the fee from 4% to 1%, see: <https://www.fedlex.admin.ch/eli/fga/2020/727/de>

⁵¹ <https://www.bundesregierung.de/breg-de/bundesregierung/staatsministerin-fuer-kultur-und-medien/medien/filmfoerderung/filmfoerderungsgesetz>

Youth and Media, the Government proposed new changes can be expected in 2021, to both the new investment obligation as well as the 2014 Incentive Scheme.

Croatia (see case study in section 3.4) plans to introduce a levy for VOD providers established in other EU Member States with the proposed Electronic Media Act from 2020.⁵² The rate of the investment obligation is not specified in the proposed law, but during the legislative process, the Croatian Audiovisual Centre (HAVC), the central funding and strategic agency for film and the Croatian Producers Association, proposed a choice between a direct investment obligation and a levy of 10% of revenues generated in Croatia. HAVC argues that the investment obligation they propose is "*relatively milder and more flexible*" than the one in France that aims to achieve "*maximum equal level-playing field between linear and non-linear players*". Croatian policymakers strategically perceive that in order to meet the new AVMSd rules for investment in European content, Netflix and other global players will have to invest in production capacities in Europe.⁵³ In this context, Croatia is considering opening a film studio complex to attract international shoots by global streamers that expand content spending for original content and use local creative talent.⁵⁴

Slovenia (see case study in section 3.11) estimates to collect around EUR 200,000 per year from a new levy it plans to introduce with the Law on Amendments to the Audiovisual Media Services Act, which is currently in legislative procedure. According to the proposed law, the providers of VOD services over which Slovenia has jurisdiction, same as providers established in other Member States, are obliged to contribute 2% of the gross annual income generated in Slovenia to a new European Audiovisual Production Fund. The fund will be used for production of European audiovisual works through a public tender procedure and managed by the ministry for the media. The fund will accumulate levies from different providers of audiovisual media services. The Association of Slovenian Filmmakers proposed the fund to be taken over by the Slovenian Film Centre as a public film agency instead of being managed directly by the ministry. They also suggested the purpose and operation of the fund to be established through a distribution scheme, for example, 70% for feature films and TV series, and 30% for animated and documentary films and series.⁵⁵ According to the estimation, there will be around 20 contributors that will pay an annual average of EUR 10,000 to the fund.

In November 2020, the Spanish Government (see case study in section 3.12) proposed a Draft General Law on Audiovisual Communication.⁵⁶ The Draft Law is meant to amend the General Act and transpose Directive 2018/1808 into the Spanish legal system. The law is still in the process of being finalized and officially adopted. The Draft Law extends the investment obligation rules to non-domestic VOD service providers targeting the Spanish market and establishes a choice for providers to make a direct contribution to the financing of European audiovisual works or to the Film Protection Fund (Fondo de Protección de la Cinematografía). In January 2021, the Spanish media regulator, the National Commission on Markets and Competition, CNMC (Comisión Nacional de los Mercados y la Competencia) published its report⁵⁷ on the Draft Law, in which it welcomed the revision and recommended the review and clarification of some aspects of the bill, including provisions on investment obligations, in order to avoid difficulties or confusion in the regulator's implementation of the quota and investment obligation rules, and to the applicable procedures for enforcement and control, especially for service providers established in other Member States.

⁵² <https://www.sabor.hr/hr/prijedlog-zakona-o-elektronickim-medijima-prvo-citanje-pze-br-62-predlagateljica-vlada-republike>

⁵³ <https://www.vecernji.hr/kultura/vrijeme-je-za-gradnju-filmskog-studija-a-ako-netflix-zeli-tu-poslovati-morat-ce-dati-vise-prostora-hrvatskim-filmasima-1322079>

⁵⁴ <https://www.havc.hr/eng/info-centre/news/prospects-for-a-film-studio-in-croatia>

⁵⁵ <https://www.dsr.si/2020/08/27/pripombe-strokovnih-zdruzenj-s-podrocja-produktivne-kinematografije-na-zakon-o-spremembah-in-dopolnitvah-zakona-o-avdiovizualnih-medijskih-storitvah-zavms-b/>

⁵⁶ https://portal.mineco.gob.es/RecursosNoticia/mineco/prensa/noticias/2020/201106_np_audiovisuales.pdf and <https://advancedigital.mineco.gob.es/es-es/Participacion/Paginas/DetalleParticipacionPublica.aspx?k=355>

⁵⁷ https://www.cnmc.es/sites/default/files/3309300_9.pdf

WHAT OTHER EU MEMBER STATES MIGHT INTRODUCE INVESTMENT OBLIGATIONS?

Finally, next to the Member States that have already introduced financial investment obligations for VOD providers, other Member States are currently (as of March 2021) planning on introducing them.⁵⁸ In Cyprus, there is currently an ongoing public consultation on a draft act which transposes the new AVMSd provisions. According to the draft Law amending the Laws on Radio and Television Organisations of 1998 until 2019, the country plans to introduce an investment obligation for VOD providers. However, the contours of the investment obligation are not known at the time of writing of this study. We identified Denmark, the Netherlands, Ireland, and Romania as interesting case studies to discuss here.

In Denmark, the government concluded a media agreement covering the next five years already in June 2018 (until 2023), in which a streaming tax of 2% on annual turnover was included. Today, VOD providers have the opportunity to meet their obligations for the promotion of European works by documenting their investments. There are no legal specifications about the nature of the financial contribution and the providers do not currently contribute to existing funds, such as the Danish Public Service Fund. In practice, providers are free to choose how they report to the Danish Radio and Television Commission in order to demonstrate that they are fulfilling their obligation to promote European works. To date, none of them has chosen to declare any financial contributions. In 2017, at the initiative of the Radio and Television Commission, a voluntary code was introduced to clarify how compliance with the requirements of the European content promotion can be achieved by VOD providers in Denmark. It specifies how European works are defined and how players can comply with the obligation to invest in European productions. However, at the moment no legislative changes could be identified even though the agreement was made in 2018.

In the Netherlands, the Dutch Council for Culture has currently advised its government to introduce a levy or tax on various forms of media exploitation (cinema recordings, on-demand services, advertisements). This levy would amount to between 2% and 5% of the income accrued from work accessible in the Netherlands and would be used to improve the quality of audiovisual productions made in that country. In an initial reaction, the Dutch Minister for Education, Culture and Science stated that the government would examine the various recommendations from the advisory report to adjust its national audiovisual and cultural policy.^{59 60}

Ireland also plans to introduce a levy for VOD providers, according to the General Scheme of the Online Safety and Media Regulation Bill,⁶¹ which is still in a legislative procedure. The General Scheme, which will transpose the revised AVMSd into Irish law, proposes the introduction of a content production levy on audiovisual media services established in Ireland and those established in other EU Member States that target audiences in Ireland. The relevant provisions would not be commenced until the Media Commission has carried out research indicating their viability.⁶² According to the Irish regulator, the Broadcasting Authority of Ireland (BAI),⁶³ there are several sections in need of clarification through research, before defining the provisions on a content production levy. Among them is the determination of the system for charging, as, for example, it might be interpreted that the levy includes revenue generated from product placement, and it is especially unclear how the levy applies to services accessible for "free". A second consideration is that of the cross-jurisdictional issues that are likely to arise. A third issue consists of a lack of concrete mechanisms in the Directive obliging service providers

⁵⁸ The data analysis for this report was gathered in March 2021.

⁵⁹ Raad voor Cultuur (2018). Zicht op zoveel meer, Sectorial Advise Audiovisual. The Hague: Council for Culture, p. 66.

⁶⁰ Ministry of Education, Culture and Science (2018). A new vision on cultural policy. Letter from the Minister of Education, Culture and Science to the Chairman of the Second Chamber of the States General, The Hague, 2 July 2018.

⁶¹ <https://www.gov.ie/en/press-release/1e05a-minister-martin-presents-additions-to-new-law-proposed-for-online-safety-and-media-regulation/>

⁶² Idem

⁶³ <https://www.bai.ie/en/bai-publishes-submission-on-regulation-of-harmful-online-content-implementation-of-new-audiovisual-media-services-directive/>

who will be subject to the levy to provide financial information to regulatory bodies administering the levy. Thus, a provision needs to be made in the law to support the regulator in acquiring the information necessary to implement such a scheme, and a significant level of cross-jurisdictional cooperation and sharing of relevant information with regulators in other Member States will also be required. While technically the issue of the levy is a matter to be resolved between a Member State and the VOD provider, there will have to be a significant degree of cooperation between Member States in order to avoid duplication in the charging arrangements and to ensure that broadly harmonised approaches are adopted to levy and revenue calculation. The levy is planned to be administered by the Media Commission as a new regulator that integrates BAI.⁶⁴ According to a consultancy report done for RTÉ and TG4,⁶⁵ a levy on streaming services and broadcasters could generate funding for the Irish independent production sector from EUR 26 million to EUR 125 million, over five years.

In March 2021, the Romanian Culture Ministry published their recommendations for the transposition of the AVMSd, in the form of a Draft Law⁶⁶ which is no (May 2021) open to public consultation. The Draft Law proposes amendments to the existing audiovisual legal framework, namely the Audiovisual Law no. 504/2002⁶⁷ and Government Ordinance no. 39/2005 on cinematography, hereafter the Cinema Ordinance.⁶⁸ The Cinema Ordinance already foresees a levy to be paid by VOD providers to the Romanian Film Centre (CNC), with the option to spend 50% of the required sum on direct investments in cinematography. However, due to the inconsistent legal wording, the measure was never implemented.⁶⁹ The Draft Law modifies and completes these measures, in order to include the payment of a levy to the Romanian Film Centre, calculated at 3% of the price of films downloaded through data transmission services, including Internet or mobile devices, through online video streaming platforms such as VOD, SVOD, and TVOD. An additional contribution of 4% must also be paid by VOD providers. This is to be calculated based on the revenues from single transactions or subscription payments for the viewing of audiovisual works by means of data transmission over the Internet or on mobile devices. The proposal also targets suppliers with headquarters in another EU Member State, in which case the contribution is to be calculated on the revenues obtained on the Romanian territory. Revisions to the legal situation in Romania may, therefore, occur in the upcoming months of 2021.

2.2. The status quo: Comparison of legislation in the EU

As shown above, the legal frameworks in EU Member States are evolving and will most likely continue to reflect the largely fragmented landscape of national law and approaches. In Table 1, we provide an overview of the current practices already in place⁷⁰ in the applicable legislation of Member States with regard to the obligations of VOD services to financially contribute towards the production of European works. This overview contains the following elements per Member State:

- Has the transposition of the AVMSd been confirmed?
- Is there an obligation for concrete financial investments for VOD providers?
- Is this obligation also applicable to VOD services established in other Member States?
- Have there been changes since 2018 (compared to our previous report)?

⁶⁴ <https://www.irishtimes.com/business/media-and-marketing/bai-prepares-for-future-within-new-media-commission-1.4458311>

⁶⁵ <https://www.independent.ie/business/media/levy-on-netflix-and-pay-tv-could-deliver-25m-a-year-for-irish-film-makers-40242669.html>

⁶⁶ <http://www.cultura.ro/proiect-de-lege-10>

⁶⁷ <https://www.cna.ro/The-Audio-visual-Law,1655.html>

⁶⁸ <http://legislatie.just.ro/Public/DetaliiDocument/63969>

⁶⁹ <https://rm.coe.int/european-works-mapping/16809333a5>

⁷⁰ End of data collection at the end of April 2021.

Member States/Regions	Transposition of AVMSd confirmed (April 2021)	Is there an obligation for financial investments for VOD services?	Is this obligation applicable to foreign VOD?	Changes since 2018?
Austria	✓	✓		New case study
Belgium (NL)		✓	✓	Yes (foreign VOD included in 2019)
Belgium (FR)		✓	✓	Yes (foreign VOD included in 2021)
Belgium (DE)				
Bulgaria	✓			
Croatia		✓	(proposed in draft law)	New draft law accessible
Cyprus				
Czech Republic		✓		New draft law accessible
Denmark	✓			
Estonia				
Finland	✓			
France	✓	✓	✓	
Germany	✓	✓	✓	
Greece				
Hungary	✓			
Ireland				
Italy		✓	✓	Yes
Latvia	✓			
Lithuania	✓	✓*		
Luxembourg		✓*		
Malta	✓			
The Netherlands	✓			
Poland		✓	✓	New case study
Portugal	✓	✓	✓	Yes (foreign VOD included in 2020)
Romania		✓**		
Slovakia				
Slovenia		✓	(proposed in draft law)	New draft law accessible
Spain		✓	(proposed in draft law)	New draft law accessible
Sweden	✓			

Table 1: Overview of financial obligations to promote European or local work for VOD providers in the applicable legislation of all EU Member States, March 2021 (Source: authors).

* Lithuania, Luxembourg and Slovenia allow VOD providers to contribute an “administrative sum” to the functioning of the media regulator, which we don’t consider as financial contribution to European work; Luxembourg and Lithuania are therefore not included in this study; Slovenia is included because there is an investment obligation in addition to the administrative payment.

** Romania has investment obligations in their legislation in place but due to the inconsistent legal wording, the measure was not implemented so far (see also section 2.1. above); Romania is therefore not included as a case study here.

Based on Table 1 below, Member States' applicable legislations falls into three main groups:

- Group 1: Member States with no specific financial investment obligations for VOD providers;
- Group 2: Member States that have investment obligations in place for VOD providers, but not for the foreign providers of such services (marked in red);
- Group 3: Member States that have investment obligations in place for VOD providers, including the foreign providers of such services (marked in blue).

Compared to our study from 2018⁷¹, we can further make the following groups:

- 2 additional cases have been identified, namely, Poland and Austria;
- 4 Member States have amended regulations since 2018 to change calculations for investment obligations and/or to also capture foreign VOD providers for financial obligations, including Belgium (both the French- and Dutch-speaking Communities), Croatia, Italy, and Portugal;
- 5 Member States have currently draft laws in legislative procedure that will amend relevant legislation possibly this year or the next, including Croatia, the Czech Republic, France, Slovenia, and Spain.

In the following sections, we focus on groups 2 and 3: EU Member States which have an investment obligation for VOD services in place. These **two groups are also represented in section 3, where each Member State or region in the EU is discussed in more detail as a case study. It needs to be noted that the sections 2.3.-2.5. only represent the current state of legislation (not including draft laws).** Section 3 in the case studies present both, current state and proposed laws for comparison.

2.3. What financial obligations exist across Europe?

As identified in Table 1, 12 Member States (or regions) in the EU27 impose financial obligations to promote European work on the providers of VOD services including Austria, Belgium (the French- and Dutch-speaking Communities), Croatia, Czech Republic, France, Germany, Italy, Poland, Portugal, Slovenia, and Spain (7 of these capture also foreign VOD providers). There are 4 forms of investment obligations⁷² for VOD providers in the EU (see also Table 2):

- A levy paid to government agencies, such as a film fund or other agencies that support the creation of European (or specifically local) audiovisual works;
- Obligations to invest directly in the production of European works through the acquisition of rights and/or (co-) production;
- A levy/tax OR obligation to invest directly, which can be chosen by the VOD provider;
- A levy/tax AND obligation to invest directly as a joint obligation.

⁷¹ <https://smit.vub.ac.be/wp-content/uploads/2018/12/VUB-VOD-report-2018-.pdf>

⁷² These investment obligations are not to be confused with the quota for audiovisual works for VOD providers, which are applicable in most EU Member States. Direct investment here refers to a percentage of the revenue/income/turnover or other financial direct financial contribution that needs to be invested in European works, but there are cases where in some countries service providers can choose to comply with either a quota or with a percentage in direct investment.

		Form of investment obligations	Service	%	Basis	
(1) LEVY	AU	Levy paid to RTR-GmbH	Domestic	Market share	Sales/turnover in Austria in previous year based on needed budget of RTR-GmbH and industry-specific total sales	
	HR	Levy paid to Croatian Audiovisual Centre	Domestic	2%	Annual gross income from VOD services (related to advertising revenues and subscription revenues)	
	DE	Levy paid to Filmförderungsanstalt	Domestic + foreign	1.8% 2.5%	Turnover from sales of cinema films in previous year in Germany ... if ≤ €20m and > €500K ... if > €20m	
	PL	Levy paid to National Film Institute	Domestic + foreign	1.5%	Revenue obtained from fees for access to VOD services or revenue obtained from broadcasting commercial communications	
(2) DIRECT INVESTMENT	IT	Pre-purchase, purchase, production, and co-production of fiction, animation, documentary, or any other type of European works produced anywhere, by independent producers in the last 5 years	Domestic + foreign	12.5%	Reported annual net revenue in Italy ... if provider has headquarters in Italy and >20 employees	
				20%	... investment modalities deemed insufficient	
				+3%	... if provider has no headquarters/employees in Italy	
				+4.5%	... if provider only gives independent producers executive role	
ES	Participation in production or acquisition of rights of European works (and % for certain formats and Spanish language work)	Domestic	5%	Annual reported income ... if commercial company		
			6%	... if public service providers		
SL	Quota of 10% for European film in catalogues OR Invest in (co-)production or rights acquisition of European works ⁷³	Domestic	1%	Revenue from audiovisual media services in the previous year		
(3) DIRECT INVESTMENT OR LEVY	BE (FR)	Finance co-production or pre-purchase of audiovisual media works OR Levy paid to the Cinema and Audiovisual Centre	Domestic + foreign	1.4%	Turnover of the previous financial year (gross revenue from advertising, sponsorship including teleshopping and gross receipts from distributor or third-party services) ... if between €300K –5m (+index)	
				1.6%	... if between €5–10m (+index)	
				1.8%	... if between €10–15m (+index)	
				2%	... if between €15–20m (+index)	
				2.2%	... if > €20m (+index)	
	BE (NL)	Finance (co-)production of (Flemish) television series (fiction, documentary or animation) OR financial contribution to the Flemish Audiovisual Fund	Domestic service providers Domestic + foreign (≠linear)	€3m €1.3 2%	Lump sum per year Or per subscriber in previous year Annual revenues in previous year	
(4) DIRECT INVESTMENT AND LEVY	FR	Purchase of exploitation rights, investment in producer's shares or sums paid for the adaptation to the deaf or hard-of-hearing persons for European cinematographic and audiovisual works and/or production of European cinematographic works (parts of the share must be made in works of French cultural expression)	Domestic SVOD	26%	Net annual turnover (exploitation of cinematographic or AV works taxes deducted) ... if >€10m and ≥10 cinematographic works are made available with a window of: ... <22 months after theatrical release in France	
				21%	... ≥ 22 and < 36 months after theatrical release in France	
				15%	... > 36 months after their theatrical release in France	
				Domestic TVOD	15%	... if > €10m
				Domestic Catch-up	3.2%	(only if their income is not included in the resources of the television service they originate from)
	Tax paid and distributed to the Centre National du Cinéma	Domestic + foreign	5.15%	Price paid (excl. VAT) for sales and leasing transactions ... for video recordings		
			15%	... for works or documents of a pornographic nature or inciting violence		
	CZ	Quota of 10% of European film in catalogue OR Investment in production or rights acquisition of European works Fee paid to the Czech Film Fund	Domestic	1%	Total revenues generated by the service in a reporting period	
				0.5%	Price paid by the end user as the product of the audiovisual charge base and the charge rate	
	PT	Tax to be paid to Portuguese Institute of Cinema and Audiovisual Media Financing the writing and development of projects of creative cinematographic and audiovisual works	Domestic + foreign	1%	Amount of the relevant income (if not possible to determine = €1 m) if > €200K annual income and >1% market share	
0.5-4%				Relevant income (calculated based on audiovisual commercial communications and on subscriptions or occasional transactions) if > €200K annual income and >1% market share (if not possible to determine = €4m) (possible decrease by 50% if programme catalogue specific)		
€0.5-€4				Or per subscriber		
€10K-4m				Or fixed amount		
Stages				... if between €200,000-1,999,999 relevant income ... if between €2,000,000-9,999,999 relevant income ... if between €10,000,000-24,999,999 relevant income ... if between €25,000,000-49,999,999 relevant income ... if > €50,000,000 relevant income		
4%				Price paid out for advertising (transmitted and in electronic program guides) (based on number of subscriptions with formula)		
Tax to be declared and paid						

Table 2: Overview of forms of financial investment obligations for VOD providers, March 2021 (Source: authors).

⁷³ Slovenia also requires an annual registration fee to be paid to the Agency of Communication Networks and Services, calculated on the basis of companies' annual revenues. Companies are divided into classes in relation to the amount of these annual revenues.

Based on Table 2, we can compare and differentiate EU Member States into the following groups based on the forms of investment obligations in place for VOD providers:

- **A levy needs to be paid to the local film funds** in Austria, Croatia, Germany, and Poland (in Germany and Poland also for foreign VOD services);
- **Obligations to invest directly in European works** exist in Italy, Spain, and Slovenia (only in Italy also for foreign VOD and in Slovenia instead of investment also a quota of 10% of the programme catalogue can be chosen);
- **A levy/tax OR obligation (as choice) to invest directly** can be found only in Belgium (both the French- and Dutch-speaking Communities), where both domestic and foreign VOD services are included;
- **A levy/tax AND obligation to invest directly** can be found in France, the Czech Republic, and Portugal (in Portugal for both foreign and domestic, in the Czech Republic only for domestic VOD, and in France only the tax is for both).

HOW ARE THE OBLIGATIONS CALCULATED?

As shown in Table 2 below, Member States calculate the financial obligations based on (sometimes variable) percentages, lump sums, or amount per subscriber:

- **Percentages range from 0.5% (in Portugal) to 26% (in France)** based on (specific) sales/ turnover/ income or revenue of the VOD provider, which can be found in all 12 Member States.
- **Some Member States offer the option of the payment of a lump sum or amount per subscriber** from VOD providers, which can often be chosen instead of a percentage of income. In Portugal, one of these three options can be chosen. In the Flemish Community of Belgium, a lump sum of EUR 3 million or EUR 1.30 per subscriber can be chosen for domestic VOD providers which also offer linear television services (another case is Austria where there is a system in place through which the amount of levy contribution is based on the market share, as calculated on the industry-specific total sales and the needed budget of the agency collecting the levy).
- **As part of the direct investment obligations, some MS also specify sub-quotas** that need to be invested in local / local-language content or specific formats. This includes for example Italy (50% sub-quota for works of original Italian expression), Spain (sub-quota of 70% for independent producers, and min 40% in official languages of Spain), France (about 85% sub-quota for works of French original expression), and Portugal (100% into independent European production in the Portuguese language). At the same time the local film funds also have rules around what kind of content or activities levy contributions (of VOD providers) can be used for.

6 Member States (see Table 2) have variable obligations in place that depend on different characteristics of the VOD service or provider captured. A differentiation is based on:

- **the size of the VOD service or provider in terms of the income or turnover;** this is the case in Germany, the French Community in Belgium, and Portugal;
- **the location of the headquarters,** which is the case in Italy (up to 3% more if not located in Italy);
- **the kind of VOD provider,** which is the case in Spain (where public services providers have +1% higher investment obligations compared to private companies);
- **the content that is offered by the VOD service,** which is the case in France (for example higher percentages for VOD series providing pornographic content, and content that is offered soon after its theatrical release).

WHAT IS THE BASIS FOR THE CALCULATION?

Most EU Member States base the calculation of the financial obligation for VOD providers on some form of income from the previous year (see also above). Based on Table 2, we can identify the following main income streams:

- **Total sales/turnover/income** of VOD service (sometimes gross or net – taxes included or not), when specified including e.g.
- **Advertising revenues** (sometimes called income from commercial communications, or specified as sponsorship including teleshopping, etc.);
- **Subscription revenues** (sometimes called fees for access),
- **Price paid** (for TVOD as in leasing or occasional transactions);
- **Income specific from certain content**, i.e. only turnover from cinema films in Germany;
- **Income from specific players** (e.g. from distributors or third-party services).

Some Member States give very detailed descriptions regarding the type of income that needs to be taken into account and how this is calculated, while others do not. Such calculations take various factors into consideration, e.g. how far payments that are already made in other Member States need to be taken into account or how obligations change if other financial obligations are already being paid by a VOD provider in the same Member State. Because this is so fragmented across **Member States**, we present here a number of examples from our case studies (see section 3 for detailed case study descriptions):

The Flemish Community of Belgium (see case study in section 3.2) defines revenues, on which the contribution scheme for non-linear broadcasters is based, as revenues obtained from the second year preceding the year of the contribution obligation. The calculation includes:⁷⁴ the revenue excluding VAT, obtained from the supply of non-linear television services to the end user, including but not limited to payment by the consumer, including agreements with service providers, including valorisation of data and valorisation of audiovisual commercial communication.

The Czech Republic (see case study in section 3.5) describes the base for calculating the fee payable by VOD providers the following way: ⁷⁵ The value-added tax shall not be included in the base of the audiovisual charge. The base of the audiovisual charge shall be rounded upwards to whole crowns. The audiovisual charge shall be calculated as the product of the audiovisual charge base and the charge rate. The data to which the obligation to keep records applies shall be maintained by the payer until the expiry of the fee determination period to which the data are related. The audiovisual charge payer shall submit a fee declaration. The fee declaration period shall not be extended. The form and structure of the fee declaration, including any mandatory details, shall be made public by the Film Fund in a manner allowing for remote access. Proceeds from the audiovisual charge shall be an income to the Film Fund. The Film Fund shall be the administrator of this fee.

France defines the price paid (excluding VAT) by the customer for the sale or rental of video recordings and includes sums paid by advertisers. The definition is formulated in the following way: ⁷⁶ the price paid in return for the sales and leasing transactions mentioned; sums paid by advertisers and sponsors for the diffusion of their advertisements and sponsorship, but not the sums paid by advertisers and sponsors for the dissemination of their advertising and sponsorship messages on catch-up television services, which are already subject to the Publishers & Distributors Tax (which targets the advertising and sponsorship amounts collected by the distributors and publishers of television services);⁷⁷ sums are reduced by 66% for services giving or allowing access to audiovisual content created by private users for the purposes of sharing and exchanges within communities of interest.

2.4. What criteria to determine the scope of application?

In order to determine which VOD services are captured, EU Member States have adopted different approaches. Nevertheless, there are also considerable similarities across them due to the guidelines published by the European Commission and the definitions given in the AVMSd (see below). Based on this, there are three main approaches to define which VOD services are captured by the financial obligations to support European work. VOD providers are exempted, because of:

- (1) the kind of VOD service they are providing; and/or
- (2) their market share or size; and/or

⁷⁴ Flemish Government (2018, 2019). Decision on non-linear television broadcasting organization. (Besluit van de Vlaamse Regering betreffende de deelname van de particuliere niet-lineaire televisieomroeporganisaties aan de productie van Vlaamse audiovisuele werken), https://www.etaamb.be/nl/besluit-van-de-vlaamse-regering-van-01-februari-2019_n2019011088.html

⁷⁵ <http://fondkinematografie.cz/assets/media/files/legislativa/act-on-audiovisual-works-and-support-for-cinematography.pdf>

⁷⁶ Legifrance, 'Loi n° 2016-1918 du 29 décembre 2016 de finances rectificative pour 2016 (1)', <https://www.legifrance.gouv.fr/eli/loi/2016/12/29/ECFX1629304L/jo>

⁷⁷ Article L115-6 - L115-13 of Cinema and Audiovisual Code,

https://www.legifrance.gouv.fr/affichCode.do?jseccionid=8AF1CE0F8A0534182673606CD60880C4.tplgfr32s_2?idSectionTA=LEGISCTA000036364823&cidTexte=LEGITEXT000020908868&dateTexte=20180809

(3) their location.

GUIDELINES OF THE AVMSD AND THE EUROPEAN COMMISSION TO DELINEATE CRITERIA

(1) Most national legislations include the definition of VOD services formulated in the AVMSd.⁷⁸

These are outlined in different directives and legislative acts, but are mostly covered in Article 1 of the AVMSd. This can be summarised into the following seven cumulative criteria:⁷⁹

- That it be a service;
- That a media service provider has editorial responsibility;
- That its principal purpose is the provision of programmes;
- That the purpose of the programmes is to inform, entertain or educate;
- That the target audience of the programmes is the general public;
- That the programmes are delivered over electronic communications networks.

“(a) audiovisual media service” means: (i) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC; such an audiovisual media service is either a television broadcast as defined in point (c) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph; [...] (g) ‘on-demand audiovisual media service’ (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider; [...]” (Article 1, AVMSd)

(2) To complement these criteria, the European Commission also published a set of guidelines in 2020, on what constitutes low audience and low turnover in the context of the AVMSd rules on VOD providers.⁸⁰

According to the European Commission’s Guidelines, there might be two types of proxies for exemptions:

- Low turnover: turnover threshold used in the definition of micro enterprise (enterprises with a total annual turnover not exceeding EUR 2 million);
- Low audience: share of less than 1 % active users within a given Member State (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).

In terms of cross-border direct investment obligations in audiovisual content, Member States with larger audiovisual markets, should either:

- Exempt enterprises with total turnover below EUR 2 million; 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.

Importantly, Member States with smaller audiovisual markets, according to the European Commission Guidelines, could introduce investment obligations to VOD with turnover lower than EUR 2 million or with audience share of less than 1%. The lower thresholds, according to the Guidelines, are recommended “*in duly justified cases and in line with their [Member States] cultural policy objectives, including the objective to ensure the sustainability of national audiovisual and film funding systems*”. Thresholds can be lowered “*depending on the size and structure of the audiovisual market*.”

⁷⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02010L0013-20181218&from=EN>

⁷⁹ <https://rm.coe.int/1680783488>

⁸⁰ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_2020.223.01.0010.01.ENG&toc=OJ:C:2020:223:TOC

According to the Commission, the 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. Also, the applicability of exemptions should respect the principle of non-discrimination i.e. if there are exemptions for providers established in Member State's territory, these must be applied to cross-border providers.

(3) Additionally, legislation also specifies which VOD services are captured based on the location of the VOD provider.

Who is deemed under the jurisdiction of a Member State is captured in Article 2 (1-6) of the AVMSd. Particularly interesting are the Member States that already capture foreign VOD services providers who target their domestic markets. The AVMSd in Article 4 (2.b) outlines that where Member States “assesses that a media service provider under the jurisdiction of another Member State provides an audiovisual media service which is wholly or mostly directed towards its territory,” can request jurisdiction. Article 13 (2) AVMSd further clarifies that “where Member States require media service providers under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds, they may also require media service providers targeting audiences in their territories, but established in other Member States to make such financial contributions, which shall be proportionate and non-discriminatory”. The AVMSd therefore outlines the following criteria for VOD providers located outside of a Member State:

- The VOD service providers need to target audiences in their territories;
- They need to be established in other Member States.

[...] 3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases: (a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State; (b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, the media service provider shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State; (c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State. 4. Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases: (a) they use a satellite up-link situated in that Member State; (b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State. [...]” (Article 2 AVMSd)

WHAT DIFFERENT APPROACHES ARE APPLIED IN EU MEMBER STATES TO DETERMINE THE SCOPE OF APPLICATION?

As can be expected the Member States with financial investment obligations follow similar criteria as are outlined in the guidelines of the AVMSd and the European Commission (as described above). Table 3 below highlights approaches that go partly beyond the above-mentioned criteria:

(1) VOD providers are included or excluded based on the kind of VOD service they are providing, which goes beyond the definitions outlined above, including exemptions for certain business models, the content that is provided, the organisation, etc.

In legislation this can include the exemption of, for example, VOD services or providers that:

- Are non-commercial (Austria, Czech Republic);

- Are made by certain providers like schools, museums, theatres, public organisations, private persons (Austria);
- Are non-public (Czech Republic);
- Have a different principal purpose than programme provision (including e.g. focus on information or promotion of film) (Czech Republic, France);
- Don't include certain audiovisual works like films, documentaries, etc. (Italy);
- Don't hold licensed rights to films (Germany);
- Offer less than a minimum required amount of cinematographic or audiovisual works (France);
- Are dedicated to pornographic or violent content (France, Portugal);
- Have a thematic nature which does not allow sourcing from independent European producers (Italy).

Noticeable in this context is France, which is the only country to purposefully and observably go beyond the scope of the AVMSd definition of an VOD provider, since its tax captures most providers of VOD, irrespective of whether these have editorial responsibility over the services or not. For example, YouTube is also captured. As a consequence, the French system is assessed on the basis of both the AVMSd and the European State Aid rules.

(2) VOD providers can be included or excluded based on their market share or size, which also go beyond existing guidelines as outlined above.

Several Member States exempt VOD providers based on this, e.g.:

- VOD providers are exempted when they have an income of less than: EUR 300,000 (French Community of Belgium), EUR 500,000 (Germany, Flemish Community of Belgium), or EUR 10 million (France) in the local market;
- Austria exempts VOD providers when the expected financial contribution is less than EUR 235;
- Poland exempts VOD providers with less than 1% of active users within Poland;
- Italy doesn't determine a threshold, but the Authority has the power to do so; additionally, providers are exempted if they haven't made a profit in the local market in 2 years.

(3) Finally, VOD service providers can be excluded because of their location.

In total, seven Member States (or regions) also capture foreign VOD providers (see Table 1). What it means to be located in a Member State follows mostly from the AVMSd. Additionally, several Member States further specify when a foreign VOD provider has obligations, for example based on:

- the service being in the local language and/or directed at the local audience;
- the service generating sales in the country.

Additionally, exemptions are made for VOD providers already contributing financially to other investments in European works. This can be the case if the VOD service is part of a television station and therefore is already captured through another financial investment obligation, or when it is part of an existing investment obligation aside from new provisions to capture on-demand audiovisual services in the Member State (such as the Flemish Community of Belgium where investment obligations for 'television service providers' already captured some on-demand audiovisual players) or because they already pay in another Member State where they are located as is also outlined in the AVMSd (Germany, Portugal, etc.).

Form of investment obligations*		A service of a VOD provider is captured, if...	Basis of requirement
AU	LEVY	> 235 EUR	Expected financial contribution
		≠	Providers such as schools, museums, theatres, public organisations, private persons, etc. when not commercialised
BE (NL)	DIRECT OR LEVY	> EUR 500K	Annual revenues (excluding VAT)
		≠	Legal entities that already contribute to the support of Flanders' audiovisual productions on the basis of their linear television activities
BE (FR)	DIRECT OR LEVY	> EUR 300K (+ index)	Turnover of gross revenue from advertising, sponsorship and distributors/third parties
CZ	LEVY	≠	Providers with non-economic, non-public services and services with a different principal purpose than programme provision
FR	DIRECT AND LEVY	> EUR 10m	Annual net turnover
		≥ 10	Cinematographic works annually
		≥ 10	Audiovisual works annually
		≠	Audiovisual service mainly devoted to pornography or violence
	TAX	=	Sale and rent of videograms
		=	Availability of paid or free access to cinematographic or AV works upon individual request formulated by an electronic communication method
		≠	VOD services whose audiovisual content is secondary; or whose main purpose is devoted to information; or whose main purpose is to provide information relating to cinematographic and AV works and to their dissemination and promotion, including through clips or trailers
		≠	Pay a similar tax in another Member State of the European Union
DE	LEVY	> EUR 500K	Sales of films in Germany per year
		=	Hold licensed rights to films
		=	Commercially exploit films (via paid or ad-supported services), if the video-on-demand provider is domiciled and established in Germany
		= or	Offer German-speaking VOD services and generate sales in Germany, if the VOD provider is NOT domiciled and established in Germany
		≠	Already pays a similar financial contribution to film funding in the country where the VOD provider is established and domiciled
IT	DIRECT INVESTMENT	≠	Providers with a thematic nature of programming schedule or catalogue that does not allow sourcing from independent European producers
		≠	Providers that have a market share below a certain threshold determined by the Authority
		≠	Providers that have not achieved profits in the last two years of operation
		=	Providers established in another Member State who have editorial responsibility over offers targeting consumers in Italy; and made a profit in the last two years, in the Italian market
PL	LEVY	> 1 %	Active users within Poland
PT	DIRECT AND LEVY	=	Providers that offer programme services or in their catalogues long and short films, telefilms, creative cinematographic documentaries or creative documentaries for television and television series, including the genres of fiction, documentary and animation;
		≠	Low turnover or low audiences
		=	Operators under the jurisdiction of another Member State, but which target audiences located in Portuguese territory and obtain an income in Portugal
		≠	Providers of pornographic material

Table 3: Overview of criteria to determine which VOD providers are captured or exempted, March 2021 (Source: authors).

* Note: Slovenia and Croatia are not displayed in the table, as no notable criteria going beyond the AVMSd could be identified. In some countries there are laws in legislative procedure to change the investment obligation (see 2.1.).

2.5. What are the applicable procedures in place?

Member States deal with the applicable procedures to control the financial obligations of VOD providers to support European content in very different ways. Most Member States transpose similar procedures as are outlined in the AVMSd (e.g., in Article 5). Four different procedural guidelines can be distinguished:

- (1) Structural and competence procedures relating to the regulatory authority;
- (2) Payment and financial procedures;
- (3) Procedures for the provision of information;
- (4) Procedures in the event of infringement or non-compliance.

“Article 5 1. Each Member State shall ensure that a media service provider under its jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information: (a) its name; (b) the geographical address at which it is established; (c) the details, including its email address or website, which allow it to be contacted rapidly in a direct and effective manner; (d) the Member State having jurisdiction over it and the competent regulatory authorities or bodies or supervisory bodies. 2. Member States may adopt legislative measures providing that, in addition to the information listed in paragraph 1, media service providers under their jurisdiction make accessible information concerning their ownership structure, including the beneficial owners. Such measures shall respect the fundamental rights concerned, such as the private and family life of beneficial owners. Such measures shall be necessary and proportionate and shall aim to pursue an objective of general interest.” (Article 5 AVMSd)

(1) Procedures relating to the regulatory authority describe the regulatory frameworks and the government agencies responsible for their implementation:

- **Public agency delineation:** Most Member States clearly state which public body is responsible for the procedures, monitoring and control of the financial obligations, and the collection of necessary data (for instance, the High Council of the AV in France, the Agency for Communication Networks and Services and the applicable ministry in Slovenia, the AV Centre in Croatia, the Filmförderungsanstalt in Germany, the Flemish Regulator for Media (VRM), and the National Commission on Markets and Competition (CNMC) in Spain). In Germany, the Czech Republic, and Austria the applicable law was the basis for the establishment of a public agency or film fund. Consequently, the structure, goals and procedures relating to the operation of these public bodies are described in detail.
- **Length of applicability of the legislation:** Germany and Croatia, for example, adopt the applicable laws for a certain period of time: in both cases, four years dating from the last amendment. After the period defined has expired, the regulations are either re-adopted or amended.
- **Cross-referencing to other legal frameworks:** Not all the laws that define and describe the financial obligation also integrate details relating to the procedures to be used. In some cases, a reference to other legal frameworks is made, which can include a provision that the responsible agency can publish and define more detailed procedures of its own. In France, the relevant media law states that its procedures and obligations are controlled under French tax law.

(2) Payment and financial procedures include the recipient of the payment, the schedule of payment, and other relevant details:

- **Recipient of the payment:** In some cases, the levy or tax needs to be paid directly to the film fund (for example, Germany). In other cases, the responsible ministry and/or public agency re-distributes the payment (for example, Portugal). In the case of France, the tax is paid through the normal tax payment mechanisms and re-distributed to the film fund. In Slovenia, a new European Audiovisual Production Fund is planned, that will be managed by the ministry for media.
- **Schedule of payment:** Several countries have clear rules about when the taxes or levy must be paid, for example, in Germany, this is monthly.

- Other financial obligations and regulations: In Germany, the legislation clearly specifies that the financial obligations of VOD providers have to be fulfilled in conjunction with other obligations stated in the law. This is important, since more and more broadcasters have income from on-demand platforms. France allows VOD providers to fulfil their investment obligation for the production of European works by starting with a lower percentage of contribution, full percentages only needing to be met in the third year.

(3) Procedures for the provision of information can be found in all countries include obligations for VOD providers to declare (e.g., Croatia, France, Belgium) and/or submit information upon request (e.g., Germany, Slovenia, the Flemish Community of Belgium):

- Schedule for the provision of information: Most countries require information to be submitted annually (for example, France). Some countries mention a specific date (for example, the end of April in Croatia, the end of February in Slovenia), or a time frame is given depending on the starting date of the service (for example, within 30 days of the first day of service activity).
- Kind of information: Some laws contain concrete details about the kind of information that needs to be submitted, sometimes to the extent of providing a detailed list (for example, Germany and the Czech Republic). Others are more fluid in this regard. Generally, VOD providers are obliged to submit general information (name, address, number of users, type of service, etc.), records of programme content for a certain time frame (for example, Croatia and Slovenia), the financial contributions that have been made in respect of European works (for example, Slovenia), and what method has been chosen to fulfil the statutory financial obligations (for example, the Czech Republic, Belgium).
- Usage of information: The German legislation states the extent to which the *Filmförderungsanstalt* is allowed to use the information it receives (namely, validate it or publish it in a report). Croatian legislation states that when the relevant information is not submitted, the provider's annual financial returns will be acquired through the competent financial agency. In the Flemish case, failure to provide information on the chosen method of support (direct investment or contribution to film fund) in due time, will result in the obligation to pay a lump sum.
- Handling of information: The legislation in some Member States includes obligations that the statements and information submitted by the providers must be certified by an accountant or auditor (for example, France) or that the responsible public agency can have it certified by competent third parties (for example, Germany and Croatia). Germany also extends the obligation to submit information upon request to non-subject VOD providers (in other words, providers who do not meet the turnover limit). The French-speaking Community of Belgium requires the information to be submitted by post and the Czech Republic in electronic form. In Slovenia, if information (for example, about the registered programme catalogue) cannot be submitted due to a technical failure, the on-demand service provider is obliged to inform the responsible agency within three days of the occurrence of the defect.

(4) Procedures in the event of infringement or non-compliance clarify what actions should be taken and which procedures apply if the VOD provider does not fulfil the financial obligation or commits some other infringement of the regulations. These measures include penalties in the form of fines, other penalties and specific actions to be taken by the public agencies.

- Fines: In the Czech Republic, the amount of the fine in the event of violations is either CZK 1,000,000 or CZK 2,000,000 (respectively: +/- EUR 38,800 or EUR 77,500).
- Other penalties: Croatia has a protective measure that prohibits VOD providers from pursuing their business activity for a period of up to one year, if an offence is committed.

- Specific actions: Some countries do not have concrete penalties in their laws but mention what action should be taken in the event of an offence being committed.
- Other rules: German legislation states that even though a VOD provider might contest its obligation to pay the film fund levy, payment must nonetheless still be made until non-applicability is proven.

Flanders (see case study in section 3.2) established procedures regarding the direct investment in audiovisual co-productions in the Media Decree.⁸¹ It is outlined how the Flemish Regulator for Media assesses the admissibility and recognition of the co-production projects that can be chosen and in how far profit-sharing between co-producers is handled. Further, detailed procedures on how and when media services need to provide information to the Regulator. On 15 May of each calendar year, the service provider submits a file with a list of investments in the form of co-productions of audiovisual works for the current year by registered letter to the Flemish Regulator for the Media. Further procedures are described if the direct contribution to the Flemish Audiovisual Fund is chosen. The identified applicable procedures can be summarized as follows: The lump sum contribution or contribution per subscriber must be deposited into an account registered to VAF; no later than 30 April of each calendar year; VAF publishes an overview of the service providers on its website every year; Independent producers who receive support from VAF for a television series must contact all service providers contributing to VAF within 15 calendar days with the possibility to be subject to payment of an additional financial contribution, to acquire rights to productions that will be realized with financial support from VAF in implementation of this decision, either "prior to the first linear transmission in open network, for a period of up to six months, via its own platform and/or after the first linear transmission in open network, for a period of up to twelve months, via their own platform"; Non-linear television organizations must report to the Flemish Media Regulator before 31 March each year on how the provisions have been complied with. The Flemish Regulator for Media makes this information public; The Flemish Regulator for Media checks whether the amount of the contribution obligation is being met and notifies the non-linear television broadcaster by registered letter of the check, and of the financial obligations that are required; A non-linear television broadcaster that appears to have made insufficient investments in co-production projects to the Flemish Regulator for Media, for the period in question, must pay the financial contribution to the Flanders Audiovisual Fund for the full amount without deduction of investments that have already been submitted; If the non-linear television broadcaster has made its choice for the investment in co-production of audiovisual works and the shortage of investment is due to the decision of the Flemish Regulator for Media, the non-linear television broadcaster will pay the balance of the total financial contribution due to the Flanders Audiovisual Fund.

2.5. What is the motivation to impose investment obligations?

The overarching motive for introducing investment obligation for VOD providers is creating a level-playing field between traditional audiovisual players that already make considerable investments in domestic audiovisual production and VOD providers. This was imperative for updating the AVMSd rules for VOD providers. In addition to the level-playing field argument, various motivations have been identified in either the law/regulatory document itself (often in the preamble that introduces the legislation by stating its objectives), or in accompanying documents (for example, the letter of mission by the Minister of Culture in France). The identified motivations can be categorised as follows (we also provide some examples below and more can be found in the case studies in section 3):

- **Economic motivations:** to make the media sector a strong economic sector (Flanders), to support the macroeconomic concerns of the film industry in Germany, to increase the revenue of the National Film Institute, which suffers from a lower levy collected from other audiovisual players (Poland), to increase the financing of the audiovisual sector (Portugal), to adapt to the market developments with dramatic changes in viewing habits and new entrants (Slovenia), to improve the attractiveness of Spain as a European platform for business, work and investment in the audiovisual field, and to update the legislation to the reality of the market, to counter tax avoidance (France).
- **Cultural motivations:** to increase the quality and diversity of Flemish programme makers and audiovisual producers in times of crisis, to provide a diverse and high-quality range of programmes and promotion of culture (Austria), to preserve the Croatian language and Croatian cultural identity within the European and world contexts.

⁸¹Flemish Government (2014). Implementation Decision (Besluit van de Vlaamse Regering van 21 maart 2014 betreffende de stimuleringsregeling voor de audiovisuele sector, vermeld in artikel 184/1 van het decreet van 27 maart 2009 betreffende radio-omroep en televisie), Article 17, §3.

- **Strengthening the audiovisual industry and improving its competitiveness:** to present Croatian audiovisual works abroad, to improve the international orientation of German film-making, to promote the production and dissemination of Portuguese audiovisual work, to enhance the quality and the audience reach of high quality Slovenian and European audiovisual works (Slovenia), to strengthen support for the production of independent audiovisual works, to enhance the amount of financing for independent cinema (Spain), to strengthen the audiovisual sector and prepare it for future challenges, such as the multiplication of distribution channels (France).
- **Covid-19 related motivations:** on-demand services to help the recovery of the film industry from the Covid-19 losses (Poland).

Austria: “[the funds have the goals] to provide a diverse and high-quality range of programs, which in particular makes a contribution to the promotion of Austrian culture, Austrian and European awareness as well as information and education of the population.” (KOG §29 and 30) ⁸²

France: “(1) remove the growing incoherence of the current legislation and (2) allow the emergence of French audiovisual communication groups which are capable of (3) structuring a powerful French industry in order (4) to face the new challenges related to the multiplication of distribution channels.” (Letter of mission by Minister of culture, 2007) ⁸³

2.6. Summary of findings and recommendations

This study aims to compare **obligations on VOD providers to financially contribute to the production of European works**. In doing so, the following part 3 outlines the different obligations in more detail and presents the full case studies of legislation in EU Member States. Our main findings can be summarized as follows:

WE EXPECT OTHER EU MEMBER STATES TO FOLLOW SUIT IN INTRODUCING INVESTMENT OBLIGATIONS FOR (FOREIGN) VOD PROVIDERS IN THE COMING YEARS.

Since our previous 2018 study, a significant number of legal measures have been introduced in different Member States in order to impose obligations to VOD providers to contribute financially to the production of European works. Many of these have also extended investment obligations to capture foreign VOD players. Yet, many Member States are still in the process of transposition of the AVMSd (see Table 1). Based on this, we expect more Member States to follow suit and for more changes to be introduced to existing laws, in the coming years. This may also involve extending existing obligations to VOD providers established in other Member States, in order to expand the opportunities for financial investments, and level the playing field between local and foreign VOD services.

The profound impact that the Covid-19 pandemic has had on the European film and audiovisual markets may have given policy makers additional motivation to create new investment obligations and provide additional funding avenues. European audiovisual industry professionals have also lobbied for the extension to capture foreign platforms in order to help local recovery, but they have not always agreed on the best measure for this, some supporting the taxation of foreign platforms and the sustainability of the national audiovisual/film fund (e.g. Portugal), while others pointing to direct investments as a more effective form of support (e.g. Spain).

LEGISLATION IN THE EU IS HIGHLY FRAGMENTED DUE TO THE LOCAL LEGISLATIVE CONTEXT AND PATH-DEPENDENT DEVELOPMENTS.

The research clearly showed that there is immense fragmentation of the legislative regimes in place. We believe that a certain level of harmonisation should be achieved, with an eye on ensuring legal predictability for companies, as well as more efficient forms of control and enforcement by media regulators and the agencies tasked with the obligation’s collection and monitoring. This would also enhance the communication and collaboration between the aforementioned regulatory bodies across

⁸² https://www.ris.bka.gv.at/GeltendeFassung_wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001213

⁸³ https://www.acces.tv/wp-content/uploads/2016/07/Etude_2_annees_dapplication_reglementation_2010_prod-CSA.pdf

EU Member States, a point often addressed in the media regulators' feedback and reporting on recent draft laws. This is particularly relevant considering the fact that foreign VOD service providers may be exempt from the investment obligation in some territories, if they already make a similar investment in a different Member State.

WE RECOMMEND THAT POLICY MAKERS BUILD FUTURE LEGISLATION ON EXISTING LEGISLATION AND PRACTICES, WHILE AT THE SAME TIME PURSUING A LEVEL PLAYING FIELD FOR LEGACY AND NEW PLAYERS, AND BY ANTICIPATING FUTURE DEVELOPMENTS

Not only do Member States introduce new measures, but they are also currently fine-tuning these according to developments in the market and best practices from other EU markets. We can see this in cases such as those of Italy and Belgium, where regulation added only three years ago has already been amended or changed to better suit the legal framework or the market conditions, whether it be in the type of investment, the calculation method, or the amount required from VOD services. Based on the developments we identified, we also recommend that policy makers closely investigate existing legislation and discussions in other Member States, in order to find best practices and align future legislation to similar audiovisual markets and legal systems. A thorough investigation and adaptation of the legislation to the specificities of each market ensures to provide the local industry with more effective support and a more coherent regulatory framework than regulation 'imported' from a market of different size, audiovisual production practice, and locally specific content.

Part 3

Case studies

3. Case studies

3.1. Austria (AU)

APPLICABLE LEGAL FRAMEWORK

In Austria, the legal framework, which regulates VOD services is the Audiovisuelle Mediendienste-Gesetz or **Audiovisual Media Services Act (AMD-G)**.⁸⁴ Further, the **KommAustria Act (KOG)**, the legislation which establishes KommAustria as the Austria communication authority, is applicable in regard to financial obligations. The AMD-G (the former Private Television Act) was first introduced in 2001 and amended in 2010 to also capture VOD services. The KOG outlines the role of the regulatory body (RTR-GmbH) to control, impose regulations, and provide funding to the media sector by specifying additional financial obligations on media services that are captured by the AMD-G.⁸⁵ Both legal acts were revised based on the AVMSd as announced in December 2020 and the new legislation came into force in January 2021. However, the revisions had no impact on the financial obligations previously set for VOD services. **The financial obligation imposed on local VOD providers consists of a levy to be paid to the RTR-GmbH** (it needs to be noted, that the levy contribution is can only be used for specific organisational and administrative tasks of the RTR-GmbH and there not directly is used for funding European work – see below).

“1, §1 This Federal Act shall regulate 1. the provision of television services by means of wireless terrestrial transmission (terrestrial and mobile terrestrial television), via satellite (satellite television) and in electronic communications networks; 2. the provision of other audio-visual media services; 3. the operation of multiplex platforms.” (AMD-G 1, §1) “1, §1 In order to administer and carry out regulatory tasks relating to electronic audio media and electronic audio-visual media, including supervision of the Austrian Broadcasting Corporation and its subsidiaries, the Austrian Communications Authority (“KommAustria”) shall be established. §22 Furthermore, KommAustria shall be responsible for administering subsidies for media according to provisions in federal legislation.” (KOG 1, §1-2) “§2 The financial contributions [for financing and managing the funds for the media department] shall be made by the media sector. The media sector shall include the Austrian Broadcasting Corporation, broadcasters established in Austria and media service providers that have a reporting obligation pursuant to the Audio-visual Media Services Act (providers liable to contribute). (KOG 35, §2)

SCOPE OF APPLICATION

In order to delineate which media services need to make financial contributions, the KOG focuses on “*media service providers that have a reporting obligation pursuant to the Audiovisual Media Services Act*” (providers liable to contribute) (KOG 35, §2). The AMD-G therefore closely follows the definition of an audiovisual media service and VOD service in the AVMSd text (see section 2.4). In addition, **a series of exemptions for VOD services belonging to specific organisations are outlined, if these services are not commercialised and limited to only capturing Austrian-based services. Exemptions based on the size of the VOD service** are also listed. Therefore, in order to be captured by the act, a VOD service has to:

- not include content made by providers such as schools, museums, theatres, public organisations, private persons, etc. when not commercialised; and
- be based in Austria.

“2a, §1 The provision of audiovisual content does not qualify as an on-demand service within the meaning of 2, §4., even if it is shown in a separable part of the content-based offer by providers including [schools, museums, theatres, public organisations, private persons, etc.] §2 The offers mentioned in §1 do not constitute an on-demand service within the meaning of this Federal Act if the provision of the audiovisual content is neither marketed nor exploited independently or by adding or fading in audiovisual commercial communication and is not financially supported by other regular donations.” (AMD-G 2a)

“3, §1 Any person who provides terrestrial and mobile terrestrial television or satellite television and is established in Austria shall require a license according to this Federal Act. Other media service providers established in Austria shall notify the regulatory authority of their services (§9) [following paragraphs outline when they are considered based on Austria].” (AMD-G 3)

⁸⁴ Bundesgesetz über audiovisuelle Mediendienste (Audiovisuelle Mediendienste-Gesetz – AMD-G) StF, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001412>

⁸⁵ Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria („KommAustria“) (KommAustria-Gesetz – KOG) StF: BGBl. I Nr. 32/2001, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001213>

CALCULATION METHODS

The calculation of and procedure for implementing the financial contributions to finance the expenditure of the regulatory authority is outlined in the KOG Article 35. The calculation of financial contribution of the Austrian Broadcasting Corporation, broadcasters established in Austria and media service providers (including VOD services) to the RTR-GmbH is **based on a calculation of the budget needed for RTR-GmbH and the market shares of all relevant media services (see below). There is an exemption outlined for services that fall under a certain threshold of financial contribution.** According to the implementing practices of KOG Article 35 all sales that are received from the provision of audiovisual media services in Austria are subject to a financial contribution. As a rule, it must be sales from advertising, sponsorship and product placement. In the area of VOD services all sales that are generated with the various types of banner and video advertising (e.g. pre-rolls, mid-rolls and post-rolls) are subject to the calculation. There are no further delineations given regarding what should be included in the individual sales/turnover at the basis of the financial contribution, except that it consists of the provider's industry-specific total turnover.

- First the expenses of specific tasks of the RTR-GmbH are calculated and made public including considerations of any surplus or shortfalls from the previous year, based on principles of economy, efficiency and expediency.
- An annual contribution of EUR 2,250,000 will be used to finance these expenses, through a subsidy from the federal budget (i.e. broadcasting fees) that will be adapted yearly based on the consumer price index.
- The total remaining costs (not exceeding EUR 3,500,000 per year, which is adapted on a yearly basis according to the consumer price index) are the calculation basis for the financial contributions of the media services.
- Second, the total respective sales/turnover in Austria (excluding broadcasting fees) of the media services liable for contributions to the industry-specific total sales are calculated.
- The share of financial contributions to be paid is calculated based on the share of the individual media service to the total turnover.
- There is an **exception for media services whose expected financial contribution falls below the amount of EUR 235** (which is adapted on a yearly basis according to the consumer price index). In this case no financial contribution is collected and the sales are not taken into account in the calculation of the industry-specific total sales.

“(1) The financial contributions on the one hand and funds from the federal budget on the other hand shall serve to finance the expenditure of KommAustria (para. 14) [...]. The grant from the federal budget in the amount of € 2,250,000 per year shall be remitted to RTR-GmbH [...] and shall be raised from receipts of the fees pursuant to § 3 para. 1 of the Broadcasting Fees Act. [...] The total amount of the remaining expenditure of RTR-GmbH to be covered by financial contributions may amount to a maximum of 3,500,000 per year. [...] (3) The financial contributions shall be determined and collected according to the respective turnover of the provider liable to contribute in proportion to the total turnover of the sector, with the entire turnover generated by the provision of broadcasting and a media service in Austria, with the exception of programme fees (§ 31 of the ORF Act), being taken as the basis of the calculation. (4) [...] The total receipts from the financial contributions collected shall correspond, if possible, to the amount of the expenditure required for financing the tasks of RTR-GmbH minus the receipts of fees pursuant to § 3 para. 1 of the Broadcasting Fees Act. [...] Use of the funds shall take into account the principles of efficiency, economy and expediency.[...] (5) If the financial contribution of a provider liable to contribute is expected to be less than € 235, no financial contribution shall be collected from such provider, and the turnover of that provider shall not be taken into account when the total turnover of the sector is calculated. This amount shall reduce and increase from 2012 to the extent to which the 2005 consumer price index published by Statistics Austria or the index of the previous year replacing it will have changed.” (KOG Article 35)

APPLICABLE PROCEDURES

The AMD-G outlines several procedures for **collecting information and registering VOD services** in Austria, which are not discussed here in detail, as they are similar to those identified in most Member States (see section 2.5). However, in KOM §35 the following additional procedures are described:

- First, the Act **outlines for what media specific tasks the RTR-GmbH can use the financial contributions.** Surprisingly, the funds are 100% financed by the broadcasting fee (KOM §29-30). However, the financial contributions can only be used for specific organisational and administrative tasks by the RTR-GmbH, which are outlined in KOM §35 (1).
- Second, it outlines **procedures applicable to how and when RTR-GmbH has to prepare and publish the needed budget** (KOM §35 (4)), including the media-related expenditures, thresholds, and calculations for contributors (KOM §35 (7)), and the actual spending and credits of contributors of the previous year (KOM §35 (10-11)), as well as how to notify and collect the financial contributions (KOM §35 (12-14)), etc.

- Third, there are **procedures about how and when financial contributors have to report their planned and actual sales** (KOM §35 (6 and 9)), and when and how to make the payments (KOM §35 (8)).

“§35 (1) To finance the expenses incurred in fulfilling the tasks pursuant to Section 2 Paragraph 1 Items 1 and 2, Items 4 to 11, Item 13 and Paragraph 2 and Section 13 Paragraph 4 Item 1 lit. KommAustria (Paragraph 14) as well as the expenses incurred by RTR-GmbH in the media department in fulfilling the tasks according to Section 17 Paragraph 1 Nos. 1, 2, 4 and 5 as well as Paragraph 6a [...]. KommAustria and RTR-GmbH must report to the Federal Chancellor about the use of these funds by April 30 of the following year and submit a financial statement. (4) [...] RTR-GmbH has to prepare a budget with the plan values for the coming year by December 10th and publish it on its website. The contributors are to be given the opportunity to comment on this budget. [...] (6) The contributors have to report their planned sales for the current year to RTR by January 15th at the latest. If the planned sales are not reported despite being requested to do so and a reasonable grace period has been set, RTR-GmbH must estimate the expected sales of the contributor. [...] (8) The financial contributions are to be prescribed by RTR-GmbH to the contributors based on the published estimates in four partial amounts at the end of each quarter and to be paid by them to RTR-GmbH. Those liable to pay contributions can also waive the quarterly prescription in favour of an annual prescription. In the case of contributions that are expected to be less than 1,000 euros, RTR-GmbH can dispense with a quarterly charge in favour of an annual charge. In this case, the financial contribution is to be paid at the end of the first quarter, the resulting interest advantage is to be credited to the contributor concerned. (9) The contributors must report their actual sales to RTR-GmbH by May 31 of the following year at the latest. Sales data, the actual amount of which cannot be collected with reasonable effort, must be estimated by RTR-GmbH. [...] (11) After the actual industry-specific expenditure and the actual industry-specific total turnover have been published, RTR-GmbH has to credit any financial contributions made or to make a subsequent claim. (12) In the event that a person liable to contribute does not meet the obligation to pay the financial contribution or does not meet it properly, KommAustria has to prescribe the payment of the financial contribution by notification. [...] For the members working in KommAustria, RTR-GmbH has to reimburse the federal government for all activity expenses including ancillary costs. These costs must be taken into account when determining the financial contributions for the media sector.” (KOG §35)

3.2. Belgium (Flemish-speaking Community) (BE NL)

APPLICABLE LEGAL FRAMEWORK

In Flanders, the Media Decree of 27 March 2009 Concerning Radio Broadcasting and Television (Decreet tot wijziging van het decreet van 27 maart 2009 betreffende radio-omroep en televisie, houdende invoering van een stimuleringsregeling voor de audiovisuele sector)⁸⁶ hereafter referred to as the **Media Decree**, lays down the foundation for financial contributions for VOD services. Two regulations apply: The (1) **Incentive Scheme** (Stimuleringsregeling) and the (2) **Contribution Scheme** for non-linear broadcasters (deelname particuliere niet-lineaire omroeporganisaties), which includes the investment obligation for non-linear broadcasting organisations which was introduced in 2019. Both regulations include obligations for VOD services, but each case applies to a different type of player. It needs to be noted that discussions led by the Department of Culture, Youth and Media in Flanders are currently taking place (Spring of 2021) that will lead to changes of current investment obligations (see section 2.1 for more info).

The (1) **Incentive Scheme** deals with VOD as “service distributors,” thus covering **VOD services that also distribute television signals**. The scheme was added in 2014 through the Implementation Decision (Uitvoeringsbesluit) of 21 March 2014.⁸⁷ Based on this, in Flanders, VOD services as **service distributors can choose between a financial contribution to co-production of audiovisual work or to contribute financially to the Flemish Audiovisual Fund**.

The (2) **Contribution Scheme** deals with **VOD players defined as “non-linear broadcasters.”** It is captured by the Implementation Decision of the Flemish Government concerning the participation of private non-linear television broadcasters in the production of Flemish audiovisual works (Besluit van de Vlaamse Regering betreffende de deelname van de particuliere niet-lineaire televisieomroeporganisaties aan de productie van Vlaamse audiovisuele werken).⁸⁸ It was introduced in 2019, its implementation taking place before the AVMSd transposition in Flanders.⁸⁹ The new regulation covers the contributions of non-linear broadcasters, which includes services such as Netflix (which is not covered by the Incentive Scheme), and grants considerable legal flexibility to the Flemish Government with regards to the implementation of investment obligations (see legal text below). Based on Article 157§2 VOD services also have the **choice to make financial contributions to production or co-production of Flemish audiovisual works or to make an equivalent financial contribution to the Flemish Audiovisual Fund. This also includes non-domestic VOD services**.

"[Service providers can choose to contribute] either in the form of a financial contribution towards the co-production of audiovisual works or in the form of a financial contribution to the Flemish Audiovisual Fund. [...] [The contribution will be directed] to Flemish, qualitative independent productions in series, which are realised in co-production with a broadcaster of the Flemish Community and/or the television broadcasting organisations recognised and/or registered in Flanders, and on which the Flemish Government and the VAF conclude a management agreement." (Media Decree, Article 184/1, §1)

"The Flemish Government determines the criteria, the conditions and the procedures for the participation of private non-linear television broadcasters in the production of Flemish audiovisual work, including the base, rate or amount and any exemptions or reductions of the financial contribution." (Media Decree, Article 157, §2)

"[Support of Flemish audiovisual work can be made] in the form of a financial contribution to the production or co-production of Flemish audiovisual works, or in the form of an equivalent financial contribution to the Flemish Audiovisual Fund." (Media Decree, Article 157, §2)

SCOPE OF APPLICATION

⁸⁶ Flemish Government (2014). Media decree: [182] Art 184/1§1 Decreet tot wijziging van het decreet van 27 maart 2009 betreffende radio-omroep en televisie, houdende invoering van een stimuleringsregeling voor de audiovisuele sector.

⁸⁷ Flemish Government (2014). Besluit van de Vlaamse Regering betreffende de stimuleringsregeling voor de audiovisuele sector, vermeld in artikel 184/1 van het decreet van 27 maart 2009 betreffende radio-omroep en televisie, http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=14-04-03&numac=2014035376

⁸⁸ Flemish Government (2018, 2019). Decision on non-linear television broadcasting organization. (Besluit van de Vlaamse Regering betreffende de deelname van de particuliere niet-lineaire televisieomroeporganisaties aan de productie van Vlaamse audiovisuele werken), https://www.etaamb.be/nl/besluit-van-de-vlaamse-regering-van-01-februari-2019_n2019011088.html

⁸⁹ It was approved by the Government of Flanders on 26 October 2018 and the decision was adopted in Parliament on April 2nd, and officially ratified and announced by May 26th. The provisions are laid down in a new Implementation Decision to Article 157. The new Article 157 is introduced by Article 13 of the Decree of 29 June 2018 and transposes Article 13 of the revised AVMSd.

The Media Decree builds mostly on the definitions and delineations outlined in the AVMSd (see section 2.4). However, additional exemptions are in place in order to manage having two regulations in place, and to determine the size of the VOD services.

With regard to the (1) **Incentive Scheme**, the regulator imposes obligations for service distributors, which are defined as **services by television broadcasting organisations that fall under the authority of the Flemish Community and have both linear and non-linear services** (Media Decree, Art 184/1§1). This includes distribution players such as cable, telecom companies, and OTT players who provide television broadcasting programmes, or their own VOD offer that includes content from domestic television channels. Players who are established in other Member States and who are targeting the Flemish market are not covered by this provision.

"[Distribution services that] make available to the public in a linear or non-linear manner one or more broadcasting services from one or more television broadcasting organisations that fall under the authority of the Flemish Community." (Media Decree, Art 184/1§1)

The (2) **Contribution Scheme** covers the regulation for so-called non-linear broadcasters. Article 157, §4 specifies that **VOD services "under the competence of another Member State targeting the Flemish Community."** In other words, the provisions also apply to OTT players such as Netflix. Article 2 of the new Implementation Decision **exempts the following players from the contribution scheme for non-linear broadcasters:**

- Non-linear television broadcasting organisations that are part of or subsidiaries of legal entities that already contribute to Flanders' audiovisual productions on the basis of their linear television activities (Articles 154, 155 and 156 of the Media Decree) or on the basis of their activities as service providers (Article 184/1 of the Media Decree);
- Non-linear television broadcasters with annual revenues (excluding VAT) of less than EUR 500,000.

"[provisions of Article 157, §2 and §3 also apply to] non-linear television broadcasting organizations which fall under the competence of a Member State of the European Union and offer non-linear television services targeting the Flemish Community." (Media Decree, Article 157, §4)

CALCULATION METHODS

The (1) **Incentive Scheme** based on Article 184/1, §3 of the Media Decree gives service providers the choice between (a) a **lump sum** that each service provider needs to dedicate to the production of audiovisual works, and that amounts to **EUR 3 million per year** or (b) a contribution of **EUR 1.3 per subscriber** in the "*Dutch language area*," calculated on the **basis of the most recent data** accepted by the Flemish Regulator for Media, as communicated in the implementation of Article 182.

"If the service provider chooses a contribution per subscriber, the amount is calculated on the basis of the number of subscribers in the year prior to the year of the contribution obligation, as communicated to the Flemish Regulator for Media on the grounds of Article 182 of the decree of 27 March 2009." (Media Decree, Article 3) "[The calculation is made based on the reporting of the] most recent data accepted by the Flemish Regulator for Media." (Media Decree, Art 184/1§1)

The (2) **Contribution Scheme**, based on Article 4 of the new Implementation Decision, stipulates that non-linear broadcasters must contribute **2% of their annual revenue**, based on the previous year, from the second year preceding the year of the contribution obligation. Revenue is defined as **"the revenue excluding VAT, obtained from the supply of non-linear television services to the end user, including but not limited to payment by the consumer, agreements with service providers, valorisation of data and audiovisual commercial communication."** In the case of non-linear television broadcasting organisations based in another Member State of the European Union that target the Flemish Community, the revenue is calculated on the basis of the income obtained by offering services to residents of the Flemish Community (Article 18 of the Implementation Decision).

APPLICABLE PROCEDURES

For the (1) **Incentive Scheme**, Articles 4 to 16 establish **procedures regarding the direct investment in audiovisual co-productions**. It is outlined how the Flemish Regulator for Media **assesses the admissibility and**

recognition of the co-production projects that can be chosen and in how far profit-sharing between co-producers is handled. Important to note is that service providers captured by the Incentive scheme, contrary to many other investment obligations in EU Member States, do not get rights in return for the investment, and are limited in rights deals they can make. Moreover, the investment must be at least 20% of the total budget of a production.

Detailed **procedures on how and when media services need to provide information to the Regulator** are also added. Art. 12. States that on 15 May of each calendar year, the service provider submits a file with a list of investments in the form of co-productions of audiovisual works for the current year by registered letter to the Flemish Regulator for the Media (see for more details legal text below). Article 17 further describes procedures if the **direct contribution to the Flemish Audiovisual Fund is chosen**. The following rules apply:

- The lump sum contribution or contribution per subscriber must be deposited into an account registered to VAF; no later than 30 April of each calendar year;
- VAF publishes an overview of the service providers on its website every year;
- Independent producers who receive support from VAF for a television series must contact all service providers contributing to VAF within 15 calendar days with the possibility, subject to payment of an additional financial contribution, to acquire rights to productions that will be realised with financial support from VAF in the implementation of this decision, either "prior to the first linear transmission in open network, for a period of up to six months, via its own platform and/or after the first linear transmission in open network, for a period of up to twelve months, via their own platform."

"Art. 4. The Flemish Regulator for the Media assesses the admissibility and recognition of the co-production projects stated in this chapter on the advice of the assessment committee or committees stated in Article 9. Art. 5. Co-production projects that comply with the provisions of this section are eligible for recognition as a co-production project that can be regarded as a form of contribution to the co-production of audiovisual works as referred to in Article 184/1, § 1, first paragraph. Art. 6. To be eligible as a form of contribution to the production of audiovisual works through a co-production, the co-production projects must meet the following eligibility conditions: [...]" (Media Decree, Art 4)

The (2) **Contribution Scheme** based on Articles 5 to 11 of the new Implementation Decision covers the application of direct investment in audiovisual productions. This is **largely the same as the Incentive Scheme**. Differences primarily target the **fixed rates that must be paid by non-linear broadcasters, the requirements to broadcast the co-production project 'free-to-air' (which is mandatory for the Incentive Scheme, but not for the contribution scheme for non-linear broadcasters), and the acquisition of rights** (no rights acquisition is possible with direct access, but in the case of non-linear broadcasters, the co-production must feature prominently in the catalogue for 12 months).

Article 17 of the new Implementation Decision contains rules on the **payment of contribution by non-linear television broadcasters** to VAF. These are also the same as those of the Incentive Scheme. Finally, Article 3 of the new Implementation Decision stipulates that non-linear television broadcasters must inform the Flemish Regulator for Media, VAF, and the Flemish Government of the chosen method of support (**direct investment or contribution to VAF**) before 15 February. If non-linear television broadcasters do not announce this, they will have to **pay a lump sum contribution of EUR 3 million to VAF**. Further provisions are added to the new Implementation Decree regarding players who choose to make **direct investments**:

- Article 157, §3 states that non-linear television organisations must report to the Flemish Media Regulator before 31 March each year on how the provisions have been complied with. The Flemish Regulator for Media makes this information public.
- The Flemish Regulator for Media checks whether the amount of the contribution obligation is being met and notifies the non-linear television broadcaster by registered letter of the check, and of the financial obligations that are required;
- A non-linear television broadcaster that appears to have made insufficient investments in co-production projects to the Flemish Regulator for Media, for the period in question, must pay the financial contribution referred to in Article 157, §2 of the Decree of 27 March 2009, to the Flanders Audiovisual Fund for the full amount stated in Article 3, §1, without deduction of investments that have already been submitted;
- If the non-linear television broadcaster has made its choice for the investment in co-production of audiovisual works and the shortage of investment is due to the decision of the Flemish Regulator for Media, the non-linear television broadcaster will pay the balance of the total financial contribution due to the Flanders Audiovisual Fund.

3.3. Belgium (French-speaking Community) (BE FR)

APPLICABLE LEGAL FRAMEWORK

The media legislation in the French-speaking Community of Belgium that deals with the investment obligation of television service providers (“éditeurs”) regarding the production of European audiovisual works is delineated in the decree coordinated by the French-speaking Community for Audiovisual Media Services (4 February 2021) (Décret relatif aux services de médias audiovisuels et aux services de partage de vidéos), hereafter referred to as the **AMS Decree**.⁹⁰ The decree was approved in February 2021 (see section 2.1 for more information) and sets down that providers should contribute to the production of audiovisual works, which, **since 2021, also includes local and foreign VOD services targeting the French-speaking audience. They can do so through a choice between (co-)production, pre-purchasing of rights, or paying a contribution to the Centre for Cinema, and Audiovisual Arts (the film fund),** (Centre du Cinéma et de l'Audiovisuel), hereafter referred to as the CCA.

“Without prejudice to the provisions applicable to RTBF, any television service publisher linear and non-linear must contribute to the production of audiovisual works. This contribution is made either under the form of co-production or pre-purchase of audiovisual works, either in the form of a payment to the Center du cinema and audiovisual.” (Art. 6.1.1-1 §1 AMS Decree)

SCOPE OF APPLICATION

The scope of application for the investment obligation for the providers of television services (Art. 6.1.1-1) pertains to all linear and non-linear services within the competence of the French Community of Belgium (Art. 6.1.1-1, §1; Art. 1.1-1) and to foreign television services targeting the French-speaking Belgian audience (Art. 6.1.1-1 §4; Art. 1.1-2). Importantly, the definition for “television services” also includes certain VOD services providers. **The definitions thus largely follow the AVMSd text** (see section 2.4). Additionally, in the **calculation method, thresholds for VOD providers with low turnover** are defined (see below).

“Without prejudice to the special provisions applicable to providers of external television services, is subject to this decree, any provider of services, any provider of video sharing services, any distributor of services, any network operator, any supplier of electronic communications services that falls under the competence of the French Community.” (Article 1.1-2. AMS Decree) “For providers of external/foreign [extérieur] television services, the first two paragraphs apply by taking only into consideration gross receipts, as referred to in paragraph 4, coming from the French Community market.” (Art. 6.1.1-1 §4 AMS Decree) “Providers of external television services: the provider of linear or non-linear television services which reports to under the jurisdiction of a member state of the European Union or party to the Agreement on the European Economic Area or Party to the Council of Europe Convention on Transfrontier Television which targets audiences from the French-speaking region or the French-speaking public of the bilingual region of Brussels-Capital in order to derive income from this market commercial communications or revenue from users. Such a publisher is particularly subject to the provisions of Articles 6.1.1-1, 9.2.3-2 and 9.2.3-3.” (Art. 1.3-1. 14° AMS Decree)

CALCULATION METHODS

The amount of the contribution payable by the providers of television services is mentioned in Art. 6.1.1-1, §3. There is a differentiation based on the size of the revenue on which the contribution is calculated. **The tariff has a minimum of 0% when the threshold of EUR 300,000 of its turnover (plus application of the index 01.01.2004 = 100) is not reached and a maximum of 2.2% when the revenue exceeds EUR 20 million.** The AMS Decree defines the revenues on which the calculations are based in more detail in Art. 6.1.1-1, §4: **turnover of the previous financial year, meaning the gross revenue derived from advertising and sponsorship (including teleshopping) and gross receipts from any distributor or third-party services** (including the gross revenue generated by the programme content of these services).

“The amount of the contribution made by the provider of television services referred to in §1 shall represent, at a minimum: 0% of its turnover, if between EUR 0 and 300,000; 1.4% of its turnover, if between EUR 300,000 and 5 million; 1.6% of its turnover, if between EUR 5 and 10 million; 1.8% of its turnover, if between EUR 10 and 15 million; 2% of its turnover, if between EUR 15 and 20 million; 2.2% of its turnover, if exceeding EUR 20 million. The amounts referred to in the previous paragraph will be adjusted annually on the basis of the index 01.01.2004 = 100,

⁹⁰ Moniteur Belge. (4 February 2021). Décret relatif aux services de médias audiovisuels et aux services de partage de vidéos, <https://www.csa.be/wp-content/uploads/2021/03/Nouveau-decret-SMA-du-4-fevrier-2021-Publication-au-MB.pdf>

in accordance with the evolution of the ordinary consumer price index, as defined by the law of 2 August 1971." (Art. 6.1.1-1, §3 a AMS Decree)

"Turnover is defined as the amount of gross revenue invoiced by the authority responsible for the service provider, without the deduction of commissions and discounts, or, failing that, invoiced by the service provider itself, for the insertion of advertising and sponsorship in the service provider's television broadcasts and all other gross receipts, without any deduction, generated by the provision of television services by the provider against payment, including gross revenue received from any service distributor or third party person for obtaining television services and the gross revenues generated by the program content of these services. When the service provider carries out the activity of service distributor himself, as referred to in Article 3.4-1, for the television services for which it has made a declaration or is authorized under the terms of this decree, the turnover referred to in the preceding paragraph must be augmented by the gross receipts, without any deduction, resulting from the service provider's activity as a service distributor." (Art. 6.1.1-1, §4 AMS Decree)

APPLICABLE PROCEDURES

The AMS Decree **outlines only specific timeframes and dates** in Article 6.1.1-1, §1 that apply to the financial obligations, which can be included in this section. Before 15 February of each contribution year, the provider (including VOD services) must **inform the CCA and the CSA** about the choice they have made. No further deadlines for payment or other procedural steps are mentioned in this context in respect to television service publishers.

"Before 15 February of each year of contribution, the service provider will inform the CCA and the CSA about the nature of the contribution they have chosen. For the first year of activity, this information must be communicated within 30 days of the first day of activity. In the event that the company fails to inform the CSA of its preferred type of contribution, the CSA will automatically assume that a contribution will be made to the CCA." (Art. 6.1.1-1, §1 AMS Decree)

3.4. Croatia (HR)

APPLICABLE LEGAL FRAMEWORK

The legal basis for the investment obligations on VOD services in Croatia is found in the **Electronic Media Act**⁹¹ and the **Law on Audiovisual Activities** (effective from July 2018).⁹² At the time of the study, only **VOD services registered in Croatia were required to make financial contributions to the Croatian Audiovisual Centre (HAVC)**. Where practicable and by appropriate means, they are also obliged to make financial contributions to the production and rights acquisition of European works or share and/or prominence of European works. The financial contribution was introduced through the amendment of the Law on Audiovisual Activities in 2011 (changes in 2018 meant that the financial contribution became mandatory while before it was a choice for reserving programmes in the catalogue). The sum collected from VOD providers is intended for the realisation of the National Programme for the Promotion of Creative Audiovisual Works (2017-2021).

However, legislators in Croatia **aim to introduce investment obligations for VOD services providers established in other EU Member States with the newly proposed Electronic Media Act**. The proposed law, which transposes the revised AVMSd, is still in a legislative procedure (see section 2.1 for more details).⁹³

“1. On-demand audiovisual media services providers shall use their best efforts in order to ensure that their on-demand audiovisual media services promote, where practicable and by appropriate means, the production of and access to European works (§1). 2. Promotion of the works referred to in §1 may 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 programs offered by the on demand audiovisual media service (§2).” (Article 21, §1(2) Electronic Media Act)

SCOPE OF APPLICATION

The Electronic Media Act offers a **definition for VOD services that follows the definition outlined in the AVMSd (see section 2.4)**. According to Article 29, §4 from the proposed Electronic Media Act, the obligation for paying a levy shall not apply to VOD services with low traffic or small audiences, under the guidelines issued by the European Commission (see section 2.1). However, these rules are not in force yet.

CALCULATION METHODS

According to the Law on Audiovisual Activities, VOD services established in Croatia are required to **transfer 2% of their annual gross income (related to advertising revenues and subscription revenues)** from VOD services to the HAVC. Article 25 of the Law on Audiovisual Activities stipulates that HAVC should make the calculation **based on the annual gross income of VOD services**, as reported by the providers. If providers do not provide information relating to their income, the Law on Audiovisual Activities states that the HAVC will calculate the amount due in accordance with the publicly available annual financial reports for the providers concerned, as registered with the Financial Agency. The same article defines the other sources of financing for the implementation of the National Program:

“(1) Funds for the implementation of the National Program shall be provided from the state budget and from a part of the total annual gross income generated by performing the activities referred to in Article 3, item a) of this Act, as follows: - Croatian Radio and Television in the amount of 2%; - television broadcasters at the national level in the amount of 0.8%; - broadcasters at regional or local level whose coverage area covers more than 750,000 inhabitants in the amount of 0.5%; - audiovisual media service providers on demand in the amount of 2%; - media service providers licensed for satellite, internet, cable and other permitted forms of audiovisual program transmission in the amount of 0.5%; - cinema screenings in the amount of 0.5%.” (Article 25 Law on Audiovisual Activities)

According to the proposed Article 29 (1): “Providers of on-demand audiovisual media services directed to the public in the Republic of Croatia, established in other Member States of the European Union, are according to the regulation of audiovisual activity obliged to pay a financial contribution from their annual income generated in the Republic of Croatia, for the implementation of the National Program for the Promotion of Audiovisual Creativity, according to the law which regulates audiovisual activity.”

⁹¹ The proposed law passed the first reading in February 2021. See: <https://www.zakon.hr/z/196/Zakon-o-elektronici%20kim-medijima>

⁹² <https://www.zakon.hr/z/489/Zakon-o-audiovizualnim-djelatnostima>

⁹³ According to the Croatian parliamentary procedures, the draft of the law needs to have a second reading. In case there are a large number of amendments, there might be a third reading. The proposed law is available via <https://www.sabor.hr/hr/prijedlog-zakona-o-elektronickim-medijima-prvo-citanje-pze-br-62-predlagateljica-vlada-republike>

In the consultation process for the newly proposed act, HAVC proposes foreign VOD providers to have a right to choose between direct investment obligation and levy. Namely, according to the proposed legal text, HAVC proposes Article 29 (1) to read as follows:

“(1) Providers of on-demand audiovisual media services directed to the public in the Republic of Croatia, established in other Member States of the European Union, and who do not directly invest in audiovisual works of independent producers in the Republic of Croatia in the amount of 12% of annual gross revenue in the Republic of Croatia, under the regulations for audiovisual activity, are obliged to pay a financial contribution in the amount of 10% of the annual gross income generated in the Republic of Croatia for the implementation of the National Program for the Promotion of Audiovisual Creativity.”

According to HAVC, there is a little chance that the investment obligation will be set at more than 5%, which is the level proposed by the government for private broadcasters.

APPLICABLE PROCEDURES

If services do not **provide information** relating to their income, the Law on Audiovisual Activities states that the HAVC will calculate the amount due in accordance with the publicly available annual financial reports for the providers concerned, as registered with the Financial Agency. The contribution is **paid quarterly**, based on the calculation for the previous year. According to the law, the Agency for Electronic Media must keep and update a list of VOD services providers. The proposed act further defines the procedure for **granting permission** to VOD providers in Article 27.

3.5. Czech Republic (CZ)

APPLICABLE LEGAL FRAMEWORK

The obligation for VOD services providers to support and promote European works in the Czech Republic was implemented through the **On-demand Audiovisual Media Services Act** of 13 April 2010 (Act No. 132/2010).⁹⁴ According to Section 7(1-2), **VOD providers established in the Czech Republic can choose between reserving programmes in their catalogues or investing directly in the production of European works. VOD services established in the Czech Republic also have to pay a fee to the Czech Film Fund** in accordance with Section 27 of Act No. 496/2012⁹⁵ concerning Audiovisual Works and Support for Cinematography. Due to administrative reasons, the obligation for payment of the fee was only implemented from 2019 onwards.⁹⁶

Additionally, a **new draft Bill on Services of Platforms for Sharing Video Recordings** on amendments to Act No. 231/2001 on Radio and Television Broadcasting and amendments to Act No. 132/2010 on On-Demand Audiovisual Media Services is in legislative procedure in 2021. This could change the financial obligations for VOD services soon, although there is no proposal for introducing investment obligations on VOD services established in another EU Member State (see section 2.1 for more information).⁹⁷

SCOPE OF APPLICATION

Article 2(1) of Act No. 132/2010⁹⁸ **defines a VOD services provider closely to the AVMSd text.** Article 2(2) of Act No. 132/2010 further clarifies **what is not regarded as a VOD provider, which includes non-economic, non-public services and services with a different core purpose than programme distribution.**

"a) a service which is primarily non-economic or which is not in competition with television broadcasting; b) a service which is not intended for public reception; c) a service whose principal purpose is not the provision of programs; or d) a service which cannot be received directly or indirectly by the public in any Member State of the European Union by means of a device technically capable of the individually selectable reproduction of an on-demand audiovisual media service, available in the retail network." (Article 2(2) of Act No. 132/2010 Law No. 132/2010)

CALCULATION METHODS

According to Section 7(1-2) (Law No. 132/2010), VOD providers **can choose between reserving at least 10% of the total number of programmes offered in their catalogues or spend at least 1% of total revenues generated by the service in a reporting period on:** 1) the production of European works, or 2) the paid acquisition of rights to display European works on their platforms. Section 27(2) of Act No. 496/2012 describes the base for calculating the fee payable by VOD providers. **The 0.5% fee is based on the price paid by the end user to the VOD services provider.** The fee for provision of VOD services is part of audiovisual charges used as the fund's financial resources. The joint provisions concerning audiovisual charges are further explained in Section 29 (Act. No. 496/2012):

- The value-added tax shall not be included in the base of the audiovisual charge.
- The base of the audiovisual charge shall be rounded upwards to whole crowns.
- The audiovisual charge shall be calculated as the product of the audiovisual charge base and the charge rate.
- The data on which the obligation applies shall be maintained by the payer until the expiry of the fee determination period to which the data refers.
- The audiovisual charge payer shall submit a fee declaration. The fee declaration period shall not be extended.
- The form and structure of the fee declaration, including any mandatory details, shall be made public by the Film Fund in a manner allowing for remote access.

⁹⁴ <https://www.zakonyprolidi.cz/cs/2010-132?text=z%C3%A1kon+o+audiovizu%C3%A1ln%C3%ADch+medi%C3%A1ln%C3%ADch+slu%C5%BEb%C3%A1ch+na+vy%C5%BE%C3%A1d%C3%A1n%C3%AD>

⁹⁵ <http://fondkinematografie.cz/assets/media/files/legislativa/act-on-audiovisual-works-and-support-for-cinematography.pdf>

⁹⁶ https://www.researchgate.net/publication/349279003_Pomuze_Netflix_ceskemu_filmu_Vyzvy_a_přilezitosti_implementace_clanku_13_revidovane_smernice_o_audiovizu_alnich_medialnich_sluzbach

⁹⁷ <https://apps.odok.cz/veklep-detail?pid=ALBSBK2HKTVZ>

⁹⁸ <https://www.zakonyprolidi.cz/cs/2010-132?text=z%C3%A1kon+o+audiovizu%C3%A1ln%C3%ADch+medi%C3%A1ln%C3%ADch+slu%C5%BEb%C3%A1ch+na+vy%C5%BE%C3%A1d%C3%A1n%C3%AD>

- Proceeds from the audiovisual charge shall become the income of the Film Fund. The Film Fund shall be the administrator of this fee.

"The fee for the provision of on-demand audiovisual media service shall be charged on the price paid by the end user to the on-demand audiovisual media services provider. The base for calculating the fee for the provision of on-demand audiovisual media service is the price (without the fee for the provision of on-demand audiovisual media service) paid by the end user to the on-demand audiovisual media services provider for one-time provision of the service, including the presentation of a cinematographic work, or for the on-demand audiovisual media service provided in a manner other than by one-time presentation of the work, irrespective of the technological nature of the service, including also all forms of pre-payment, provided that the service includes the presentation of at least one cinematographic work. The payer of the fee for the provision of on-demand audiovisual media service shall include the fee for the provision of on-demand audiovisual media service into the price to be paid by the end user for these services. The rate of the fee for the provision of on-demand audiovisual media service shall be 0.5%." (Section 27(2) of Act No. 496/2012)

APPLICABLE PROCEDURES

According to Act No. 132/2010 concerning On-demand Audiovisual Media Services, the Council for Radio and Television Broadcasting keeps a **register of VOD services providers, monitors the content, and also imposes penalties** in the event of violation of the act (Section 12 and 13 of Act No. 132/2010). Based on Article 12, the amount of the fine is either CZK 1,000,000 or CZK 2,000,000 (respectively: +/- EUR 38,800 or EUR 77,500).

3.6. France (FR)

APPLICABLE LEGAL FRAMEWORK

The financial obligations for VOD providers to contribute to the production of original French expression and European cinematographic and audiovisual works is stipulated in the **(1) General Law on the Freedom of Communication** (Law No. 86-1067 of 30 September 1986), (Loi No. 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard))⁹⁹ and the **(2) “Video and VOD Tax”** (“Taxe sur la diffusion en vidéo physique et en ligne de contenus audiovisuels/Taxe Vidéo et VoD/Taxe TSV/ Article 1609 sexdecies B” in the General Tax Code of France).¹⁰⁰ **VOD providers are subject to both a direct investment obligation and a levy to be paid to the film fund.**

The **(1) General Law on the Freedom of Communication** provides the general description of the **obligation of direct investment for local VOD providers** (Articles 27, 33 and 33-2 of the same law). More specifically, the **“SMAD Decree”** (Décret n°2010-1379 relatif aux services de médias audiovisuels à la demande)¹⁰¹ is applicable in this context as it elaborates on the application of Articles 27, 33 and 33-2 of the General Law on the Freedom of Communication, in particular relating the obligation for catch-up, TVOD, and SVOD services.

In the context of the transposition of the AVMSd however, France has published a draft decree (28 October 2020)¹⁰² increasing the rates for VOD providers to contribute to the production of original French expression and European audiovisual and cinematographic production, which would come into force on 1 July 2021 (see more information in section 2.1).¹⁰³

The **(2) “Video and VOD Tax”** outlines the levy that needs to be paid to the Centre National du Cinéma (hereafter referred to as CNC), which is based on the income from the physical and online transactions of audiovisual and cinematographic content by VOD services. The Video and VOD Tax (Article 1609 sexdecies B, The General Tax Code of France)¹⁰⁴ was changed effectively in 2018 **to include foreign companies such as Netflix and YouTube to pay a tax to the CNC.**¹⁰⁵

“On-demand audiovisual media services providers should financially contribute to the production of audiovisual and cinematographic European works.” (Law No. 86-1067 Articles 27 and 33)

SCOPE OF APPLICATION

Generally, the French legislation **follows the same definitions as outlined in the AVMSd (see section 2.4)**. However, there are several exemptions in place for both the (1) direct investment obligations and the (2) taxes to be paid to the CNC by VOD services in France.

The **(1) VOD services captured by the direct investment obligation** should have an **annual net turnover in excess of EUR 10 million and offer at least 10 cinematographic or audiovisual works annually** (Article 1 of

⁹⁹ Legifrance, ‘Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)’, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068930>

¹⁰⁰ Legifrance, ‘Article 1609 sexdecies B’ (version in force on 25 March, 2021), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041472728/

¹⁰¹ Legifrance, ‘Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande’,

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023038244&dateTexte=20170502>

¹⁰² Boxofficepro.fr. (2020). ‘Projet de décret : quelle contribution pour les plateformes de streaming dans le cinéma français ?’. <https://www.boxofficepro.fr/projet-de-decret-quelle-contribution-pour-les-plateformes-de-streaming-dans-le-cinema-francais/>

¹⁰³ CSA. (2021). ‘L’avis du CSA sur le projet de décret relatif aux services de médias audiovisuels à la demande (SMAD)’. (PDF, p. 14)

<https://www.csa.fr/Informer/Espace-presse/Communique-de-presse/Le-CSA-publie-son-avis-sur-le-projet-de-decret-relatif-aux-services-de-medias-audiovisuels-a-la-demande-SMAD>

¹⁰⁴ Legifrance, ‘Taxe sur la diffusion en vidéo physique et en ligne de contenus audiovisuels (Article 1609 sexdecies B)’,

https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041472728/

¹⁰⁵ The financing of the CNC is based on three taxes overall: 1) the TV Publishers and Distributors Tax (Taxe sur les éditeurs et distributeurs de services de télévision, ‘Taxe TST’), which focuses on the amounts for advertising and sponsorship collected by the distributors and publishers of television services; 2) the Tax on Cinema Access (Taxe sur le prix des entrées aux séances organisés par les operators d’établissements de spectacles cinématographiques, ‘Taxe TSA’), which focuses on the price paid by spectators for access to the screenings of cinematographic works; and 3) the Video and VOD Tax (Taxe sur la diffusion en vidéo physique et en ligne de contenus audiovisuels or the Taxe Vidéo et VoD, ‘Taxe TSV’).

Decree No. 2010-1379) and **be established in France** (Article 43-2 and 43-3 of Law No. 86-1067). Services offering mainly pornographic **or violent content** are also excluded from this rule.¹⁰⁶¹⁰⁷

The **(2) VOD services captured by the Video and VOD Tax** are delineated similarly to the AVMSd. These services can be **established in France or outside of France** (§2 of Article 1609 sexdecies B). The delineation specifically ensures that the first and third category of companies will be assessed under European State Aid law instead of the AVMSd. Services such as YouTube are thereby captured, since they offer mainly free services to end users. **An exemption from the Video and VOD Tax is granted to taxable persons established in France who already pay a similar tax in another EU Member State**, other than value-added tax (§4, 2° of Article 1609 sexdecies B). Additionally, services are exempted if:

- their offering of audiovisual content is secondary;
- their main purpose is devoted to information,
- of which the main purpose is to provide information relating to cinematographic and audiovisual works and to their dissemination and promotion, including through clips or trailers (§1, 3° of Article 1609 sexdecies B).

“3° Making services available to the public in France, giving or allowing free access to audiovisual content, upon individual request made by an electronic communication process. Services whose audiovisual content is secondary, services whose main purpose is devoted to information, as well as services whose main purpose is to provide information relating to cinematographic and audiovisual works and their distribution to the media are exempt. the public and ensure its promotion, in particular by means of extracts or trailers. The operations mentioned in 1° are deemed to be carried out in France when they are carried out for the purposes of value added tax in application of I bis of section I of chapter I of title II of the first part of book I of Tax Code. The services mentioned in 2° and 3° are deemed to be made available to the public in France when they are carried out in favor of persons not subject to value added tax who are established, have their domicile or their usual residence in France.” (Article 1609 sexdecies B, §1, 3°)

“II. - The tax is payable by persons, whether established in France or outside of France who: 1° Sell or rent videograms in France to any person who himself does not have the activity of selling or renting videograms; 2° Make the services mentioned in 2° of I available to the public in France; 3° Make the services mentioned in 3° of the same I available to the public in France, in particular those whose activity is to publish online communication services to the public or to ensure that they are made available to the public by online public communication services storage of audiovisual content; 4° Collect the sums mentioned in 3° of III.” (Article 1609 sexdecies B, §2)

CALCULATION METHODS

For the **(1) direct investment obligations of VOD players** in France, the SMAD Decree stipulates the percentages for the direct investment contribution differentiating between SVOD/TVOD and catch-up services that are part of television services (Articles 27 and 33 of the same law). SVOD and TVOD must contribute **between 15% and 26% of their annual turnover in the previous year to European audiovisual and cinematographic productions (with a defined share to French productions)**; catch-up services must contribute to cinematographic works at the same rate **(3.2%) as television services, but only if their income is not included in the resources of the television service** from which they originate. **Catch-up services are exempt from the investment obligation for audiovisual works (but not for cinematographic works). The turnover on which the direct investment obligation is calculated relates to the net annual turnover, consisting of the sums collected through the exploitation of the cinematographic or audiovisual works, with the deduction of the value-added tax and the Video and VOD Tax** (Articles 2 to 5 of Decree No. 2010-1379). There is a fairly complicated system for calculating what percentage applies and the amounts for the direct investment obligation, whereby the actual financial contribution varies depending on **(a) the type of service on offer, (b) the size of VOD offers, or (c) the window(s) on offer after theatrical release, or (d) the shares represented by cinematographic and audiovisual works** (see legal text below).

In December 2020 France announced that it will increase the rate of its direct investment obligation for VOD services to 20%-25% which will be applicable from July 2021 (see section 2.1).¹⁰⁸

¹⁰⁶ Note: these rules should be substantially modified with the new decree (planned to come into force 1 July 2021) which should be based upon a combination of different criteria: an annual turnover in excess of €5 million, an audience of more than 0.5% in France of services in the same category (SVOD, TVOD), an offer annually of at least 10 cinematographic or audiovisual works.

¹⁰⁷ Note: companies offering at least 10 cinematographic works of pornographic nature might still have to contribute. This has, however, never been the case before.

¹⁰⁸ 20 Minutes. 'Netflix et Amazon devront investir 20 à 25% de leur chiffre d'affaires dans la création française'. Available at: <https://www.20minutes.fr/arts-stars/culture/2937783-20201222-netflix-amazon-devront-investir-20-25-chiffre-affaires-creation-francaise>

“Article 2 I.- For the application of this chapter, the following are not taken into account in the net annual turnover of a service: 1 ° The value added tax; 2 ° The tax provided for in article 1609 sexdecies B of the general tax code. II.- A revenue from the joint operation of several on-demand audiovisual media services is taken into account for the calculation of the turnover of each of these services in proportion to the respective amounts of these turnover.” (Articles 2, Decree No. 2010-1379)

“Article 3 - Catch-up television services devote each year a part of their net annual turnover for the previous financial year to expenditure contributing to the development of the production of European cinematographic works, on the one hand, and of French original expression, on the other hand, the rate of which is identical to that to which the service publisher is subject for the operation of the television service from which the catch-up television service originates. The provisions of the preceding paragraph are not applicable to catch-up television services whose revenues are included in the resources of the television service from which they are derived by application of the aforementioned decree of July 2, 2010. Article 4 I.- Subscription services devote each year a part of their net annual turnover for the previous financial year to expenditure contributing to the development of the production of European cinematographic and audiovisual works, on the one hand, and French original expression, on the other hand, respectively at least equal to: 1° 26% and 22% when they offer at least 10 long-term cinematographic works each year within a period of less than twenty-two months after their theatrical release in France; 2° 21% and 17% when they offer at least 10 long-term cinematographic works each year within a period of less than thirty-six months and equal to or greater than twenty-two months after their theatrical release in France; 3° 15% and 12% in other cases. II.-The expenses resulting from the application of the provisions of I are invested in the production of cinematographic works and in the production of audiovisual works to the exclusion of those mentioned in the fifth paragraph of article 1609 sexdecies B of the code general taxes, in proportion to the shares represented by each of these two types of works in the total downloading or viewing of works by users of the service during the previous financial year. When the service annually offers less than 10 cinematographic works of long duration or less than 10 audiovisual works, the expenses are invested only in the production of works for which the threshold has been reached. Article 5 I.- Services other than those mentioned in Articles 3 and 4, in particular fee-for-service services, devote each year: 1° at least 15% of the net annual turnover of the previous financial year resulting from the exploitation of cinematographic works at expenses contributing to the development of the production of European cinematographic works, of which at least 12% at expenses contributing to the development of the production of cinematographic works of original French expression; 2° at least 15% of the net annual turnover of the previous financial year resulting from the exploitation of audiovisual works other than those mentioned in the fifth paragraph of article 1609 sexdecies B of the general tax code to expenses contributing to the development of the production of European audiovisual works, of which at least 12% to expenditure contributing to the development of the production of audiovisual works of original French expression. II.-The part of the turnover coming from the receipts other than those referred to in I is taken into account for the calculation of the turnover mentioned in 1 ° and 2 ° of I in proportion to the respective amounts of the latter.” (Articles 3-5, Decree No. 2010-1379)

The **(2) calculation for the French Video and VOD Tax** on VOD services is based on net annual turnover, consisting of the sums collected through the exploitation of cinematographic or audiovisual works, with the deduction of the value-added tax (§3 of Article 1609 sexdecies B). The rate (which is applicable to companies established in France, as well as to foreign services) **is set at 5.15% and raised to 15%** when the transactions concern cinematographic or audiovisual works or documents of a pornographic nature or incitement to violence. The base for calculating the Video and VOD Tax is the **net annual turnover for certain income, with the exclusion of the value-added tax**, dependent on the kind of VOD service (TVOD, SVOD, AVOD). This includes either a) the **price paid** in exchange for the sale and leasing of physical and online videograms in France (i.e. for TVOD) (§3, 1° of Article 1609 sexdecies B), b) the price paid in exchange for access to cinematographic and audiovisual works (upon individual request) (i.e. SVOD) (§3, 2° of Article 1609 sexdecies B), and c) the **sums paid by advertisers and sponsors** for broadcasting their promotional messages on services broadcasting online audiovisual content in the case of services with free access to content (i.e. AVOD). The calculation of the Video and VOD Tax does not include amounts paid by advertisers and sponsors for catch-up television services (§4 Article 1609 sexdecies B). These sums are already subject to another tax, namely the TV Publishers and Distributors Tax.¹⁰⁹ The **tax base is reduced by 66% for services giving or allowing access to audiovisual content created by private users for purposes of sharing and exchanges within communities of interest** (§3, 3° of Article 1609 sexdecies B). For these services the tax is calculated after the application of an abatement of EUR 100,000 on the tax base (§5 of Article 1609 sexdecies B). The revenue from the tax is allocated to the CNC (Article 1609 sexdecies B, §6).

“III. - The tax is based on the amount excluding value added tax: 1° The price paid in consideration for the sale and rental transactions mentioned in 1° of I; 2° The price paid in return for access to cinematographic and audiovisual works mentioned in 2 of the same I; 3° Amounts paid by advertisers and sponsors, for the dissemination of their

¹⁰⁹ Legifrance, 'Taxe sur les éditeurs et distributeurs de services de télévision', https://www.legifrance.gouv.fr/affichCode.do;jsessionid=8AF1CE0F8A0534182673606CD60880C4.tplgfr32s_2?idSectionTA=LEGISCTA000036364823&cidTexte=LEGITEXT000020908868&dateTexte=20180809

advertising and sponsorship messages on the services mentioned in 2° and 3° of said I, to the taxpayers concerned. The sums paid back by a person mentioned in 4° of II to a person mentioned in 3° of the same II are included in the base of the tax due by the latter and excluded from the base of the tax due by the person mentioned in 4° of said II. These sums are subject to a reduction of 66% for services giving or allowing access to audiovisual content created by private users for the purposes of sharing and exchange within communities of interest. IV. - Are not included in the tax base: 1° The sums paid by advertisers and sponsors for the dissemination of their advertising and sponsorship messages on catch-up television services, which are already subject to the tax provided for in Articles L. 115-6 to L. 115-13 of the cinema and moving image code; 2° For taxpayers established in France, the amount paid in respect of a tax due on account of the operations mentioned in I of this article in another Member State of the European Union, other than value added tax. V. - The tax rate is set at 5.15%. It is increased to 15% when the transactions concern cinematographic or audiovisual works or documents of a pornographic nature or incitement to violence. The conditions under which taxpayers identify these works and documents are set by decree. For the taxpayers mentioned in 1° of II, the tax is calculated after application of a reduction of 65% on the tax base. This reduction does not apply when the operations mentioned in 1° of III concern cinematographic or audiovisual works or documents of a pornographic nature or incitement to violence. For the taxpayers mentioned in 3° and 4° of II, the tax is calculated after application of a reduction of 100,000 € on the tax base. This allowance is distributed among the persons mentioned in 3° and 4° of I in proportion to the respective base established for each of them [...].” (Article 1609 sexdecies B (§3-6))

APPLICABLE PROCEDURES

The procedures outlined in the French law consist of **how (1) direct investment obligations can be made and penalties for failing to oblige by the rules**. If VOD providers fail to satisfy their direct investment obligation, they must pay a fine of EUR 75,000 (Article 79, 1° of Law No. 86-1067).

For the **(2) video and VOD taxes, it is mentioned only that the taxes are treated similarly** to other taxes. No further specific procedures have been identified.

"Will be punished with the penalty referred to in Article 78 (infra) [Law No. 86-1067], first paragraph: 1° Anyone who does not comply with the provisions of the specifications and the decisions referred to in Articles 27 and 33 [Law No. 86-1067], as well as the specifications accompanying the concession contracts for the exploitation of audiovisual communication services, and which relate to the number and nationality of broadcast and re-exported cinematographic works, and to the timetable for those works." (Article 79, 1° of Law No. 86-1067)

"Will be punished with a €75,000 fine for the person entitled or the actual officer of an audiovisual communication service who has issued the following: (...)." (Article 78, §1 of Act No. 86-1067)

"It is recognised, liquidated, recovered and controlled according to the same procedures and under the same sanctions, guarantees, sureties and privileges as the value-added tax. Claims are presented, processed and judged according to the rules applicable to this same tax." (§6 of Article 1609 sexdecies B)

3.7. Germany (DE)

APPLICABLE LEGAL FRAMEWORK

The main legal framework for the promotion of European and local audiovisual content in Germany can be found in the new Medienstaatsvertrag (MStV), which came into force on 7 November 2020 and thereby replaced the former Staatsvertrag für Rundfunk und Telemedien (RStV),¹¹⁰ hereafter referred to as the **Media-Interstate-Treaty**. The Treaty regulates public and private broadcasters as well as so-called “telemidia,” which includes broadcasting-like services over the internet, i.e. also VOD services. However, no specific financial obligations are described in the State Media Treaty (as was the case with the RStV). The national media law that deals with financial obligations concerning European film promotion is the “Filmförderungsgesetz” (FFG), hereafter referred to as the **German Film Law**.¹¹¹ The **German Film Law**, signed in December 1967, entered into force in 1968, provides the legal basis for the establishment of the Filmförderungsanstalt, the national film funding Institution. It works on the basis of the FFG and has been amended several times. The latest version is the 8th instalment that came into force in 2017 and is running until the end of 2021.¹¹² The **German Film Law** specifies that the **Filmförderungsanstalt is financed through a parafiscal levy, which is applied to different media outlets, including VOD services that are based outside of Germany.**

"This state treaty contains basic regulations for the presentation and supply, the distribution and the accessibility of broadcasting and telemidia in Germany. [...] In addition to other regulations and funding projects in Germany, this state treaty serves to provide sustainable support for new European film and television productions." (MStV Preamble)

"As a nationwide film funding agency, the Filmförderungsanstalt promotes the structure of the German film industry and the creative and artistic quality of German film as a prerequisite for its success at home and abroad." (FFG, §1)

"The Filmförderungsanstalt is essentially financed by levying a film fee that is differentiated according to subgroups of tax debtors." (FFG, §146)

SCOPE OF APPLICATION

The **German Film Law** sets out several requirements to define which VOD services are captured by the levy. This includes **a definition of a VOD service (following the AVMSd) (see section 2.4) and the more specific requirement that only film providers to German audiences are captured.** The requirements can be summarised into the following points. **Most notably, this delineation includes local but also foreign audiovisual media service providers.** VOD providers have to:

- provide films via the Internet,
- provide films that users can access at their requested time, and
- provide films at users' individual requests;
- hold licensed rights to films,
- have sales from films in Germany that exceed EUR 500,000 per year, and
- commercially exploit films (by paid or ad-supported services),
- if the provider is domiciled and established in Germany, or offer German-speaking on-demand audiovisual media services and generate sales in Germany,
- if the provider is not domiciled and established in Germany, and not already pay a similar financial contribution to film funding in the country in which the provider is established,
- it is not necessary to have a programme catalogue or receive payment for individual films.

"(9) A video retrieval service is an electronic information or communication service in which individual films are provided for reception at a time selected by the user or at his or her individual request. It is irrelevant whether any remuneration for the use of the individual film or the usability of the entire service is payable." (FFG, §40)

"(1) Holders of licensed rights domiciled or established in Germany who exploit commercially produced cinematographic works by means of paid or ad-supported video-on-demand services shall pay a film levy from the net sales of cinema films in Germany, if such sales exceed €500,000 per year. (2) For holders of licensed rights without domicile or establishment in Germany, paragraph 1 shall apply if German-speaking video-on-demand

¹¹⁰ Die medienanstalten, 'Medienstaatsvertrag (MStV) vom 14./ 28. April 2020, in Kraft seit 7. November 2020', https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Medienstaatsvertrag_MStV.pdf

¹¹¹ Federal Ministry of Justice and Consumer Protection, 'Gesetz über Maßnahmen zur Förderung des deutschen Films (Filmförderungsgesetz – FFG)', <https://www.ffa.de/ffg-2017.html>

¹¹² The renewal of the FFG is initiated, but has been stalled due to possible changes taking into account the impact of COVID on the film sector in Germany. A first draft for the renewal was published in January 2021, which could change financial obligations as outlined here starting in 2022. See <https://www.bundesregierung.de/breg-de/bundesregierung/staatsministerin-fuer-kultur-und-medien/medien/filmfoerderung/filmfoerderungsgesetz>

services are provided and sales are generated in Germany. The duty to pay the levy mentioned in paragraph 1 does not exist if the VOD provider already has to pay similar financial contributions to film funding through a film funding agency at the place of establishment." (FFG, §153)

CALCULATION METHODS

The FFG outlines that a **levy of 1.8% to 2.5%** based on the annual turnover from the net sales of cinema films in Germany has to be paid. The calculation of the levy on on-demand audiovisual media services providers is based on the following parameters and is outlined in FFG, §153:

- **The levy is based on the annual turnover from the net sales of cinema films.** This implies all income that is generated by the provision of cinema films.
- On-demand audiovisual media services providers with **up to EUR 20 million turnover** from sales of cinema films in Germany have to pay **1.8%** of that turnover;
- those whose **turnover exceeds EUR 20 million** have to pay **2.5%** (FFG, §153(3)).
- Companies whose net turnover is **below EUR 500,000** are not captured (see above).
- The turnover limits are calculated over the previous year.
- If the provider of on-demand audiovisual media services was active for less than 12 months, the annual turnover is calculated by multiplying the average monthly turnover of the previous year by twelve.
- If there was no activity the previous year, a comparable calculation will be made based on the monthly turnover in the year of issue.

"[...] video on-demand services must pay a film levy on the turnover achieved in Germany with the exploitation of cinema films if this exceeds EUR 500,000 per year. [...] (3) The film levy is 1. 1.8 percent with an annual turnover of up to 20 million euros, and 2. 2.5 percent with an annual turnover of more than 20 million euros. (4) To determine the turnover limits, the turnover of the previous year is to be taken as a basis. If turnover were only achieved during part of the previous year, the annual turnover is calculated by multiplying the average monthly turnover of the previous year by the number twelve. If there is no previous year's turnover, the turnover limit can be calculated using the monthly turnover in the tax year." (FFG, §153)

APPLICABLE PROCEDURES

The **German Film Law** describes several procedures and obligations that outline for example **information collection and verification, as well as explores how the Filmförderungsanstalt collects the levy of the VOD providers**. No special measures are described with regard to service providers that are established outside of Germany. The regulations concerning the levy for VOD providers can be summarised as follows:

- Audiovisual content providers have to fulfil parallel obligations, if the relevant conditions are met (for example, a private television broadcaster who also has a video-on-demand platform has to pay the percentage of turnover from both income streams);
- On-demand audiovisual media services providers have to pay the levy, even if objection and annulment actions are initiated; and
- Payment of the levy is due monthly by the 10th of the following month.
- Obligations related to information disclosure and use of data include the following:
- All applicable on-demand audiovisual media services providers have to provide a list of information;
- This information provision requirement is also imposed on companies who do not meet the turnover limit (as described above) (FFG, § 164 (1)); and
- Provision of the list of information and proof to support needs to be provided upon request (FFG, §165 (3)).
- The right of the Filmförderungsanstalt to verify the information given through third parties;
- to make estimates to prove liability in the event that the VOD provider refuses to provide the necessary information;
- and to publish and distribute the information provided for specific means and to certain agencies (FFG, §§ 166-169).

"§147. Inter-relationship of taxation rules: If a debtor fulfils several sub-contracting conditions, then the duty of distribution exists in parallel with these other conditions. §148. Collection of the film levy: The film levy is claimed on the basis of an official order. Objections and actions for annulment of the decision to collect the film levy have no suspensive effect. §149. Maturity: (1) The levy pertaining to the film distribution of the cinemas, the video program providers and the providers of video retrieval services in accordance with §§151-153 shall be paid monthly to the Filmförderungsanstalt by the tenth of the following month." (FFG, §147-149)

3.8. Italy (IT)

APPLICABLE LEGAL FRAMEWORK

The Consolidated Law for Audiovisual and Radio Media Services No. 177 of 31 July 2005 (Testo unico dei servizi di media audiovisivi e radiofonici),¹¹³ hereafter referred to as the **Consolidated Law**, sets down the financial obligations imposed on VOD providers. The investment obligations were introduced and extended to foreign VOD through Law no. 220/2016, Decree Law no. 204/2017, whose changes entered into force on 12 January 2018. The draft law to transpose the revised AVMSd is still being discussed by the Italian Government. The most recent modifications to the Consolidated Law have been introduced by Decree Law no. 59/2019,¹¹⁴ which was later converted into Law no. 81/2019¹¹⁵ and went into effect in 2020. The text maintained the previous obligation for direct investments in audiovisual works through pre-purchase, purchase, production, and co-production, but amended the percentage and some of the procedures.

“(§1) On-demand audiovisual media service providers under the Italian jurisdiction must promote the production of European works and access to them by jointly respecting: a) programming obligations of European works [...]; b) investment obligations in European audiovisual works produced by independent producers [...]. (§6) The obligations established by the Authority’s regulation referred to in this article shall apply from 1 January 2020” (Article 44-quater).

SCOPE OF APPLICATION

The Consolidated Law (Article 2 and 44) defines which services are captured by the financial obligations. The **definition mostly follows the AVMSd text (see section 2.4)**. However, the Italian law further clarifies that also **VOD services established outside of Italy are captured, if the service has editorial responsibility over the offers aimed at consumers in Italy, and specifies that thematic programming needs to allow for investment in European works**. To summarise, the following additional requirements are set for VOD providers to be captured by the investment obligations:

- those in another Member State who have editorial responsibility over offers targeting consumers in Italy;
- services that have made a profit in the last two years, in the Italian market;
- services that have a market share over a certain threshold;
- services whose thematic programming allows for sourcing from independent producers, as well as the purchase, pre-purchase, production or co-production of European audiovisual works, including works of original Italian expression.

“(b) ‘media service provider’ means 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 organized; this excludes natural or legal persons who only deal with the transmission of programs for which the editorial responsibility lies with third parties; [...] (m) ‘non-linear audiovisual media service’ or ‘on-demand audiovisual media service’ is an audiovisual media service provided by a media service provider for viewing programs currently selected by the user and at his request on the basis of a catalogue of programs selected by the media service provider” (Article 2, §1). “(§2) Starting from 1 January 2020, the obligations [...] also apply to on-demand audiovisual media service providers who have editorial responsibility over offers aimed at consumers in Italy, even if established in another Member State” (Article 44-quater). “(§2) Audiovisual media service providers can ask the Authority for exceptions to the obligations under this title, illustrating the reasons and providing any useful supporting proof in the event that one or more of the following circumstances occurs: a) the thematic nature of the program schedule or catalogue for which it has editorial responsibility does not allow sourcing from independent European producers or to purchase, pre-purchase, produce or co-produce European audiovisual works, including works of original Italian expression produced anywhere; b) the audiovisual media service provider has a market share below a certain threshold determined by the Authority through regulation; c) the audiovisual media service provider has not achieved profits in the last two years of operation” (Article 44-quinquies).

CALCULATION METHODS

¹¹³ <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2005:177~art45>

¹¹⁴ https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRhht&p_p_id=101_INSTANCE_FnOw5IVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5IVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5IVOIXoE_assetEntryId=14067681&_101_INSTANCE_FnOw5IVOIXoE_type=document

¹¹⁵ <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2019-08-08;81>

The investment obligation for both local and foreign VOD services in the Italian market is **12.5% of the annual net revenues in Italy, which can go up to 20% in specific cases** and is overseen by AGCOM (the Italian media regulator). The investments must be made a) through the pre-purchase, purchase, production, and co-production, b) of fiction, animation, documentary, or any other type of European works, c) produced anywhere, by independent producers, d) in the last 5 years. **A 50% sub-quota** (6.25-10% of net revenues) of all investments must go to works of original Italian expression, produced anywhere, of which 20% must be cinematographic works, and 75% must be produced in the last 5 years. The percentage of annual net revenues that need to be invested in European works is set at 12.5% if the VOD service is headquartered in Italy and if it has >20 employees in Italy. **Higher percentages are defined if this is not fulfilled** (see law below). **The VOD provider can subtract amounts due, if the annual investment was exceeded in the previous year.**

“Investment obligations of 15%, until the adoption of the relevant resolution by AGCOM; a min of 12.5% and maximum of 20% after the adoption of the resolution, calculated based on the provider’s reported annual net revenues in Italy, as follows: the investment is set at 12.5% if the provider establishes operational headquarters in Italy and has >20 employees; the increase of the quota up to 20% may be determined in the case of investment modalities that are deemed inconsistent with the goal of a balanced development of the national audio-visual industry, or on the basis of the following criteria: it is raised by 3% if the provider has not established operational headquarters in Italy and has no employees there 12 months after this law entered into force; and by 4.5% in the absence of a quota of secondary rights for independent producers proportional to the financial contribution of each producer in the work in which investments are made, or the implementation of contractual schemes resulting in independent producers being vested in a merely executorial role (Article 44-quarter, §1-bis). If the provider exceeds the annual investment due, the excess can be counted towards reaching the amount due in the following year (Art. 44-quinquies, §3).

“(§1, b) investment obligations in European audiovisual works produced by independent producers in an amount equal to 12.5 per cent of its annual net income in Italy, as established by the Authority. Until the enter into effect by the regulation of the Authority referred to in paragraph 1-bis, the obligations of investment referred to in this paragraph are fixed at 15 per cent. (§1-bis) With the Authority’s regulation to be adopted, after consultations with the Ministry of Cultural Heritage and Activities and Tourism and the Ministry of Economic Development, the share referred to in paragraph 1, letter b), may be raised, not exceeding 20 per cent” (Article 44-quarter).

“(§4) [...] the revenues reported in the last official trading account available on 1 January of the year for which the investments [...] are counted. [...] (§5) [...] annual net revenues that the media service provider established in another Member State achieved in Italy by providing the public with catalogues” (Resolution 421/19/CONS, Annex B¹¹⁶ Title III, Article 6).

APPLICABLE PROCEDURES

The Italian media regulator **AGCOM is in charge of collecting and enforcing the investment obligation. The Consolidated Law** describes the procedures regarding the **submission of information by VOD services** and the **sanctions for non-compliance** with the financial obligations. In order to comply with the regulations, media services providers captured by the law must submit the following information to AGCOM: a) communicate a series of documents detailing their net annual revenues in Italy, b) the investments made in order to comply with the legislation, c) or the necessary documentation to request exemptions or changes in the percentage owed. Other relevant procedures can be summarised as follows:

- AGCOM must acquire the necessary information on the annual net revenues of foreign providers either through the regulatory authority in the respective Member State or through the European Regulators Group for Audiovisual Media Services (ERGA) (421/19/CONS, Article 6, §5).
- Sanctions for failure to comply with the regulations are set by Article 51 of the Consolidated Law and the Annex to resolution no. 265/15/CONS.¹¹⁷
- The sanctions for non-compliance range between EUR 100,000-5 million, or up to 1% of annual revenues.

“(§4) The Authority presents to the Parliament by March 31 of each year, a report on the fulfillment of promotion obligations of European audiovisual works by audiovisual media service providers, on the measures adopted and on the sanctions imposed. The report also provides data and indicators of the sector’s micro and macroeconomics, relevant for the promotion of European works, such as production volumes in terms of hours transmitted, the turnover of production companies, revenues of audiovisual media services, the share and indication of European and original Italian works present in schedules and catalogs, the number of employees in the audiovisual media production sector, circulation of international works, the number of waivers requested, accepted and rejected, with the relative reasons, as well as the summary tables in which the percentages of investment obligations are indicated, with the related European and original Italian works [...]” (Article 44-quinquies).

¹¹⁶ <https://www.agcom.it/documents/10179/16550869/Allegato+28-10-2019+1572271102242/56258420-6d52-4a70-8e30-0e7122524e37?version=1.0>

¹¹⁷ <https://www.agcom.it/documents/10179/1686063/Allegato+16-7-2015/918b1815-127e-41a7-a3e9-86e8334b6b64?version=1.0>

3.9. Poland (PL)

APPLICABLE LEGAL FRAMEWORK

Poland transposed the AVMSd with the Act of 14 May 2020,¹¹⁸ amending the Broadcasting Act and the Cinematography Act (see also section 2.1 for more information). The obligation for investment obligation for VOD services is stipulated with the amendments of the **Cinematography Act as of July 2020**.¹¹⁹ Pursuant to Art. 19, §6 of the Cinematography Act,¹²⁰ the **investment obligation applies both to VOD providers established in Poland and to those with seats in another EU Member State. VOD services providers are required to pay a levy to the National Film Institute.**

“Art. 1. [Subject of the regulation] The Act defines the rules for supporting filmmaking and other activities in the field of cinematography and the protection of film art resources.” (Art. 1, Cinematography Act)

SCOPE OF APPLICATION

The definition of a VOD provider and the responsibilities of the National Film Institute are laid down in the Broadcasting Act.¹²¹ Article 19, §6c of the Cinematography Act outlines exemptions from the investment obligation for smaller VOD services, which follow the European Commission guidelines (see section 2.4). These include **micro-enterprises and services whose number of users in the previous year was less than 1% market share.**

“6c. The obligation referred to in paragraph 1. 6a and 6b, shall not apply to the entity providing the on-demand audiovisual media service: 1) being a micro-entrepreneur within the meaning of Art. 7 sec. 1 point 1 of the Act of 6 March 2018 - Entrepreneurs' Law (Journal of Laws of 2019, items 1292 and 1495 and of 2020, item 424) or 2) whose number of users of all on-demand audiovisual media services made available to the public in the year preceding the year in which the obligation to pay the Institute is established did not exceed 1% of subscribers of data transmission services providing broadband access to the Internet; the number of users of data transmission services providing broadband Internet access is determined on the basis of data from the inventory referred to in Art. 29 of the Act of 7 May 2010 on supporting the development of telecommunications services and networks (Journal of Laws of 2019, item 2410 and of 2020, item 471).” (Art. 19, 6c, Cinematography Act)

CALCULATION METHODS

According to Article 15 of the Cinematography Act, the levy consists of **1.5% of the revenue obtained from fees for access to VOD services available to the public or revenue obtained from broadcasting commercial communications, if this revenue in a given settlement period is higher.** The levy must be paid to the National Film Institute. Foreign VOD providers shall make the payment based on revenues obtained in Poland. It is also clarified that these payments constitute tax deductible costs, within the meaning of the provisions on income tax, on the date they are incurred.

“The entity providing the on-demand audiovisual media service makes a payment to the Institute in the amount of 1.5% of the revenue obtained from fees for access to on-demand audiovisual media services available to the public or the revenue obtained from broadcasting commercial communications, if this revenue in a given settlement period is higher.” (Art. 15, Cinematography Act)

APPLICABLE PROCEDURES

Payments to the Polish Film Institute are made quarterly. Additionally, the law provides information about the declaration and data gathering.

“The payments referred to in paragraph 1. 1-5 and 6a, are provided on a quarterly basis within 30 days after the end of the quarter.” (Art. 19, 8., Cinematography Act)

¹¹⁸ The amendments were part of protective measures in connection with the spread of SARS-CoV-2 virus: <https://www.portalkadrowy.pl/wynagrodzenia-swiadczenia-pracownicze-dzialalnosc-socjalna/ustawa-z-dnia-14-maja-2020-r.-o-zmianie-niektorych-ustaw-w-zakresie-dzialan-oslonowych-w-zwiazku-z-rozprzestrzenianiem-siewirusa-sarscov2-dz.u.-z-2020-r.-poz.-875-19698.html>

¹¹⁹ <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kinematografia-17204285>

¹²⁰ Idem

¹²¹ <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000805>

3.10. Portugal (PT)

APPLICABLE LEGAL FRAMEWORK

Relevant legislation for the financial obligations of VOD services in Portugal can be found in Law No. 74/2020 of 19 November,¹²² which transposes the new AVMSd into Portuguese law, through a fifth amendment to Law no. 27/2007 of 30 July,¹²³ hereafter the **Television Act** (Lei da Televisão e dos Serviços Audiovisuais a Pedido), and a third amendment to Law no. 55/2012 of 6 September,¹²⁴ hereafter the **Cinema Act** (Lei da arte cinematográfica e do audiovisual). Law 74/2020 entered into force in February 2021. The Cinema Act establishes the principles of state action for the promotion, development, and protection of cinematography and audiovisual activities. The Television Act specifically stipulates that VOD providers must contribute to the promotion and visibility of European works, and that they are “*subject to the contributions and investment defined in [the Cinema Act], in the wording resulting from the review carried out in 2020*” (Article 45, §2-3). The Cinema Act stipulates three different financial obligations that apply to **VOD providers, in the form of (1) the payment of a tax to the film fund ICA, IP (The Portuguese Institute of Cinema and Audiovisual Media), (2) direct investments, and (3) the payment of an ‘exhibition fee’, and extends these to foreign audiovisual service operators targeting the Portuguese market.**

“The purpose of this law is to regulate access to and the exercise of audiovisual media activities, namely television and audiovisual services on demand, [...], transposing into national law Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018.” (Law 74/2020, Article 1).

“(§4-5) The operators of audiovisual services on demand by subscription are subject to the payment of an annual tax” (Article 10). “(§3) The proceeds from the collection of the tax [...] constitutes ICA, IP’s own revenue. (§5) The available revenue of ICA, IP, [...], is allocated to the different programs and measures, in compliance with multi-annual strategic plans and annual declarations of priorities [...]” (Cinema Act, Article 13 for the payment of a tax).

“(§1) Operators of television services or audiovisual services on-demand, distributors of cinematographic works and videogram publishers are obliged to allocate part of their investment expenses, under the terms provided for in this law and in the decrees that regulate it, for the development, production and promotion of European and Portuguese works, as well as works of independent production. (§3) The investment obligation is exercised with total freedom of choice on the part of the obliged entity as to the works and activities that are the object of this investment [...]” (Cinema Act, Article 14-A for direct investment obligations).

“(§1) Commercial advertising [...] transmitted by [...] audiovisual commercial communication included in on-demand audiovisual services [...] as well as advertising included in the electronic program guides, whatever the exhibition, broadcast or transmission platform, is subject to a fee, called the exhibition fee.” (Cinema Act, Article 10 for the ‘exhibition fee’).

SCOPE OF APPLICATION

The Television Act defines an “audiovisual media service” (Article 2, §1-z) **following definitions as outlined in the AVMSd (see section 2.4)**. The Cinema Act further outlines that **VOD services under the jurisdiction of other Member States are covered, if they target Portuguese audiences** and that it only covers VOD platforms, which **offer certain formats (e.g. film), excluding VOD services with pornographic content** (Cinema Act, Article 14). Both the Television Act (Articles 2 and 45) and the Cinema Act (Articles 5, 9, 14-A) additionally make reference to **exemptions to the three types of obligations that apply to service providers with limited financial gains**: “The provisions [...] are not applicable to television operators, operators of on-demand audiovisual services and suppliers of video sharing platforms with low turnover or low audiences.” The scope of application can therefore be summarised as follows.

- services that include in their programming or catalogues the following works: long and short films, telefilms, creative cinematographic documentaries or creative documentaries for television and television series, including the genres of fiction, documentary and animation;
- operators that are under the jurisdiction of the Portuguese State, as defined by the AVMSd;
- operators under the jurisdiction of another Member State, but which target audiences located in Portuguese territory and obtain an income in Portugal;
- VOD providers of pornographic material are exempted; and
- operators who register “low turnover” or “low audiences” in the Portuguese market are exempted.

¹²² <https://dre.pt/web/guest/pesquisa/-/search/148963298/details/maximized>

¹²³ As amended by Laws no. 8/2011 of 11 April, 40/2014 of July 9, 78/2015 of July 29, and 7/2020 of April 10

¹²⁴ As amended by Laws no. 28/2014 of May 19, and 82-B/2014 of December 31

“(§7) The obligations provided for in this article apply to television operators and audiovisual service operators on demand under the jurisdiction of another Member State, whenever these operators target audiences or direct commercial offers to the public in the national territory, applying only to the income realised in the national market. (§8) In the case of television operators and operators of on-demand audiovisual services, the obligations provided for in this article: a) They are applicable only to those that include in the programming of any of its program services or in its catalogs long and short films, telefilms, creative cinematographic documentaries or creative documentaries for television and television series, including the genres of fiction, documentary and animation; b) They are not applicable to those operators whose programme or catalogue services exclusively include works of a pornographic nature.” (Cinema Act, Article 14-A)

CALCULATION METHODS

The calculations for the investment obligations for VOD services in Portugal are set out in the Cinema Act and encompass different calculation methods for the **(1) the payment of a tax to the film fund, (2) direct investments, and (3) the payment of an “exhibition fee”**.

The **(1) payment of a tax to the film fund**¹²⁵ (Cinema Act, Article 13) is based on **1% of the amount of the relevant income**. If it is not possible to determine the value of the relevant income of these operators, **the annual tax is set at EUR 1 million**. The following operators are exempted from the tax: a) Those with an **annual income in the national market below EUR 200,000**; and those whose share in the **respective market segment is less than 1%**.

The **(2) direct investments** are defined in the Annex of Law No. 74/2020, which lists the amounts for the mandatory direct investments stipulated by Articles 14-16. The investment obligations of VOD services are based on the relevant income. **There are three ways to determine the relevant income based on the type of service (i.e. TVOD, SVOD, AVOD). The calculations rank from 0.5% to 4% of relevant income, on the fee paid by the subscriber, with calculations EUR 0.50 to EUR 4 or by a fixed amount of EUR 10,000 to EUR 4 million.**¹²⁶ In case the content in the catalogues of the VOD services regarding European works constitutes less than 50% of the total hours of programming, the investment values are reduced by 50%. VOD services with relevant income **below EUR 200,000 are exempted or whose share in the respective market segment is below 1%**. If it is not possible to determine the value of the relevant income of these operators, the **annual investment amount is fixed at EUR 4 million**. Law 74/2020 does **not define what “relevant income” consists of in more detail**, but Decree-laws that will determine this are said to be in the pipeline. For VOD services, the law mentions the following: relevant income will be **calculated based on audiovisual commercial communications and on subscriptions or occasional transactions**. The Act further outlines that at least 30% of the investment must go to financing or participation in financing cinematographic and audiovisual work as mentioned in Article 16, §2. For subscription VOD operators, investment in own production or that of associated companies, purchase of works by order or investment in other European creative works (Article 16, §2-f) must be in the Portuguese language. The participation of VOD providers can also be ensured through the creation, in the respective catalogues, of an area dedicated to the promotion of European works and in Portuguese¹²⁷, in terms to be specified in an upcoming decree-law (Article 16, §5).

The **(3) “exhibition fee” is set at 4% of the advertising charges** made and is settled and paid annually. The Act outlines that the calculation is based on the number of subscriptions existing in the previous calendar year, obtained by applying a set formula.

The payment of a tax calculation method is outlined as follows: “(§4-5) The operators of subscription audiovisual services on demand are subject to the payment of an annual tax corresponding to 1% of the amount of the relevant income of these operators” (Article 10). “(§3) The proceeds [...] constitute ICA, IP's own revenue. (5) The available revenue of ICA, IP [...] is allocated to the different programs and measures, in compliance with multi-annual strategic

¹²⁵ The Act also outlines as well that the proceeds will go to ICA, IP who must invest it as follows by spending 80% to support cinematographic art; 20% to support audiovisual production, which is to be increased in each calendar year by 5% up to a maximum limit of 30% (Cinema Act, Article 13).

¹²⁶ In detail, the following rules apply to VOD: a) relevant income < EUR 199,999 – no investment; b) relevant income EUR 200,000-1,999,999 – 0.5% of relevant income or EUR 0.50 per subscriber or fixed amount of EUR 10,000; c) relevant income EUR 2,000,000-9,999,999 – 1% of relevant income or EUR 1 per subscriber or value fixed EUR 100,000; d) relevant income EUR 10,000,000-24,999,999 – 2% of relevant income or EUR 2 per subscriber or value fixed amount of EUR 500,000; e) relevant income EUR 25,000,000-49,999,999 – 3% of relevant income or EUR 3 per subscriber or value fixed amount of EUR 1,500,000; f) relevant income > EUR 50,000,000 – 4% of relevant income or EUR 4 per subscriber or value fixed amount of EUR 4,000,000.

¹²⁷ The Portuguese language requirement does not apply in the case of co-productions with national participation under the applicable treaties, of any of the types referred to in paragraph a) of paragraph 8 of article 14-A.

plans and annual declarations of priorities, observing in any case the following breakdown: a) 80% is used to support cinematographic art; b) 20% is used to support audiovisual production. (6) The percentage provided for in paragraph b) of the preceding paragraph will be increased in each calendar year by 5% up to a maximum limit of 30%, by checking the degree of financial execution of the competitions in the audiovisual support program and the number of spectators supported works, under the terms of the decree-law that regulates this law.” (Cinema Act, Article 13). “(§1) In the event that it is not possible to determine the value of the relevant income of subscription audiovisual service operators on-demand [...] the annual tax is assumed to be of 1 000 000 (euro).” (Cinema Act, Article 16-A). The calculation for the direct investments is outlined as follows: “(§5) The amounts to be invested by private operators [...] are defined according to the relevant income of these operators, according to the table in the annex to this law [...]. (§6) Relevant income is considered to result from the following services rendered in the year prior to the exercise of the obligation: a) Audiovisual commercial communications, in the case of television operators and operators of audiovisual services on request; [...] e) Subscriptions or occasional transactions for audiovisual services on request, in the case of operators of this type of services. (§8) [...] the obligations provided for in this article: a) are applicable only to those that include in the programming of any of their program services or in their catalogues long and short films, telefilms, creative cinematographic documentaries or creative documentaries for television and television series, including the genres of fiction, documentary and animation [...]. (§9) In the case of general program services or where the types of content referred to in paragraph a) of the previous number constitute less than 50% of the respective programming, measured in number of hours, the investment values provided for in the annex to this law are reduced by 50%.” (Cinema Act, Article 14-A). “(§2) If it is not possible to determine the value of the relevant income of the operators [...] the annual investment amount is fixed at 4,000,000 (euro)” (Cinema Act, Article 16-A). “(§4) The provisions [...] are not applicable to [...] operators of on-demand audiovisual services with low turnover or low audiences in the national market, in the following terms: a) Annual income in the national market below 200,000 (euro); b) Whose share in the respective market segment is less than 1%.” (Cinema Act, Article 14-A). “[...] the production of creative cinematographic and audiovisual works of independent European production in the Portuguese language, may take the following forms: a) Financing the writing and development of projects of creative cinematographic and audiovisual works; b) Participation in the financing of the production of creative independent cinematographic and audiovisual works, by means of: Acquisition of cinematographic and audiovisual works’ exploration rights at the design stage; Co-production; Association with production, without co-ownership; c) Acquisition of rights to explore creative cinematographic and audiovisual works; d) Restoration and mastering of films; e) Promotion of European cinematographic and audiovisual works; f) Own production or that of associated companies, purchase of works by order or investment in other European creative works.” (Cinema Act, Article 16, §2)

The calculation method for the ‘exhibition fee’ is outlined as follows: “(§1) Commercial advertising [...] transmitted by [...] audiovisual commercial communication included in on-demand audiovisual services [...] as well as advertising included in the electronic program guides, whatever the exhibition, broadcast or transmission platform, is subject to a fee, called the exhibition fee, which is the advertiser's charge of 4% of the price paid out. (§3) The fee [...] is settled and paid by each operator in the calendar year to which it relates, the respective annual value being calculated based on the number of subscriptions existing in the previous calendar year, obtained by applying the following formula: $NS = SNST/4$ where: NS is the number of subscriptions for each operator; SNST is the sum of the number of subscriptions in each quarter of the calendar year prior to the application of the fee, calculated in accordance with the data reported to ANACOM in compliance with ANACOM's regulation on the provision of statistical information that is in force on the date of the calculation.” (Cinema Act, Article 10).

APPLICABLE PROCEDURES

Law 74/2020 describes some of the **procedures and indicates the institutions responsible for the collection, verification, and enforcement of the investment obligations**, including: the Regulatory Entity for the Social Communication (ERC), the Institute of Cinema and Audiovisual (ICA, IP), the General Inspection of Cultural Activities (IGAC), and the National Communications Authority (ANACOM). Applicable procedures include how the ICA, IP can **certify if investment obligations are met by VOD services**. The Decree-laws determine **how and when operators must provide certified accounts proving their relevant income to ICA, IP, and how the investments will be assessed, controlled, and supervised**. Some of them are yet to be published by the regulator. Other procedures can be summarised as follows:

- When only a dissociated part of the service provided meets the definition of an audiovisual media service, only that part of the service is covered by the law (Article 2);
- After the settlement of the exhibition fee, or in the absence of its settlement, ANACOM, at the request of ICA, IP, must check with operators how the calculation and settlement took place, including the number of existing subscriptions and the internal control methodologies used in this calculation (Article 10-A);
- The amounts that are not allocated towards direct investments at the end of two consecutive years, must be delivered to ICA, IP, in January of the following year (Article 16, §6);
- The investment obligations calculated on the income declared in the previous year, must be paid by the end of January of each year;

- The amounts stipulated in Article 10 must be delivered within the period referred to in Decree-Law no. 25/2018 (Article 42);
- Failure to deliver the correct required payments by the stipulated deadlines is penalised under the terms of the General Regime of Tax Infractions (Article 114, §1-2).

“(§3) [...] operators must deliver to ICA, IP, the certified accounting documents proving the relevant income under the terms and conditions to be specified in the decree-law that regulates this law. (§4) [...] it is considered that it is not possible to determine the value of the relevant income of the operators in the following situations: a) Income does not have to be declared in Portugal, but in other Member States, and the elements made available in those countries do not discriminate income by geographic origin, thus not allowing to determine the part of the income obtained in Portugal; b) Failure to deliver the legal documents that allow the determination of the value of the relevant income.” (Article 16-A)

3.11. Slovenia (SL)

APPLICABLE LEGAL FRAMEWORK

Articles 16, §2 and §3 of the **Act on Audiovisual Media Services**¹²⁸ contains an obligation for the providers of VOD services¹²⁹ to **reserve a share of their catalogue programming to European works or, alternatively, to make a financial contribution to promote European works**. This legislation has been in effect since 2011 (note that in section 2, the current legislation is analysed).

Slovenia is expected to transpose the revised AVMSd with the **Law on Amendments to the Audiovisual Media Services Act** which is currently in legislative procedure.¹³⁰ The changes to the law introduce investment obligations both for domestic and foreign audiovisual media services providers via payments to the European Audiovisual Production Fund. The proposed law seeks to introduce levies for audiovisual media services, which according to the changes of Article 3, are either television programmes or VOD services (see section 2.1 for more details).

“European audiovisual works must account for at least 10% of the programs in the catalogue of programs of an on-demand audiovisual media service in an individual calendar year, unless this act determines otherwise. A provider of on-demand audiovisual media services that fails to attain the proportion referred to in the preceding paragraph must, every calendar year, earmark funds amounting to at least **one percent** of all revenues from its audiovisual media services in that calendar year for the production of or acquisition of the rights to European audiovisual works that it provides via its on-demand audiovisual media services.” (Article 16, §2-3, Act on Audiovisual Media Services)

SCOPE OF APPLICATION

In the current legislation, the definition of a provider of VOD services **reproduces the wording of the AVMSd** (see section 2.4). Article 4 of the proposed law provides an explanation of what audiovisual media services providers are considered to be **under the jurisdiction of Slovenia**.

Regarding the planned revisions, there is an additional explanation in terms of what type of non-domestic VOD services are considered to target Slovenian territory and have to pay the levy (see the following subsection). Services with a turnover of less than EUR 200,000 in the Republic of Slovenia in the past year are expected to be exempted from the levy on providers of VOD services under the Slovenian jurisdiction, according to the proposed Article 16a, §5.

CALCULATION METHODS

In accordance with the Act on Audiovisual Media Services, the **calculation is based on the reporting of revenue from audiovisual media services in the previous year**, which consists of aggregated data on the achieved share of European audiovisual work in its catalogue for the previous calendar year, or data relating to the share of the financial contribution that the provider has devoted to the production or acquisition of rights to European audiovisual works. Articles 16, §2-3 of the Act on Audiovisual Media Services contains an obligation for the VOD providers to reserve at least **10% of their catalogue programming to European works or, alternatively, to make a financial contribution of at least 1% of revenues to promote European works**.

According to the proposed law, the VOD providers over which Slovenia has jurisdiction, same as providers established in other Member States, are required to contribute **2% of the gross annual income generated in Slovenia to the European Audiovisual Production Fund**. This means that Slovenian legislators want to create a level-playing field between the providers of VOD services established in other EU Member States and those established in Slovenia. These changes are stipulated in Article 16a, §1-2 of the proposed law. The basis for calculating the levy is defined as **revenues from the sales, subscriptions, and advertising generated in Slovenia, excluding the value-added tax**. Revenues also include income from parties through which audiovisual media services providers carry out marketing according to Article 16a, §6.

“(1) Audiovisual media service providers based in the Republic of Slovenia and the audiovisual media service providers over which Slovenia has jurisdiction under the conditions laid down in Article 4 of this Act, each year shall contribute two per cent of the gross annual income, generated in Slovenia, to the budget fund referred to in Article

¹²⁸ <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6225>

¹²⁹ The providers of VOD services also have to make a small annual payment for registration with the AKOS, in accordance with Article 38 of the same law.

¹³⁰ The proposed law was sent to the Committee for Culture in Parliament on 23 March 2021 for a second reading, <https://e-uprava.gov.si/drzava-in-druzba/e-demokracija/predlogi-predpisov/predlog-predpisa.html?id=11475>

16b of this Act. The contribution is a dedicated budget receipt. (2) Providers of audiovisual media services who are not established in the Republic of Slovenia or the Republic of Slovenia has no jurisdiction over them under the conditions set out in Article 4 of this Act and whose services are targeting the territory of the Republic of Slovenia shall contribute to the budget fund referred in Article 16b of this Act in accordance with the previous paragraph. An audiovisual media service that meets one of the following conditions is considered to be a service that targets the territory of the Republic of Slovenia: -disseminate audiovisual commercial communication intended for viewers of the Republic of Slovenia; -program and advertising services and other promotional activities, including subtitling and synchronization, are in Slovenian, or -the number of subscribers in the Republic of Slovenia exceeds 1,000.” (Article 16a §1 and §2, proposed Law on Amendments to the Audiovisual Media Services Act)

APPLICABLE PROCEDURES

According to the **Act on Audiovisual Media Services**, VOD providers must, by the end of February each year, submit an **annual report to the Ministry of Culture, as well as to AKOS**, to demonstrate their compliance with the requirements. Article 43, §8 of the Act on Audiovisual Media Services introduces a **penalty ranging from EUR 6,000 to EUR 60,000** if the proportion of European audiovisual works in the programme of the VOD provider does not amount to at least 10% or if the provider does not make a financial contribution of at least 1% of revenues towards the promotion of European works. Furthermore, a VOD provider that fails to submit an annual report faces a fine of up to EUR 10,000.

Article 16a, §7 of the proposed law, explains the reporting obligations and the deadlines for paying the levy to the European Audiovisual Production Fund. As stipulated in Article 16b, this fund is established as a budgetary fund in accordance with the law governing public finances. The resources of the European Audiovisual Production Fund shall be used to finance projects in the field of European audiovisual production. The fund will be managed by the ministry responsible for media.

3.12. Spain (ES)

APPLICABLE LEGAL FRAMEWORK

The main legal framework for the promotion of European and domestic audiovisual content in Spain is currently formulated in Law No. 7/2010 of 31 March 2010 on Audiovisual Communication,¹³¹ hereafter referred to as the **General Act (Ley General de la Comunicación Audiovisual)**. The General Act obliges **domestic VOD services providers to contribute to the production of European works**. The obligation can be fulfilled by directly taking part in the production of European works and/or to pay for the acquisition of rights (note that in section 2, the current legislation is analysed).

In November 2020, the Spanish Government proposed a **Draft General Law on Audiovisual Communication** (Anteproyecto de Ley General de Comunicación Audiovisual),¹³² hereafter referred to as the Draft Law. The Draft Law **extends the investment obligation rules to non-domestic VOD service providers targeting the Spanish market** and establishes **a choice for providers to make a direct contribution to the financing of European audiovisual works or to the Film Protection Fund** (Fondo de Protección de la Cinematografía) (for more information, see section 2.1).

"This Law regulates audiovisual communication for state coverage and establishes the basic standards in audiovisual matters without prejudice to the powers reserved to the Autonomous Communities and Local Bodies in their respective areas." (General Act, Article 1). "The financing of the aforementioned audiovisual works may consist of direct participation in their production or in the acquisition of the rights to exploit them. [...] Electronic communication service providers that broadcast television channels and program catalogue service providers are also subject to the financing obligation established in this article." (General Act, Article 5)

"(§1) The providers of a linear television or on demand audiovisual communication service operating at a state and autonomous [regional] level and the provider of a linear television or on demand audiovisual communication service established in another Member State of the European Union that directs their services to Spain." (Draft Law, Article 115)

SCOPE OF APPLICATION

The 2010 General Act defines VOD services as the providers of a programme catalogue service (Article 2) without further specifications (see also section 2.4). Therefore, **only minimum requirements for the scope of application are set out** at the moment in Spanish legislation to capture VOD service providers.

In accordance with one of its objectives, the 2020 **Draft Law** updates the scope of the regulation to the broader "audiovisual communication service provider on demand" which is defined as the "natural or legal person that provides an audiovisual communication service on demand" (Article 2, §16). "Audiovisual communication service on demand" is defined as "audiovisual communication that lends itself to viewing programmes and content at the time chosen by the viewer and at their own request based on a catalogue of programs selected by the provider of the service" (Article 2, §6). This **aligns with the definition of the AVMSd**. Further, the Draft law specifies that non-domestic VOD services are also **obliged to contribute to the financing of European works** if Spanish audiences are targeted (Draft Law, Article 115, §1). Nevertheless, non-domestic and domestic **VOD services that have an income below EUR 10 million in the Spanish market during the previous year are exempted** (Draft Law, Article 115, §1).

"(§16) The individual or legal entity recognised as an audiovisual communication service provider in the sense of 'audiovisual communication on demand' that, directly or indirectly, offers on the demand of retail clients the viewing of cinematographic films, television films and series for television in a fixed, portable or mobile player with access to IP networks." (General Act, Article 2).

"The providers of audiovisual communication services through linear television or on demand operating at a state and autonomous [regional] level with such coverage and the providers of audiovisual communication through linear television or on demand established in another Member State of the European Union that direct their services to Spain" and whose declared income for the previous year, obtained in the Spanish audiovisual market "is equal or more than ten million euros, will be obliged to prefund European audiovisual works" (Draft Law, Article 115, §1).

CALCULATION METHODS

¹³¹ <https://www.boe.es/buscar/act.php?id=BOE-A-2010-5292>

¹³² https://portal.mineco.gob.es/RecursosNoticia/mineco/prensa/noticias/2020/2011106_np_audiovisuales.pdf and <https://avancedigital.mineco.gob.es/es/Participacion/Paginas/DetalleParticipacionPublica.aspx?k=355>

The 2010 General Act makes a distinction in the calculation method between commercial and public VOD services. Commercial VOD providers are obliged to make **direct investment of 5% of their reported income in the production of European works. Public VOD providers must allocate 6%** of their reported income from the previous year. 60% of the allocated money must be spent on cinema films. For public providers, this increases to 75%. The remaining funds can be spent on television films, series or mini-series. **The income earned in the previous year by service providers is calculated on the basis of their trading account.** The procedure, the computation mechanisms and the information that may be gathered from the providers are established by Royal Decree 988/2015, Articles 16 and 17.¹³³

The **Draft Law amends the calculation methods and includes a threshold of income at EUR 50 million.** VOD services providers both below and above this threshold have to invest 5% of their income, but smaller providers of VOD services can also choose to spend this by purchasing rights (see below). To summarise, the calculation of the proposed investment obligation for VOD providers is based on the following parameters:

- the obligation is based on the service provider's reported income in the Spanish market, according to their trading account;
- the income is calculated based on earnings from the previous year.
- On-demand service providers who report an income of EUR 50 million or more:
 - must allocate 5% of these earnings to the financing of European audiovisual works
 - or contribute to the Spanish Film Protection Fund;
 - of that amount, a minimum of 70% must be used to finance works by independent producers, and a minimum of 40% must be used to finance independent cinematographic works of any genre, in any of the official languages of Spain.
- On-demand service providers who report an income of less than EUR 50 million:
 - must allocate 5% of these earnings to the financing of European audiovisual works,
 - or to purchase the rights to finished European audiovisual works,
 - or contribute to the Spanish Film Protection Fund,
 - of that amount, at least 70% should be used to finance works by independent producers.
- On-demand service providers who generate an income of less than EUR 10 million in the Spanish market are exempt from this obligation.

"(§2) The providers [...] whose income accrued in the previous fiscal year, according to their trading account, is equal to or greater than fifty million euros, will annually allocate five percent of said income to the financing of European audiovisual works or contribute to the Film Protection Fund. The provider's financial obligation must respect the following two terms: a) A minimum of seventy percent must be allocated to audiovisual works of independent producers. b) A minimum of forty percent must be allocated to films of independent producers of any genre in the official language of the State or in some of the official languages of the Autonomous communities. (§3) The providers [...] whose income accrued in the previous fiscal year, according to their trading account, is less than fifty million euros, will annually allocate five percent of said income to the financing of European audiovisual works, to the purchase of exploitation rights of European audiovisual works already completed or to contribute to the Film Protection Fund. The total of the provider's financing obligation must respect a minimum of a seventy percent allocated to audiovisual works by independent producers." (Draft Law, Article 117).

APPLICABLE PROCEDURES

The National Commission on Markets and Competition (CNMC) is the authority in charge of the **control and monitoring** of the promotion of European audiovisual works in Spain. Royal Decree 988/2015 (Article 14, §1-3) establishes the procedures through which service providers have to **communicate to the CNMC** the manner in which they complied with the financing obligation instated by the General Act. Although plans to create a media regulator (the State Council for Audiovisual Media) were put forward, these were never finalised. Thus, the CNMC, a supra regulator, remains in charge of dealing with competition issues also in the media sector. In its report¹³⁴ on the Draft Law, the CNMC recommends the following additions or clarifications:

- For enhanced clarity, a reference to providers established in another Member State of the European Union that direct their services to Spain should also be included in Articles 117, §2-3 and 118, §2 similar to the reference included in Article 115.

¹³³ For more details, see the previous version of the report, Donders et al, 2018.

¹³⁴ https://www.cnmc.es/sites/default/files/3309300_9.pdf

- The law should foresee instruments of collaboration with media regulators of other Member States, for the purposes of verifying compliance with the investment obligations, while guaranteeing the confidentiality of the information shared.
- Better coordination between CNMC and the Institute for Cinematography and Audiovisual Arts (ICAA) in order to verify compliance with the obligation foreseen by Article 115, §3, regarding the possibility to comply with the investment obligation by contributing to the Film Protection Fund, which is managed by the ICAA.

“(§1) The control and monitoring of the obligations contained in this Chapter will correspond to the National Commission on Markets and Competition, after a mandatory opinion of the Institute of Cinematography and Audiovisual Arts. (§2) Regulations shall establish the procedure, the mechanisms of computation and the information that may be collected [...]” (Draft Law, Article 118).

Part 4

Annexes

4. Annexes

4.1. Full list of sources per Member State analysed

	Main legislation
AUSTRIA	Audiovisual Media Service Directive (Audiovisuelle Mediendienste-Gesetz), 2001 (Consolidated 04.12.2018)
BELGIUM (French-speaking Community)	Decree for Audiovisual Media Services (Décret relatif aux services de médias audiovisuels et aux service de partage de vidéos) (Consolidated, 26.03.2021)
BELGIUM (Dutch-speaking Community)	Media Decree concerning radio broadcasting and television (Decreet betreffende radio-omroep en televisie), 2009 (Consolidated in 2014) Decision on non-linear television broadcasting organization. (Besluit van de Vlaamse Regering betreffende de deelname van de particuliere niet-lineaire televisieomroeporganisaties aan de productie van Vlaamse audiovisuele werken), 2019
BELGIUM (German-speaking Community)	Decree concerning radio broadcasting and television (Decreet betreffende radio-omroep en televisie), 2005
BULGARIA	Law on radio and television (ЗАКОН за радиото и телевизията), (SG No. 93/2005, amended, SG No. 12/2010) Law amending the Law on Radio and Television (Законопроект за изменение и допълнение на Закона за радиото и телевизията)
CROATIA	Electronic Media Act (Zakon o elektroničkim medijima), 2009 Ordinance on the criteria and manner of increasing the share of European Works, 2015 Law on Audiovisual Activities (Zakon o audiovizualnim djelatnostima), 2011 (in effect from 19.07.2018) Proposed Electronic Media Act (Prijedlog Zakon o elektroničkim medijima)
CYPRUS	The Radio and Television Organizations Laws (Ο περί Ραδιοφωνικών και Τηλεοπτικών Οργανισμών Νόμοι), 1998 (Amended 2012) Draft law entitled "Law amending the Laws on Radio and Television Organizations of 1998" (Νόμος που τροποποιεί τους περί Ραδιοφωνικών και Τηλεοπτικών Οργανισμών Νόμους του 1998 μέχρι (Αρ. 2) του 2019), 2019
CZECH REPUBLIC	On-demand Audiovisual Media Services Act (Zákon o audiovizuálních mediálních službách na vyžádání a o změně některých zákonů (zákon o audiovizuálních mediálních službách na vyžádání)), 2010 Act No. 496/2012 on Audiovisual Works and Support for Cinematography and on Amendment to Certain Acts (Audio/Video Act), 2012 (in effect 01.01.2016) Draft Bill on Services of Platforms for Sharing Video Recordings and on amendments to Act No. 231/2001 on Radio and Television Broadcasting and amendments to Act No. 132/2010 on On Demand Audiovisual Media Services (Vládní návrh zákona o službách platform pro sdílení videonahrávek a o změně některých souvisejících zákonů zákon o službách platform pro sdílení videonahrávek)
DENMARK	Decree on program activities based on registration and on-demand audiovisual program activities of the Act on Radio and Television Activities (Bekendtgørelse om programvirksomhed på grundlag af registrering samt on-demand audiovisuel programvirksomhed - Radio-og fjernsynsvirksomhed), 2014 (Amended 2014, 2016)
ESTONIA	Media Services Act (Meediateenuste seadus), 2010
FINLAND	Information Society Code (Tietoyhteiskuntakaari), 2014
FRANCE	General Law 86-1067 on the Freedom of Communication (Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard)), 1986 (Consolidated 04.12.2018) On-demand Audiovisual Services Decree ('SMAD Decree'), No. 2010-1379 (Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande), 2010 'Video and VOD Tax' (Taxe sur la diffusion en vidéo physique et en ligne de contenus audiovisuels, also referred to as 'Taxe Vidéo et VoD' or 'Taxe TSV' (in French)
GERMANY	Medienstaatsvertrag (MStV), vom 14./ 28. April 2020, in Kraft seit 7. November 2020 Film Funding Act (Filmförderungsgesetz (FFG)), 2017
GREECE	Law 3905/2010 on the Reinforcement and development of film and other provisions
HUNGARY	Act CLXXXV on Media Services and Mass Communication (2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációról), 2010 (Consolidated 1 July 2015) Amending certain laws on media services (2019. évi törvény a médiaszolgáltatással kapcsolatos egyes törvények módosításáról)
IRELAND	S.I. No. 247/2012 - European Communities (Audiovisual Media Services) (Amendment) Regulations 2012 General Scheme of the Online Safety and Media Regulation Bill
ITALY	Consolidated Law of Audiovisual and Radio Media services (Decree-Law No. 177) (Testo unico dei servizi di media audiovisivi e radiofonici), 2005 Law no. 220 of 14 November 2016 (Disciplina del cinema e dell'audiovisivo) Decree-Law no. 204 of 7 December 2017 (Riforma delle disposizioni legislative in materia di promozione delle opere europee e italiane da parte dei fornitori di servizi di media audiovisivi, a norma dell'articolo 34 della legge 14 novembre 2016 n.220), 2017 Resolution 59/19/CONS / Law no. 81/2019 / Resolution 421/19/CONS, Annex B / Resolution 265/15/CONS, Annex
LATVIA	Electronic Media Law (Elektronisko plašsaziņas līdzekļu likums), 2010 (Consolidated 12.07.2018)
LITHUANIA	Law on the Provision of Information to the Public (Visuomenės informavimo įstatymas), 1996 (Consolidated 12.01.2018)
LUXEMBOURG	Grand-ducal regulation (Règlement grand-ducal du 2 février 2015 fixant le montant et les modalités de paiement des taxes à percevoir par l'Autorité luxembourgeoise indépendante de l'audiovisuel en matière de surveillance des services de médias audiovisuels et sonores), 2015
MALTA	ACT No. LVI of 2020 to amend the Broadcasting Act
NETHERLANDS	Media Act of 2008 as amended by Act no 552 - Art. 3.29c (Mediawet 2008)
POLAND	Broadcasting Act of December 29, 1992 (USTAWA z dnia 29 grudnia 1992 r. o radiofonii i telewizji/Rozdział 1/Przepisy ogólne) (Consolidated in 2016) Act of 14 May 2020 on the amendment of certain acts in the area of protective measures in connection with the spread of SARS-CoV-2 virus (Ustawa z dnia 14 maja 2020 r. o zmianie niektórych ustaw w zakresie działań osłonowych w związku z rozprzestrzenianiem się wirusa SARS-CoV-2 (Dz.U. z 2020 r., poz. 875)
PORTUGAL	Law no. 27/2007, on Television and Audiovisual Service On-Demand (Lei da Televisão e dos Serviços Audiovisuais a Pedido), 2007 (Consolidated in 2015) Law no. 55/2012, the Cinema Act (Lei da arte cinematográfica e do audiovisual), 2012 / Law No. 74/2020
ROMANIA	The Audiovisual Law 504/2002 (Legea audiovizualului), 2002 (Consolidated 17.11.2017) Government Ordinance no. 39 of 14 July 2005 on Cinematography Draft Law for amending Law 504/2002 and Ordinance 39/2005
SLOVAKIA	Act 308/2000 on Broadcasting and Retransmission and on the amendment of Act No. 195/2000 on Telecommunications (Zákon zo 14. septembra 2000 o vysielaaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách), 2000 (Consolidated in 2016, 2018)
SLOVENIA	Act on Audiovisual Media Services (Zakon o avdiovizualnih medijskih storitvah (ZAvMS)), 2011 Proposed Law on Amendments to the Audiovisual Media Services Act (Predlog Predpisa Zakon O Spremembah In Dopolnitvah Zakona O Audiovizualnih Medijskih Storitvah)
SPAIN	General Act No. 7/2010 of 31 March on Audiovisual Communication (Ley General de la Comunicación Audiovisual) Draft General Law on Audiovisual Communication (Anteproyecto de Ley General de Comunicación Audiovisual), November 2020 Royal Decree 988/2015 of October 30 (Real Decreto 988/2015, de 30 de octubre, por el que se regula el régimen jurídico de la obligación de financiación anticipada de determinadas obras audiovisuales europeas), 2015
SWEDEN	The Radio and Television Act (Radio- och tv-lag 2010:696), 2010 (Consolidated in 2018)

4.2. List of experts

We would like to thank the experts for their support in conducting the research.

Member State	Name	Position and Organisation
Austria	Stefan Rauschenberger	Director Legal Department Media, Rundfunk und Telekom Regulierungs-GmbH (RTR-GmbH)
Croatia	Dina Vozab	Assistant Professor, University of Zagreb
Czech Republic	Petr Kozák	Head of the Department of Licences and Retransmission, Council for Radio and TV Broadcasting
France (<i>direct investment obligation</i>)	Thierry Vachey	Deputy director TV and VOD / ' <i>Direction de la télévision et de la vidéo à la demande</i> ', Conseil Supérieur de l'Audiovisuel CSA France
France (<i>Video and VOD Tax</i>)	Alexis Viprey	Director of physical video and VOD / ' <i>Chargé de mission V&D / Direction du numérique / Service de la vidéo physique et en ligne</i> ', Centre national du cinéma et de l'image animée (CNC)
French-speaking Community of Belgium	Bernardo Herman	Director of European Affairs Conseil Supérieur de l'Audiovisuel CSA Belgium
Germany	Solène Tardieu	Advisor to the board / international affairs, Filmförderungsanstalt / German Federal Film Board
Italy	Marco Cucco	Senior Assistant Professor, Università di Bologna
Poland	Michał Glowacki	Associate Professor, University of Warsaw
Portugal	Helena Sousa	Full Professor, University of Minho
Slovenia	Martin Hari	Undersecretary, Electronic Media Department, AKOS
Spain	M ^a Trinidad García Leiva	Associate Professor, Universidad Carlos III de Madrid

4.3. About imec–SMIT–VUB

SMIT (Studies on Media, Innovation and Technology) is a research centre associated with the Vrije Universiteit Brussel and part of imec. In addition to fundamental research into digitization and the consequences for data and media, SMIT also specializes in policy preparation and evaluation research. The expertise of imec-SMIT-VUB was provided to governments (including the Department of Youth, Culture, Sport and Media, the Media Sector Council) and media players (involved in various ICON and MIX projects; research for SACD, SBS, VRT, Mediarte, among others. be, etc.) invoked and recognised.

The research presented here was conducted within SMIT's Media & Society Programme. This consists of 50 junior and senior researchers specialized in market, policy and user research in various research domains: regional, national and European media policy, competition, cultural diversity, public broadcasting, sustainability of creative industries, immersive media, data and valorisation, privacy, media literacy, fake news/disinformation and digital inclusion. As part of the research activities at regional, national and international level, imec-SMIT has built up extensive knowledge about the audiovisual sector, including broadcasting, distribution and support policy in Europe. The department has strong methodological expertise, both quantitative and qualitative, and also has a wide network of stakeholders within the audiovisual sector.

The Media Economics and Policy (MEP) unit focuses on analysing and ensuring the economic and cultural sustainability of content production, aggregation and consumption. Our research projects cover both market and policy aspects for a multitude of creative sectors, from publishing and cultural heritage to broadcasting, film, video games, music and documentary filmmaking. Researchers within this unit work on fundamental and applied research tracks seeking to advance knowledge on how digitisation, internationalization and platformisation have affected business models of traditional media players, how these media players innovate and interact with new players, and how governments contribute to sustaining or boosting local media ecosystems.

Methodologically, we combine qualitative and quantitative research methods (impact assessments, scenario-building, financial monitoring, business modelling, document analysis, mapping, quick-scan, case studies, stakeholder consultations, survey and data-scraping), with a clear focus on advancing academic insights in the field of media policy and media economics, and with a clear objective to critically contribute to societal and industry debates. We have a strong track record in research on audiovisual markets, with a particular focus on the specificities of small markets, and a longstanding expertise in public service media and European media policy. Over the past two decades, we have been specializing in applied research for media industries and policymakers. Clients include the Flemish Government, the Dutch Government, the Ministère de la Fédération Wallonie-Bruxelles, the European Commission, Screen Brussels, VRT, SBS, Google, SACD and the Flemish independent producers' organization (VOFTP).

Our researchers have published widely in peer-reviewed journals and have (co-)authored several key publications in the field, including The Palgrave Handbook of European Media Policy, The Palgrave Handbook of Methods for Media Policy Research, Platform Power and Policy in transforming television markets, Creative Cluster Development: Governance, Place-making and Entrepreneurship.

Our current research fits within 4 strands, combining media policy and media economic foci:

- Creative clusters, collaboration and Innovation
- Platform economics and policies
- Sustainability of audiovisual production and distribution
- Challenges in European and international media policy