Obligations on on-demand audiovisual media services providers to financially contribute to the production of European works

An analysis of European Member States' practices

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Practical information

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1. Introduction

1.1 Background

The European Commission, European Council and European Parliament reached a political agreement on the revision of the Audiovisual Media Services directive (hereafter referred to as ‘AVMSd’) at the beginning of June 2018. The revised directive aims to strengthen European culture by requiring providers of on-demand audiovisual media services to ensure at least 30% of European works in their on-demand catalogues and a good visibility for that content. Companies with a low turnover and/or audience are exempted from this rule. The same also holds for companies that have a very specific offer that makes it inappropriate for them to be subject to the abovementioned requirements.

Apart from the direct quota for on-demand audiovisual media services providers, the new AVMSd clarifies the rules that already existed for investment obligations. By the latter, we mean the obligations for on-demand audiovisual media services providers to contribute financially to the production of European works. The new rules make explicit that Member States can impose an obligation to invest directly, or to contribute to a fund for this purpose through the transfer of taxes or the payment of a levy. This investment obligation applies both to domestic media services providers and to media services providers established in a different Member State, but which target the audience of the Member State imposing the obligation. Importantly, this is a voluntary measure. Member States are therefore allowed, but not obliged, to introduce such an investment obligation into their media laws. On the one hand, the motivation for doing this is self-evidently to legalise practices that already existed or were emerging in Member States such as France and Germany. On the other hand, the aim is also to harmonise to some extent the practices at national level, albeit rather superficially.

This report provides an overview of the existing approaches of European Member States with regard to the imposition of investment obligations for on-demand audiovisual media services providers. It will illustrate how fragmented the approaches of the Member States are. The report was commissioned by the Flemish Administration for Culture, Youth, Sports and Media of the Flemish Government. The findings and conclusions are those of the researchers. They do not represent the opinion of the Flemish Administration or the Flemish Government.

1.2 Main questions

The main question underlying this study is how different EU Member States are shaping the investment obligations imposed on on-demand audiovisual media services providers for both the domestic and foreign providers of such services. The report provides a detailed overview of investment obligations in EU Member States. It answers the following questions:

- What is the motivation for imposing the investment obligation?
- What are the criteria to determine who is subject to the obligation?
- How are revenues (or related concepts such as profit or turnover) defined?
- What are the applicable tariffs, amounts, percentages, etc., and is there any variation between companies?
- What are the applicable calculation methods?
- Are there any exemptions or reductions in place? If so, which ones and why?
- What are the applicable procedures in general?
- What are the applicable procedures in the event of conflicts with on-demand service providers that are non-domestic?
1.3 Design of the study

The research report consists of five parts, of which this introduction is the first part. Part 2 provides a brief contextualization of the issue, explaining the legislative change at the EU level and providing a brief overview of the investment obligations for the providers of on-demand audiovisual media services in EU Member States. Concretely, it shows which Member States have obligations in place and which ones do not. It highlights some fundamental differences at the level of scope. On this basis, we selected a number of Member States to study in greater depth.

These case studies can be found in Part 3. Countries and regions included in the analysis are: the Flemish Community of Belgium, the French Community of Belgium, Croatia, the Czech Republic, France, Germany, Italy, Portugal, Slovenia and Spain. For all these EU Member States the above mentioned questions are dealt with (see section 1.2 above). In Part 4 we draw some conclusions. Finally, annexes and references are included in Part 5. We have included all links to relevant legislation in EU Member States. This should allow readers to retrieve more detailed information quickly and easily.

The findings are largely based on available legal documents. These were also checked with experts from the Member States included in this report. We would like to thank all the experts who were willing to participate, most of whom preferred not to be named.

1.4 Excluded from this study

Obviously, investment obligations are not new. The Television Without Frontiers directive (hereafter referred to as 'TWFd') already imposes obligations for outsourcing 10% of the program offer or production budget to independent producers, with 50% of the television offer reserved for European works. Some countries and regions have implemented more stringent measures, especially for public broadcasters. In several countries, for example, 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 various forms of imposed charges, often with the aim of contributing towards the financing of audiovisual productions (levies on advertising revenues, sales from cinema tickets or DVDs/Blu-Ray, etc.) or the funding of the operations of regulatory authorities (the payment of a license fee to be active in a market). In this study, the emphasis is on the investment obligations for on-demand audiovisual media services providers. Only where it is necessary for the understanding of the context will reference be made to quotas or other measures.
2. From national practices to EU law and back again

2.1 The increasing consumption of on-demand audiovisual media services

The global market for on-demand audiovisual media services has grown over the last few years. Consumption of and revenues from these services are on the rise. Services can be advertising-supported (‘AVOD’), financed through subscription (‘SVOD’), or paid for per transaction (‘TVOD’). Specifically, so-called over-the-top (‘OTT’) services (distributed via the internet) have become increasingly popular. In 2016, research showed that although the OTT market accounted for only 5% of the global industry, it was growing by more than 20% annually and, moreover, rapidly winning shares over traditional television, whose revenues were growing at the rate of a mere 2% per year.\(^1\)

According to recent studies,\(^2\) revenues from video-on-demand (‘VOD’) in Europe amount to approximately €6 billion in 2018. Although no recent figures can be presented for the video OTT share of the European on-demand market, reports consistently point to a significant growth. SVOD is responsible for most of the revenues, accounting for approximately €4 billion in 2018,\(^3\) while TVOD is valued at approximately €1 billion.\(^4\)

Further growth is expected in the European VOD market. The SVOD segment is expected to account for over half of this growth, but operators moving from pay-TV services to OTT delivery are also expected to achieve significantly higher profits.\(^5\) TVOD is expected to grow at a much slower pace, decreasing its importance in the years ahead.\(^6\) Several markets are currently taking the lead in the European VOD field, primarily Western and Northern European countries: Germany, the United Kingdom, France, Denmark, Spain and Sweden.

2.2 The dominance of American video-on-demand providers in Europe

VOD markets are increasingly dominated by US-based companies. This is particularly the case with regard to on-demand audiovisual media services providers delivering OTT to consumers. The top five global players that compete across multiple markets and collectively control approximately half of the annual OTT market revenues (which were estimated at $25 billion in 2016)\(^7\) are all US-based companies: Facebook, YouTube, Hulu, Netflix and Amazon Prime. In 2016, Netflix’s market capitalisation was approximately $50 billion, while YouTube was estimated to be worth as much as $90 billion, and Hulu approximately $6 billion.\(^8\) Of these top five companies, Hulu, Netflix and Amazon Prime deliver professionally produced content through a subscription model. HBO is also an SVOD service that is currently expanding globally by setting up an OTT stand-alone service.

This is not to say that there are no relevant VOD services, including OTT, offered by European companies. In fact, the European Audiovisual Observatory MAVISE database\(^9\) identified 668 active pay-

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\(^3\) https://www.statista.com/outlook/206/102/video-streaming--svod--/europe
\(^4\) https://www.statista.com/outlook/205/102/pay-per-view--tvod--/europe
\(^5\) http://www.analysysmason.com/Research/Content/Regional-forecasts-/ott-forecast-europe-rdv0/
\(^8\) Idem
\(^9\) http://mavise.obs.coe.int/
on-demand services in the EU28 in 2017. Four big US players - Amazon Prime, iTunes Store, Netflix and HBO Go - account for 38% of the 236 localised versions of these pay-on-demand services. However, they account for a much larger share of the income (see above), which points to the fragmentation and relative weakness of European players in this market.

A recent study estimates that the European SVOD market will nearly double by 2022. This growth is primarily ascribed to the presence and rapid expansion of the US players Netflix, Amazon Prime, HBO and Showmax. Several initiatives are emerging that aim to counter the American success in this market. In the United Kingdom, several media companies have announced plans to launch some sort of 'Britflix'. In France, the main broadcasters are likewise contemplating the idea of a joint VOD service, while in smaller markets, such as the Dutch, Danish and Flemish markets, companies are also thinking of launching common SVOD services focused on local content.

2.3 Pressure on revenues in domestic audiovisual markets

The European audiovisual market is, in fact, a collection of different markets, which often have a different language, culture and market size. Many EU Member States are small media markets with a limited number of media companies of some size. 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. Cultural proximity plays a major role and ensures that a Belgian audience, for example, is less inclined to tune in to an East European television series.

A smaller market also means that there is limited revenue from VOD, which is also visible in the limited interest of the pay-TV operators, who are increasingly less inclined to invest in audiovisual content. In European markets, it is mainly the broadcasters (both public and private) that take up most of the investment opportunities in original content. The fact that the resulting investments are substantial is mainly due to the popularity of home-made content, because in economic terms the acquisition of broadcasting rights for international series is actually much cheaper.

The success of specific, 'expensive', but highly sought-after genres, such as quality fiction, is therefore linked in many countries to the extent of public support, especially in the small media markets. In various countries there are 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 the European Audiovisual Observatory (2016), audiovisual funds in Europe invest more than €2.5 billion in audiovisual content. In total, the European market has more than 240 audiovisual funds (regional, national and supranational). At European level, it is mainly the Eurimages and MEDIA programs that support the development, production, distribution and promotion of films, series and cross-media audiovisual content.


Recent trends have further increased the precarious situation of European audiovisual ecosystems.

Firstly, the increase in VOD and especially SVOD platforms and services has led to greater competition for the offer of traditional broadcasters. Foreign players invest substantial sums in big-budget productions, against which local productions must attempt to compete. In December 2017, the Financial Times recorded an investment of $1.5 billion by Netflix in European content (in the form of broadcasting rights, original content and co-productions). However, most of these investments are happening in the large markets, with series such as The Crown, Marseille and Dark developed for the British, French and German markets respectively.

Secondly, existing advertising models are under strong pressure, due to the shift of advertising revenues to international platforms such as Google, YouTube and Facebook. The reinvestment of advertising revenues in local content is undertaken by local players but not by major foreign platforms.

Thirdly, the increase in ad-skipping and deferred viewing results in a decline in advertising revenues for private broadcasters, which for the time being are difficult to make good by 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. Finally, the increase in operating windows also means tighter competition, which makes it more difficult for broadcasters to acquire foreign rights. At the same time, 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. Investment is falling in several countries, which has, of course, triggered several Member States of the EU to look for funding in the (deep) pockets of foreign providers of on-demand audiovisual media services.

All in all, this creates a somewhat paradoxical situation whereby watching audiovisual content has never been more popular, while its valorisation within domestic media markets has never been more difficult.

### 2.4 Emerging legal practices at the national level

Today, there seems to be an emerging consensus within the EU that companies that benefit from content should also contribute to content, regardless of the market in which they are based or the types of services they are offering. Several countries have taken steps to explore the possibility of encouraging or obliging non-domestic on-demand audiovisual media services providers to contribute to original production.

Essentially, there are two ways of involving both domestic and non-domestic providers of on-demand audiovisual media services. The first is by obliging these companies to carry a minimum percentage of European (including domestic) audiovisual works in their catalogue. This measure can,
theoretically, encourage the purchasing of the rights for European works. The AVMSd quota of 30% is an example of such a measure. All Member States intend to incorporate this measure into their national media legislation. Some of them will also specify a minimum level of domestic productions. For example, the Dutch Council for Culture advised its government to impose a minimum quota for Dutch films, series, documentaries and animation productions in the offer of on-demand platforms operating in the Netherlands or targeting the Dutch market.15

The second type of investment that can be made by on-demand audiovisual media services providers takes the form of a financial investment obligation, based on their number of subscriptions or their turnover. These investments can either be direct or indirect (via payment to a fund) and should contribute to the production of European works. Examples of this already exist in Brazil, Argentina, Colombia and several European countries.

In Europe, it was France that first introduced an investment obligation for on-demand media services providers. In part, this can be explained by France’s longer tradition of participatory financing, where the funding of the audiovisual CNC is based on a series of levies. The amount raised by the Video Tax - in force since 1992 - had been steadily decreasing between 2004 and 2014, falling from €38 million in 2004, to €32 million in 2011 and €28 million in 2014. This was mainly due to the fact that the rental of physical video had become marginal and the turnover of sales of physical videos/DVDs was also decreasing year after year. At the same time, the performance of the VOD Tax remained limited, because of legal loopholes that made it impossible to assess all the relevant players. While the SVOD market was already active in 2005, it only started booming in 2014. This coincided with the arrival of Netflix in France in September of that year, further supported by the significant promotional efforts made by some platforms, the deployment of fixed and mobile high and very fast broadband networks, and the rising rate of household terminal equipment. It was partly for these reasons that the government proposed to extend the tax to operators located abroad. In 2017, 65 SVOD services were active in France, which was three times more than in 2010. These actors are highly diverse in both nature and positioning. Nearly one in five is established abroad (including Netflix, Amazon Prime Video and SFR Play); 82% of the services have a specific positioning (youth, documentaries, concerts, etc.), as opposed to the generalist services offered by companies such as Canalplay or Netflix; almost half of the active services are dependent on a group with an activity in the publishing or the distribution of television. Since 2009, the levy in France has also included the sale and rental of online films. In 2014, a first text for the so-called ‘Netflix tax’ was drafted that would extend the Video and VOD Tax to companies targeting the French market but established outside of France. The end of 2016, this ‘Netflix Tax’ (or ‘YouTube Tax’) was finally formalised for the purpose of taxing the GAFA (Google, Apple, Facebook, Amazon). It proposed a 2% tax on advertising revenue or subscriptions for all video platforms reaching the French public, with the rate rising to 10% for pornographic platforms. New sites and film promotion sites, such as AlloCiné, were to be excluded from the scheme. The idea was that all proceeds from the tax would be paid to the CNC, up to a maximum of €70 million per annum. The draft legislation was adopted by the French Parliament but did not receive the support of the Valls Government, which rejected the idea as being too complex in exchange for minimal returns. 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. In the end, the obligation to invest did gain a legal basis, allowing it to be extended to OTT on-demand audiovisual services, such as Netflix, and video sharing platforms, such as YouTube (see the case study on France).

In the Netherlands, the Dutch Council for Culture has also advised its government to levy a tax on various forms of media exploitation (cinema recordings, on-demand services, advertisements). This

15 https://www.filmfonds.nl/page/5756/raad-voor-cultuur-sectoradvies-audiovisueel
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A levy would amount to between 2 and 5% of the income accruing 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.\(^\text{16} \ 17\)

In Canada, Netflix agreed with the government (after long discussions) to invest €340 million in original Canadian content.

Austria is also considering the introduction of a financial investment obligation. Talks with providers were foreseen for 2018.

In Denmark, the Minister of Culture, Mette Bock, had earlier made known that she was not in favour of imposing obligations on OTT players, such as Netflix and other overseas companies. She preferred an international approach to solve the problem of competitive disadvantage created by platforms like Netflix. However, when the European Parliament reached an agreement on the AVMSd, this paved the way for further moves by various parties and stakeholders who favoured incentives to levy a tax. The Social Democrats, among others, urged the Danish Government to prepare legislation. Other political parties, such as DF and SF, advocated a similar tax (and in some cases had been doing so since as long ago as 2014). In June 2018, the government concluded a media agreement covering the next five years, in which a streaming tax of 2% on annual turnover was included. Today, on-demand audiovisual services providers have the opportunity to meet their obligations in respect of 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, the 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 (EW). 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 promotion program can be achieved by VOD service providers in Denmark. It specifies how European works are defined and how players can comply with the obligation to invest in European productions.

It is important to note that by no means all Member States have a financial investment obligation in place; far from it, in fact.

The EU Member States that currently have an investment obligation in place for on-demand audiovisual media services are: France, Germany, Croatia, Slovenia, the Czech Republic, Belgium, Portugal, Italy and Spain. However, only France, Germany, Italy and (from 2019) Denmark and the Flemish Community of Belgium have developed obligations for non-domestic providers of on-demand audiovisual media services.

As a separate but related issue, there is also discussion about the possible extension to streaming services and international platforms (such as Airbnb, Spotify, Hulu, Uber, etc.) of other existing goods and services taxes that players normally have to pay when operating on a market. Our study does not focus on general tax obligations, only on those directly aimed at supporting the audiovisual industry.

\(^{16}\) Idem

\(^{17}\) Minister Van Onderwijs, Cultuur en Wetenschap (2018). Nieuwe visie cultuurbeleid (New vision of cultural policy). Available at: https://zoek.officielebekendmakingen.nl/kst-32820-221.html
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2.5 Revision of the AVMSd to legitimise and harmonise investment obligations

Given the various steps already taken in different countries, the EU institutions deemed it necessary to harmonise the various national practices, at least to some extent. The result was the revised AVMSd. Although unambiguous application is still lacking for all countries, the revision has nonetheless legitimised the existing instruments for investment obligations throughout the EU. Article 13 of the current AVMSd determines the following:\(^{18}\)

"**Member States shall ensure that on-demand audiovisual media services provided by media services providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programs offered by the on-demand audiovisual media service.**"

Article 13 of the new AVMSd consists of two paragraphs.

Article 13(1) states that Member States must ensure that the providers of on-demand audiovisual media services under their jurisdiction have **at least a 30% share of European works** in their catalogue and must give prominence to those works.

Article 13(2) stipulates that **Member States may require the providers of on-demand audiovisual media 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 on-demand audiovisual media services, who target audiences in their territories **but are established in other EU Member States,** 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. 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 on-demand services offered to end-consumers. Member States have to report on the transposition of both paragraphs 1 and 2 of Article 13 into their national legislation no later than three years after the adoption of the new AVMSd. Subsequent regular reporting is also foreseen.

2.6 Overview of practices in EU Member States

Practices in EU Member States are and will most likely continue to be **highly diverse.** Below, we provide an overview of the practices already in place\(^ {19}\) in the applicable legislation of the Member States with regard to the obligations of on-demand audiovisual media services providers to financially contribute towards the production of European works. This overview\(^ {20}\) contains the following elements per Member State:

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\(^{19}\) End of data collection: mid-December 2018.

\(^{20}\) The overview is based on input gathered from multiple sources. The main source is the AVMS Database published by the European Audiovisual Observatory, which is responsible to the Council of Europe in Strasbourg. The AVMS Database allows interactive searches across the national transpositions of the AVMSd 2010/13/EU in the 28 EU Member States. The
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- Is there an **obligation** to promote European works **in the VOD catalogues**?
- Is there a specific **quota** for European works **in the VOD catalogues**?
- Is there an **obligation** to promote European works **through financial investments, a tax or a levy** to be paid to a fund?
- Is this obligation **also applicable to foreign on-demand audiovisual media services providers**?

Based on table 1 below, we can group the applicable legislation of the Member States into four main groups. In-depth case studies have been carried out for the countries in groups 3 and 4:

1. Group 1. Countries that at the time of the study only have a **minimum of legislative obligations for on-demand audiovisual media services providers** with regard to the promotion of European works. These countries emphasise the importance of promoting European works, but this currently involves relatively few concrete obligations for on-demand audiovisual media services providers.

2. Group 2. Countries that have legislation that obliges on-demand audiovisual media services providers to promote European works. These obligations **relate mainly to quotas in catalogues**. No specific financial investment obligations are currently in place.

3. Group 3. Member States that have **investment obligations** in place for on-demand audiovisual media services providers, but **not for the foreign providers** of such services.

4. Group 4. Member States that have **investment obligations** in place for on-demand audiovisual media services providers, **including the foreign providers** of such services.

**Table 1.** Overview of obligations to promote European or local work for on-demand audiovisual media services providers in the applicable legislation of all the Member States, December 2018 (Source: authors)

<table>
<thead>
<tr>
<th>Member States and their applicable laws</th>
<th>Is there a legal obligation to promote and/or finance European works imposed on on-demand audiovisual players, but without concrete obligations?</th>
<th>Is there a specific quota for European works in VOD catalogues?</th>
<th>Is there an obligation for concrete financial investments and/or to pay a levy/tax?</th>
<th>Is this obligation also applicable to foreign on-demand audiovisual media service providers?</th>
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<tbody>
<tr>
<td>Austria</td>
<td>✓</td>
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<td>Belgium (French/bilingual)</td>
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<td>Belgium (Dutch/bilingual)</td>
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<td>Belgium (German)</td>
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gathered information was checked for accuracy and gaps were identified. Outdated information was updated through consultation of the Member States’ applicable laws (including decrees, media laws and other legal documents). The applicable laws were partially translated with the help of online tools. Other sources, including information provided by the European Platform of Regulatory Authorities, and different studies were consulted to fill gaps (a full list of all the sources on which Table 1 is based can be found in Annex 1).
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* = from 2019 onwards.

*** Luxembourg, Lithuania and Slovenia allow on-demand audiovisual media services providers to contribute an administrative sum to the functioning of the media regulator. Luxembourg and Lithuania are not included in this study, Slovenia is included because there is an investment obligation in addition to the administrative payment.
3. Case study analysis

3.1. Belgium (Flemish Community)

3.1.1 Basic provisions applicable to on-demand audiovisual media services providers

In Flanders two regulations apply to the contribution imposed on on-demand audiovisual media services:

1. The Incentive Scheme (Stimuleringsregeling) was added in 2014 through the decree amending 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), hereafter referred to as the Media Decree, and by the Implementation Decision (Uitvoeringsbesluit) of 21 March 2014;

2. The new regulation for non-linear broadcasting organisations that is currently being formulated and is captured by the new 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). The decision adds a new article to the existing Media Decree, as well as a new decision relating to its implementation.

Both regulations include obligations for on-demand audiovisual media services providers, but each case applies to a different type of player. The Incentive Scheme deals with on-demand audiovisual providers as ‘service distributors’, thereby covering on-demand audiovisual services that distribute television signals. The new regulation deals with on-demand audiovisual players as ‘non-linear broadcasters’.

The Incentive Scheme obliges service providers to contribute to the production of audiovisual works. This regulation is foreseen in Article 184/1 of the Media Decree.

- According to Article 184/1, §1, 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 the public broadcaster of the Flemish Community and/or the television broadcasting organisations recognised and/or registered in Flanders, and for which the Flemish Government and the VAF conclude a management agreement".

The new regulation covers the contributions of non-linear broadcasters (deelname van de particuliere niet-lineaire televisieomroeporganisaties aan de productie van Vlaamse audiovisuele werken).

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22 http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=14-04-03&numac=2014035376
23 Flemish Government. Implementation Decision (Besluit van de Vlaamse Regering betreffende de deelname van de particuliere niet-lineaire televisieomroeporganisaties aan de productie van Vlaamse audiovisuele werken), S.D.
24 At the time of writing, in December 2018, no official Decree was out, but a so-called ‘Ontwerp van Decreet’: Vlaamse Regering. All provisions described on the new measure for non-linear broadcasting organisations are currently provisional as no official decree or decision has been passed through parliament.
Although the contribution scheme for non-linear broadcasts builds on the existing 2014 Incentive Scheme, a separate regulation has nevertheless been added.

The new arrangement also applies to non-linear television broadcasters based in another Member State of the European Union that offer non-linear television services targeting the Flemish Community.

This new regulation was approved for the first time by the Government of Flanders on 26 October 2018, following which the Sector Council for Media (SARC) was consulted about the document.²⁶ The next step is a consultation on the document with the Council of State (Raad van State). During the writing phase of this report, the draft of the new obligation scheme was still with the Council of State. Their suggestions can lead to changes in the draft decision. Thereafter, the draft decision will be approved and submitted to the Flemish Parliament for ratification. Decree-based ratification will follow in the spring of 2019 with the aim of applying the decision in the course of 2019.

The legal basis for the new scheme consists of two parts:
- **An article** that is introduced to transpose Article 13 of the revised AVMSd. The provisions for this are laid down in a new Implementation Decision. From the information we have at this point, the decision will allow players to choose between a direct financial contribution to the (co-)production of Flemish audiovisual works, and an equivalent financial contribution to the Flemish Audiovisual Fund. The contribution is spent by the Flemish Audiovisual Fund on the co-production of quality independent Flemish series.
- The second instrument is the **deed that will ratify the new Implementation Decision**.

### 3.1.2. Motivation

The **Incentive Scheme**

According to the provisions set out by the Flemish Regulator for Media (VRM), the aim of the Incentive Scheme for service providers is to enable them to “contribute to the production of audiovisual works in order to make the media sector a strong economic sector, increase the sustainability of broadcasters in Flanders, increase the quality and diversity of Flemish program makers and audiovisual producers in times of crisis.”²⁷ The Incentive Scheme also explicitly focuses on the support of television series, either fiction series, documentary or animation series, as this genre was considered to be unsustainable without extra government support in the form of an investment obligation.

The motivation to give service providers a choice between co-production or contribution to the Flanders Audiovisual Fund (VAF) is linked to a legally imposed obligation. Initially, the legislators’ plan was for distributors to only contribute to audiovisual productions via the media fund in order to increase its budget, but later they settled on the possibility of choice. At the start of the scheme, Proximus, one of the two largest providers of digital television services in Belgium, opted for direct investment in co-productions. Telenet, the largest provider of digital television in Flanders, initially made a payment to the Flanders Audiovisual Fund, but since 2016 has also opted for direct investment in co-productions.²⁸

**Contribution scheme for non-linear broadcasters**

²⁶ The Sector Council for Media is an advisory body composed of media players, interest groups and independent experts, competent for advice on the implementation of the Media Decree.
This obligation came as a result of recent discussions about the necessity to involve over-the-top players that are not based on the Belgian territory, but target the Flemish audience, and are thereby in direct competition with legacy media that already invest in original domestic productions. Following the example of France and Germany, the Flemish Government developed a regulation that obliges foreign on-demand audiovisual media services to contribute to the production of Flemish original audiovisual works.

Prior to the new obligation, the Minister of Media and other media policy makers, such as the Media Committee in the Flemish Parliament, repeatedly signalled the need to sustain the fragile Flemish media ecosystem, supported by recommendations of a commissioned study. Actions that were subsequently considered useful were: the involvement of foreign players that target the Flemish market in the making of Flemish audiovisual productions; the creation of a level-playing field between players who already contribute (the distributors) to domestic production and players who operate in the Flemish market but are not already covered by the Incentive Scheme.

### 3.1.3. Scope of application

**The Incentive Scheme**

With regard to the Incentive Scheme, the regulator imposes obligations for service distributors. These are defined as players who: "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." This includes distribution players such as cable, telecom companies and over-the-top players who provide television broadcasting programs, or their own audiovisual on-demand 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.

**Contribution scheme for non-linear broadcasters**

The new article to be added to the Media Decree will cover the regulation for non-linear broadcasters. It is not known, at this point, how ‘non-linear broadcasting organisations’ will be defined. What is clear is: that the scheme excludes players that already fall under the Incentive Scheme; and that the provisions also apply to over-the-top players, such as Netflix.

### 3.1.4 Tariffs and/or amounts

**The Incentive Scheme**

Article 184/1, §3 of the Media Decree gives service providers the choice between:

- **A lump sum** that each service provider needs to dedicate to the production of audiovisual works, amounting to €3 million per year.

- **A contribution of €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.

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31 Art 184/1§1 of the Media Decree (Decreet tot wijziging van het decreet van 27 maart 2009 betreffende radio-omroep en televisie, houdende invoering van een stimuleringsregeling voor de audiovisuele sector).
Article 2 of the Implementation Decision for the Incentive Scheme states that before 15 February each service distributor must inform, by registered letter, the Flemish Audiovisual Fund, the Flemish Regulator for Media and the Flemish Government of the chosen form of participation (contribution to the VAF or direct investment) and the form of contribution (lump sum or contribution per subscriber). If no registered letter is received, the service provider is deemed to have opted for participation by means of a financial contribution to the VAF, calculated per subscriber.\(^\text{32}\)

**Contribution scheme for non-linear broadcasters**

According to communication from the Minister of Media, the new Implementation Decision will stipulate that non-linear broadcasters must contribute 2\% of their annual revenue, based on the previous year.\(^\text{33}\)

It is expected for the same obligations and procedures to apply to non-linear broadcasting organisations, as per requirements also laid out in the Incentive Scheme. This includes an obligation to inform the Flemish Regulator for Media, the VAF and the Flemish Government of the chosen method of support (direct investment or contribution to the VAF), payment of a lump sum contribution if the providers fail to do so, and the obligation to provide information on their revenue through documentation validated by a company auditor. For players who opt for a direct investment, similar provisions as the ones laid out for service distributors are most likely to also apply for non-linear broadcasters (cf. supra).

### 3.1.5 Definition of ‘revenues’

**The Incentive Scheme**

This obligation is determined on the basis of a lump sum or on the price paid per subscriber. The calculation and definition of 'revenues' is therefore not applicable here.

**Contribution scheme for non-linear broadcasters**

Based on available public information, the new scheme proposed, at the moment of writing this report, for players to contribute 2\% of revenues obtained in the previous year. The official definition of 'revenues' has not yet been agreed upon.

### 3.1.6 Calculation methods

The Article 3 of the Media Decree determines the method of calculation: "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."\(^\text{34}\)

The calculation is made based on the reporting of the "most recent data accepted by the Flemish Regulator for Media", as communicated in the implementation of Article 182 of the Media Decree.\(^\text{35}\)
No information on the calculation methods for the new contribution scheme for non-linear broadcasters was available, at the time of writing.

3.1.7 Exemptions or reductions

The new Implementation Decision will exempt 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 the support of Flanders audiovisual productions on the basis of their linear television activities or on the basis of their activities as service providers;
- Non-linear television broadcasters with annual revenues under a certain threshold.

3.1.8 Applicable procedures

The Incentive Scheme

Articles 4 to 16 establish the following procedures regarding the direct investment in audiovisual co-productions:

- The Flemish Regulator for Media assesses the admissibility and recognition of the co-production projects (Article 4);
- In order to be eligible, the co-production projects must (Article 6):
  - Be Flemish audiovisual creations, defined on the basis of "a Dutch original version, Dutch text, Dutch-language underlying work, the cultural connection with Flanders, the creative input from the Flemish cultural community and/or a subject that expresses Flemish culture";
  - Be registered with the Flemish Regulator for the Media by 15 February of each calendar year;
  - Involve service provider participation in at least 20% but less than 50% of the financing of the co-production of the audiovisual work;
  - Be developed together with at least one independent producer with a registered office in the Flemish Region or the Brussels-Capital Region, who is responsible for the role of delegated producer, and with a television broadcaster acknowledged or registered in the Flemish Community;
  - Be a television series in the form of an animation, documentary or fiction series;
  - Be for broadcasting exclusively on linear television and only by a television broadcaster.

Profit sharing from co-production is only possible for the participating service provider "after all other financiers have capitalised on their investment amount, increased by a market-based return that is calculated in this case at 10% per year."36

- The service provider may, however, renounce participation in the profit and instead opt to offer the co-production project after the first linear free-to-air broadcast, for a period of 12 months via its own platform, provided payment of an additional market-compliant financial contribution is made.
- The Flemish Regulator for Media (VRM) decides and informs on the admissibility of the co-production projects as follows (Article 7):
  - within fifteen calendar following receipt of the applications.

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36http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=14-04-03&numac=2014035376, Article 6, §6, c
- based on the recommendations of an assessment committee appointed by the Flemish Regulator for the Media,
- consisting of six members, nominated by the VAF,
- which gives non-binding recommendations no later than 15 March of each calendar year, duly taking account of all substantive and production aspects,
- which are then submitted to the Flemish Regulator for Media,
- who informs the service providers of its decision by 15 April of each calendar year at the latest,
- following which the service provider reports to the Flemish Regulator for Media on 15 February of each subsequent calendar year about the investments in ongoing co-production projects and co-production projects submitted and recognised in the previous year (Article 15),
- with all expenses related to the co-production projects to be made within three years after the notification by the Flemish Regulator for Media.37

Article 17 deals with the option for direct contribution to the Flemish Audiovisual Fund. The following rules apply:
- The lump sum contribution or contribution per subscriber must be deposited into an account registered to the VAF, no later than 30 April of each calendar year.
- The VAF publishes an overview of the service providers on its website every year;
- Independent producers who receive support from the VAF for a television series must contact all service providers contributing to VAF within 15 calendar days, notifying them of the possibility, subject to payment of an additional financial contribution, to acquire rights to productions that will be realised with financial support from the 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".38

Contribution scheme for non-linear broadcasters
At the moment of writing this report, information on the exact procedure was not yet available. However, it is expected that it follow the provisions laid out in the Incentive Scheme. Differences will most probably occur with regard to the fixed rates (calculated as % of revenues) that must be paid by non-linear broadcasters, and a requirement regarding the prominence of certain content in providers’ respective catalogues.

37http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=14-04-03&numac=2014035376, Article 7 up to and including 15
38http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=14-04-03&numac=2014035376, Article 17, §3.
3.2. Belgium (French Community)

3.2.1 Basic provisions applicable to on-demand audiovisual media services providers

The media legislation in the French Community of Belgium that deals with the investment obligation of television service publishers (éditeurs) and distributors (for example, cable or satellite distributors of television signals, often also providing pay on-demand services) in respect of the production of European audiovisual works is contained in the decree coordinated by the French Community for Audiovisual Media Services (26 March 2009), (Décret Coordonné sur les services de médias audiovisuels), hereafter referred to as the ‘AMS Decree’.39

This decree sets down that both publishers and distributors should contribute to the production of audiovisual works. They can do so through (co-)production, the pre-purchase of rights or by paying a contribution to the Centre for Cinema and Audiovisual Arts (Centre du Cinéma et de l’Audiovisuel), hereafter referred to as the ‘CCA’. The AMS Decree states:

1. Article 41 (for linear and non-linear publishers of television services):
   a. Article 41, §1: "The publisher40 of television services must contribute to the production of audiovisual works. This contribution can either be in the form of co-production or the pre-purchase of audiovisual works, or in the form of a payment to the CCA."
   b. Article 41, §3: "The amount of the contribution made by the publisher of television services referred to in §1 shall represent, at a minimum:
      - 0% of its turnover, if between 0 and 300,000 euros;
      - 1.4% of its turnover, if between 300,000 euros and 5 million euros;
      - 1.6% of its turnover, if between 5 and 10 million euros;
      - 1.8% of its turnover, if between 10 and 15 million euros;
      - 2% of its turnover, if between 15 and 20 million euros;
      - 2.2% of its turnover, if exceeding 20 million euros.
      The amounts referred to in the previous paragraph will be adjusted annually on the basis of the index 01.01.2004 = 100, in accordance with the evolution of the ordinary consumer price index, as defined by the law of 2 August 1971."

2. Article 80 (for service distributors, but not specifically on-demand audiovisual services providers):
   a. Article 80, §1: "The distributor42 of television services must contribute to the production of audiovisual works. This contribution can either be in the form of co-production or the pre-purchase of audiovisual works, or in the form of a payment to the CCA."
   b. Article 80, §3: "The annual contribution of the service distributor referred to in §1 is fixed at:
      - 2 euros per user for each user from the previous year. This amount is indexed every two years from 1 January 2005, on the basis of the health index, with the index of the previous September being used for comparison purposes;"

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40 Service broadcaster (Art. 1 °16): “the natural or legal person who assumes editorial responsibility for the choice of audiovisual media service content and determines the way in which it is organized.”
41 https://bestat.statbel.fgov.be/bestat/api/views/1e33c9bc-20f4-4699-adff-f800da946ed9/result/PDF
42 Service distributor (Art. 1 °15): “any legal entity that makes available to the public one or more audiovisual media services in any way whatsoever and particularly by terrestrial radio, satellite or through a cable television network. The offer of services may include services edited by the person himself and services published by third parties with whom it establishes contractual relations; is also considered as a distributor of services, any legal person who constitutes an offer of services by establishing contractual relations with other distributors.”
Obligations on audiovisual media services providers to contribute financially to the production of European works

- or 2.5% of the previous year’s revenues, excluding VAT and copyrights, generated by paying users for the services offered.”

On-demand audiovisual media services providers\textsuperscript{43} are not considered separately from other television services with regard to the obligatory contribution towards audiovisual production. Consequently, they are subject to the same obligation as the television service publishers (as set down in Article 41). The distribution revenues of on-demand audiovisual media services providers are therefore not subject to a separate tax or levy under Article 41, §1. Instead, their contribution towards the creation of European works is covered in full by Article 80, §1.

3.2.2 Motivation for imposing the investment obligation

To guarantee a healthy growth of the local audiovisual industry, the Wallonia-Brussels Federation, hereafter referred to as the ‘WBF’, has put in place a series of obligations to support the creation of European works, which it considers to be both culturally and economically important. These obligations cover all the regulated actors on WBF territory, including on-demand audiovisual media services providers.\textsuperscript{44} 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, the French television chains accumulated an average of 35% of audience market share, followed by the Luxembourg-based RTL-TVi (19.2%) and La Une (Belgium) (16.8%).\textsuperscript{45} 69% of the television advertising market is captured by the chains, in particular those from Luxembourg and France, which have been targeting the WBF’s territory without complying with the specific rules laid down by the WBF Parliament in relation to audiovisual matters. With regard to the regulation of services targeting WBF territory from the jurisdiction of another state, the AMS Decree has provided - in the case of TF1 (France) - for the possibility that the High Council for Audiovisual Arts (Conseil Supérieur de l’Audiovisuel), hereafter referred to as the ‘CSA’, can negotiate with the French State, or with the relevant authority of its regulatory framework, in order to enforce stricter compliance with the requirements in the WBF and to create the conditions for fair competition throughout WBF 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.\textsuperscript{46}

The CSA has repeatedly denounced over many years the instability in the WBF media landscape caused by this situation: not only the act of targeting itself but also the manner in which publishers active in Belgium bypass the stricter WBF rules, because their establishment and editorial responsibility are allegedly based abroad. The arrival of TF1 has further highlighted the potential dangers of these targeting activities.\textsuperscript{47} In its 2017 annual report, the CSA stated that its focus is now fixed 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 captation of associated advertising revenues, since these activities seem to be destabilizing local actors to a significant degree.\textsuperscript{48}

It should be noted that the official decree does not include a specific motivation relating to these cultural and economic contextual circumstances.

\textsuperscript{43} Non-linear service (Art. 1°): "An audiovisual media service whose programs are intended to be received at the request and at the moment chosen by the user, on the basis of catalogue of programs established by a publisher of audiovisual media services."

\textsuperscript{44} https://regulation.be/2017/10/23/se-recentrer-sur-le-local-une-solution-pour-le-secteur-audiovisuel/

\textsuperscript{45} https://www.statista.com/statistics/543973/market-share-tv-channels-french-speaking-belgium/

\textsuperscript{46} http://www.csa.be/system/documents_files/2829/original/CSA%20Rapport%20annuel%202017.pdf?1528878822

\textsuperscript{47} http://www.csa.be/system/documents_files/2829/original/CSA%20Rapport%20annuel%202017.pdf?1528878822

\textsuperscript{48} http://www.csa.be/system/documents_files/2829/original/CSA%20Rapport%20annuel%202017.pdf?1528878822
3.2.3 Scope of application

The scope of application for the investment obligation for the publishers of television services (Article 41, §1) pertains to all linear and non-linear services within the competence of the French Community of Belgium. The definitions of the AVMSd are applicable and have been transposed into the legislation of the French Community. Importantly, the definition for 'television services' also includes exclusive on-demand audiovisual media services providers. That means that services such as UniversCiné, Plush and DVDPost are also subject to the regulations. However, in 2017 these three different services did not have to pay a contribution, since they did not generate a turnover of at least €387,570 (see 'Tariffs and/or amounts').

In 2017, RTBF, BeTV, Proximus, Brutélé, BTV (AB), SiA and TECTEO/Nethys made contributions in the form of co-production and pre-purchase agreements, whereas AlIESH/CODITE, BBT (CanalZ), Telenet and Orange made a direct contribution to the CSA. The total amount invested by these services and distributors in 2017 was €8.7million. None of these services are exclusively on-demand audiovisual media services providers.

3.2.4 Tariffs and/or amounts

The amount of the contribution payable by the publishers of television services is mentioned in Article 41, §3. There is a differentiation based on the size of the turnover on which the contribution is calculated. The tariff has a minimum of 0% when the threshold of €300,000 (plus application of the index 01.01.2004 = 100) is not reached and a maximum of 2.2% when the turnover exceeds €20 million. Article 41, §3 reads as follows:

"The amount of the contribution of the publisher of television services referred to in §1 shall represent, at a minimum (Art. 41, §3):
- 0% of its turnover, if between 0 and 300,000 euros;
- 1.4% of its turnover, if between 300,000 euros and 5 million euros;
- 1.6% of its turnover, if between 5 and 10 million euros;
- 1.8% of its turnover, if between 10 and 15 million euros;
- 2% of its turnover, if between 15 and 20 million euros;
- 2.2% of its turnover, if exceeding 20 million euros.

The amounts may be adjusted annually on the basis of the index 01.01.2004 = 100, in accordance with the evolution of the ordinary consumer price index, as defined by the law of 2 August 1971."

The amount of the contribution payable by service distributors is detailed in Article 80, §3. The distributor can choose whether to contribute €2 for each user from the previous year or 2.5% of their total revenue for the previous year. Article 80, §3 reads:

"The annual contribution of the service distributor referred to in §1 is fixed at:

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49 Under the jurisdiction of the French Community, any publisher of services: (1) who is established in the French-language Region; or (2) who is established in a Brussels-Capital bilingual region and whose activities must be attached exclusively to the French Community. (Article 2§3)
50 https://www.fr.universcine.be/
51 http://www.plush.be/nl/informatie/video-on-demand (website unavailable due to cessation of activities, 2018)
52 http://www.dvdpost.com/dvdpostmap.php (website unavailable due to cessation of activities, 2018)
53 The minimum turnover in December 2017 amounted to €387,570 as result of indexation.
54 http://www.audiovisuel.cfwb.be/index.php?eID=t_x_nawsecured&u=0&g=0&hash=8e76ee16e77c22e9137545c08685dd607078a5a98$file=fileadmin/sites/avm/upload/avm_super_editor/avm_editor/Publications/Telechangement_pdf/Bilan_CCA/Bilan_2017.pdf
Obligations on audiovisual media services providers to contribute financially to the production of European works

- 2 euros per user for each user from the previous year. This amount is indexed every two years from 1 January 2005 onwards, on the basis of the health index, with the index for the previous September being used for comparison purposes;
- 2.5% of the previous year's revenues, excluding VAT and copyrights, generated by paying users for the services offered.

To determine its level of contribution, the service distributor must select annually one of the two methods of calculation referred to in the preceding paragraph and inform the CCA and the CSA accordingly, no later than 15 February each year."

3.2.5 Definition of 'turnover'

The AMS Decree defines the turnover on which the tariffs and percentages for the investment obligations of television publishers (including on-demand audiovisual media services providers) are based.

The turnover on which the amount of the investment obligation is calculated is specific. It is the 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 program content of these services). Article 41, §4 states:

"Turnover is defined as the amount of gross revenue invoiced by the authority responsible for the service publisher, without the deduction of commissions and discounts, or, failing that, invoiced by the service publisher itself, for the insertion of advertising and sponsorship in the service publisher's television broadcasts and all other gross receipts, without any deduction, generated by the provision of television services by the publisher 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 publisher carries out the activity of service distributor himself, as referred to in Article 77, 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 publisher's activity as a service distributor."

3.2.6 Calculation methods

The contribution of television service publishers is determined as a percentage of their turnover and is adjusted annually on the basis of the index 01.01.2004 = 100, in accordance with the evolution of the ordinary consumer price index, as defined by the law of 2 August 1971 (Article 41, §3).

The contribution of distributors is determined by the number of subscribers in the previous year or a percentage of their turnover during the previous year. The definition of the turnover to which the percentages and the rates for the investment obligation are applied for distributors (excluding on-demand audiovisual media services providers) is described in Article 80, §3:

1. If the distributor opts to make a contribution per user, the amount of the investment is equivalent to the number of users from the previous year multiplied by €2.
2. If the distributor opts to make a contribution based on 2.5% of its previous year's turnover, this 2.5% is calculated on all turnover generated by users paying for the services offered, excluding VAT and copyrights.
3.2.7 Exemptions or reductions

**Television service publishers** (including on-demand audiovisual media services providers) with a turnover below €300,000 (plus the application of the index 01.01.2004 = 100) are not subject to an investment obligation (Article 41, §3).

**Service distributors** (excluding on-demand audiovisual media services providers) are not subject to the investment obligation, if they satisfy the requirements defined in Article 80, §4:

1. Publishers of television services who also operate as distributors and have declared their activities or are authorised under the terms of the AMS Decree. When the television provider offers services originating from third parties, no contribution will be due if the result of applying the rates in Article 41, §3 to the annual revenues generated by the users of the external platform is greater than the result of applying the fixed €2 per subscriber rate in accordance with Article 81, §3. However, this is only valid if the third party has chosen to make a contribution per subscriber.

2. Distributors who also offer a complementary television service, while already being subject to the terms of Article 80, §1, for which they opt for the base of users that are subject to Article 82 (for cable distributors). Again, this exemption is only valid for those distributors that have chosen to contribute per user.

As Article 80, §4 reads:

"By way of derogation, is not subject to the payment of the contribution referred to in [Article 80,]§1:

1. The service publisher who also carries out the activity of a distributor in order to offer television services for which he is declared or authorized under the terms of this decree; this exemption shall be for these services only. However, if the publisher also offers third-party services and if a user makes use of both the services he publishes independently and the said third-party services, the publisher must not pay a contribution in respect of this user when the result of the percentage applied to the annual revenue generated by that user pursuant to Article 41 is greater than the fixed rate of 2 euros per user envisaged in sub-paragraph 1° of paragraph §3 of this article; this derogation is only valid on condition that the publisher has opted for the fixed contribution per user referred to in the said sub-paragraph 1° of paragraph §3 of this article.

2. The service distributor who also offers a complementary television service, while already making a contribution towards the production of audiovisual works referred to in §1 on the basis of the number of users of the distributor's basic offer, as envisaged in Article 82; this exemption is only applicable for users who have used both the basic offer and the complementary offer during the year and on condition that the distributor has opted for the fixed contribution per user as referred to in sub-paragraph 1° of paragraph §3 of this article."

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55 Once the service distributes services other than its own services, it is considered to be a distributor (personal communication with the CSA on 23 July 2018).

56 Article 82: "§1. As long as a significant number of people use their networks as a means of reception of audiovisual media services, the network operators referred to in Article 97 guarantee the distribution on their networks of a basic offer, including the services subject to compulsory distribution referred to in Article 83. The basic offer is provided by a service distributor. Otherwise, the network operators are required to exercise the activity of distributor by providing the basic offer. §2. Any distributor of services may not propose a complementary offer of media services only to those users who have access to the basic offer."
3.2.8 Applicable procedures

The AMS Decree gives television service publishers (including on-demand audiovisual media services providers) the choice to either contribute to the budget of the CCA or to invest in films, documentaries, TV series, etc. through the acquisition of rights and/or co-production shares.

Before 15 February of each contribution year, the publisher (including on-demand audiovisual media services providers) 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 of television service publishers.

Article 41, §1 states:

"Before 15 February of each year of contribution, the service publisher 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."

Similarly, the service distributors must also inform the CCA and the CSA before 15 February of each contribution year about the choice they have made. The AMS Decree also describes the method of payment for the service distributor, with the payment being made at two six-monthly intervals in February and August each year.

Article 80, §1 states:

"The amount of the contribution to the CCA is paid by the service distributor in two half-annual instalments by the end of February and the end of August each year. At the time of payment, the service provider must send to the CCA and CSA:

- Either a statement showing the number of users from the previous year, if he opts for the fixed contribution per user referred to in Article 80, §3(1) (...);
- Or a declaration showing the previous year’s revenue, excluding VAT and copyrights, generated by the payment of users for obtaining the service offered, if he opts for the contribution by percentage referred to in Article 80, §3(2)."

There are no specific procedures in the event of conflicts with the domestic and foreign providers of audiovisual media services. A dispute currently exists between the CSA and RTL about whether or not RTL should pay such a contribution, since it is established in Luxembourg.57 The new AVMSd might thus actually provide a solution to this dispute.

### 3.3 Croatia

#### 3.3.1 Basic provisions for on-demand audiovisual media services

Amendments to the Electronic Media Act (Zakon o elektroničkim medijima)\(^58\) dating from 2009 impose the following relevant obligations on on-demand audiovisual media services providers in Article 21, §1(2):

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)."

As explained in the Ordinance on the Criteria and Manner of Increasing the Share of European Works,\(^59\) the program catalogue of an on-demand audiovisual media services provider must contain at least 20% of European works. As a second option, providers can make a financial contribution to help increase the share of European works.

In addition to the obligation to either promote or contribute towards the production of European works, the on-demand audiovisual media services providers in Croatia **have to make a financial contribution** to the Croatian Audiovisual Centre,\(^60\) hereafter referred to as the 'HAVC'. This obligation was introduced through the amendment of the Law on Audiovisual Activities in 2011.\(^61\)

According to Article 25 of the current Law on Audiovisual Activities (effective from 19.07.2018) (Zakon o audiovizualnim djelatnostima),\(^62\) on-demand audiovisual media services providers are required henceforth to transfer **2% of their annual gross income** from on-demand audiovisual media services to the **HAVC**. According to the same article, the sum collected from on-demand audiovisual media services providers is intended for the realisation of the National Program for the Promotion of Creative Audiovisual Works (2017-2021).\(^63\)

#### 3.3.2 Motivation for imposing the investment obligation

The National Program for the Promotion of Creative Audiovisual Works (2017-2021) contains a strategic map that illustrates the motives for imposing investment obligations on on-demand audiovisual media services providers. The program states that:

"The distribution and funding of European film is a challenging and complex task, which is why it is important that public policy-makers implement existing European and legal frameworks in a way that will contribute to the expansion of the principle of cultural diversity and not undermine it".

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\(^{59}\) https://www.e-mediji.hr/repository_files/file/683/

\(^{60}\) https://www.havc.hr/eng/


\(^{62}\) https://www.zakon.hr/z/489/Zakon-o-audiovizualnim-djelatnostima

On-demand audiovisual media services providers, specifically those who offer their service online, often move outside the traditional audiovisual value chain. Valorisation of these services does not always benefit the authors and other creative parties. According to the National Program for the Promotion of Creative Audiovisual Works (2017-2021), digital players should only be supported in so far as they also work towards building a sustainable European audiovisual market.

In the preamble to the Law on Audiovisual Activities (2011), when the obligation for on-demand audiovisual media services providers to make a financial contribution to the HAVC was first introduced, a certain degree of explanation for the legislative changes was put forward. However, these explanations refer to various audiovisual media providers, and not just to on-demand audiovisual media services providers. Namely, it was explained that there was a need to:

"Introduce direct obligations to transfer funds to the HAVC and, consequently, to define precisely the sum that Croatian radio-television, regional and national television providers, operators of public communication networks and others have to pay. This is necessitated by the fact that the liable entities have denied signing mandatory agreements to pay the HAVC under the pretext that the previous law did not precisely define the audiovisual activities in relation to the individual entities and their contribution to the HAVC."

Furthermore, the amended Law on Audiovisual Activities (2018) sets out the following broader goals: the promotion of Croatian audiovisual production and distribution, the promotion of broadcasting and complementary activities, the protection and study of the audiovisual heritage, the presentation of Croatian audiovisual works abroad, the encouragement of the development of audiovisual activities, the promotion of audiovisual creativity at both the national and international level, the preservation of the value of national cinematography, the creation of conditions for co-production, the preservation of the Croatian language and Croatian cultural identity within the European and world contexts.

3.3.3 Scope of application

Article 2, §1,°12 of the Electronic Media Act (2009) offers the following definition for on-demand audiovisual media services providers:

"On-demand audiovisual media service (i.e. a non-linear audiovisual media service): an audiovisual media service provided by a media service provider for the viewing of programs at the moment chosen by the user and at his individual request on the basis of a catalogue of programs selected by the media service provider."

In other words, it transposes the definition in the AVMSd.

3.3.5 Definition of 'revenues'

Contributions are calculated on the basis of the provider's annual gross income derived from on-demand audiovisual media services, as reported to the HAVC (Article 25 of the Law on Audiovisual Activities, 2018).

3.3.6 Tariffs and/or amounts

2% of annual gross income must be transferred to the HAVC (Article 25 of the Law on Audiovisual Activities, 2018).
3.3.7 Calculation methods

The HAVC makes the calculation on the basis of the annual gross income from on-demand audiovisual media services, as reported by the providers. If providers do not provide information relating to their income, the Law on Audiovisual Activities (2018) 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.

3.3.8 Exemptions or reductions

There are no exemptions listed.

3.3.9 Applicable procedures

On-demand audiovisual media services providers are obliged to report information relating to their obligatory promotion of European works to the Electronic Media Council, which is responsible for ensuring the implementation of the investment obligation. Reports in respect of the previous year must be submitted by 31 March. The Council can check whether this information is accurate and can ask for additional information.

Articles 82 and 83 of the Electronic Media Act (2009) describe the penal provisions for electronic media services. A fine ranging from HRK 100,000 (± €13,500) to HRK 1,000,000 (± €135,000) can be imposed in cases involving a breach of the obligations relating to on-demand audiovisual media services providers and the promotion of European works. A fine ranging from HRK 10,000 (± €1,350) to HRK 100,000 (± €13,500) can be imposed on on-demand audiovisual media services providers who fail to provide the HAVC with information about their annual gross income or who fail to allow an authorised auditor access to their financial documentation. An additional fine ranging from HRK 3,000 (± €405) to HRK 100,000 (± €13,500) can be imposed if the same breach is committed by a natural person in charge of a legal entity. The law also foresees the possibility to restrict entities from performing audiovisual activities in cases of severe or repeated breaches of the obligation to pay an annual contribution.

64 https://www.fina.hr/Default.aspx?sec=1134
3.4 Czech Republic

3.4.1 Basic provisions for investment obligations for on-demand services

The transposition of the AVMSd in the Czech Republic was implemented through the introduction of moderate quota requirements and investment obligations for on-demand audiovisual media services providers in the On-demand Audiovisual Media Services Act (Act No. 132/2010 of 13 April 2010).66

According to Section 7(1-2) (Law No. 132/2010), the on-demand audiovisual media services providers can choose between reserving at least 10% of the total number of programs offered in its service catalogue or to 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 acquisition of rights to use European works through the on-demand audiovisual media services provider.

On-demand audiovisual media services providers also have to pay a fee in accordance with Section 27 of Act No. 496/201267 concerning Audiovisual Works and Support for Cinematography. The fee must be transferred to the Czech Film Fund, the central institution that provides support for filmmaking in the Czech Republic.

The revenue from the fee was expected to become part of the Film Fund’s budget in 2017.68 However, so far the institution has not yet received contributions from on-demand audiovisual media services providers.

3.4.2 Motivation for imposing the investment obligation

The primary objective for introducing a fee for on-demand services was to find new sources for generating revenue to support domestic film production. According to the Czech Ministry of Culture, the Film Fund’s revenue from licensing was stagnating because of "poor quality of media" and "declining interest in Czech films".

3.4.3 Scope of application

Article 2(1) of Act No. 132/201069 relating to On-demand Audiovisual Media Services defines an on-demand audiovisual media services provider as follows:

"On-demand audiovisual media service means an information society service, which is under the editorial responsibility of an on-demand audiovisual media services provider and the principal objective of which is the provision of programs to the public in order to inform, entertain or educate, which allows for the viewing of programs at the moment chosen by the user and at his individual request on the basis of a catalogue of programs established by the on-demand audiovisual media services provider."

69 https://www.zakonyprolidi.cz/cs/2010-132?text=%C3%A1kon+o+audiovizu%C3%A1ln%C3%ADch+medic%C3%A1ln%C3%ADch+slu%C5%BEb%C3%A1ch+na+v%C5%BE%C3%A1d%C3%A1n%C3%AD
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Article 2(2) of Act No. 132/2010 further clarifies what does not qualify as an on-demand services provider:

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."

According to Article 3 of the same act, these provisions apply to on-demand audiovisual media services providers established in the Czech Republic.

3.4.4 Definition of revenues

Section 27(2) of Act No. 496/2012 describes the base for calculating the fee payable for the provision of on-demand audiovisual media service. The fee is based on the price paid by the end user to the on-demand audiovisual media services provider. The fee is calculated as the product of the audiovisual charge base and the charge rate.

3.4.5 Tariffs and/or amounts

Section 27 (4) of Act No. 496/2012 describes how the fee for on-demand audiovisual media services is calculated. The rate for on-demand audiovisual media services providers is 0.5% of the price paid by the end user. The fee is included in the price which users pay for on-demand-audiovisual media services, as described in the next section.

3.4.6 Calculation methods

Section 27(2-6) of Act No. 496/2012 concerning Audiovisual Works and Support for Cinematography details the calculation methodology for the 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%.
- The fee period shall be the calendar year.
- The payer of the fee for the provision of on-demand audiovisual media service shall maintain files for purposes related to the fee. These files shall comprise any data concerning the obligation to pay the fee, including, but not limited to, the information about the number of
persons to whom the on-demand audiovisual media service is provided and the amount of the price they have paid for the provision of the on-demand audiovisual media service."

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 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."

3.4.7 Exemptions or reductions

There are no exemptions or reductions listed.

3.4.8 Applicable procedures in general

According to Act No. 132/2010 concerning On-demand Audiovisual Media Services, the Council for Radio and Television Broadcasting\(^70\) keeps a register of on-demand audiovisual media services providers, monitors the content of on-demand audiovisual media services providers, and also imposes penalties in the event of violation of the act (Section 12 and 13 of Act No. 132/2010).\(^71\) The amount of the fine depends on the article that is violated.

Legislators have included provisions relating to administrative offences: the Council is given the responsibility to decide on the amount of the fine in the event of an administrative offence.

Section 13 (Act No. 132/2010) foresees the following:

- "In determining the amount of a fine to be imposed on a legal person, the Council shall take into account the seriousness of the administrative offence, including, but not limited to, the manner in which it was committed, its consequences and the circumstances under which it was committed, and the opinion of the self-regulatory body with physical jurisdiction in the case as referred to in the register of collaborating self-regulatory bodies, if this opinion is received in writing within 10 working days from the date of initiation of the administrative offence proceedings.
- A legal person shall not be held liable for an administrative offence if the administrative body fails to initiate proceedings within one year of the date on which it learned of the administrative offence, but no later than three years from the date on which the administrative offence was committed.
- The provisions of the legislation regulating the liability and penalisation of legal persons shall also apply to the conduct of natural persons pursuing business activities or their conduct directly related to such activities.

\(^70\) [https://www.rrtv.cz/en/](https://www.rrtv.cz/en/)
\(^71\) Article 12: the amount of the fine is either CZK 1,000,000 or CZK 2,000,000 (respectively: +/- €38,800 or €77,690).
- The filing of a complaint against a decision to impose a fine shall have suspensive effect.
- Failing to comply with the quota obligation is also considered an administrative offence."

Section 14 (Act No. 132/2010) underpins the procedure in the event of illegal conduct committed by an on-demand audiovisual media services provider in the EU or in another state in the European Economic Area:

"The Council, upon discovering illegal conduct under directly applicable legislation of the European Union which has been committed by an on-demand audiovisual media services provider in the territory of the European Union or in another State in the European Economic Area and which harms or could harm the collective interests of consumers, shall issue a decision prohibiting such conduct."
3.5 France

3.5.1 Basic provisions for on-demand audiovisual media services providers

France has a longstanding tradition of different forms of financial contribution for the various players in the value chain for the financing of the Centre National du Cinéma (hereafter referred to as 'CNC'). This explains why the direct investment obligations and the tax levy for on-demand players were introduced here earlier than in other EU Member States.

The financing of the CNC is based on three taxes:

1. The TV Publishers and Distributors Tax (Taxe sur les éditeurs et distributeurs de services de télévision),\(^{72}\) 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 organisées par les operators d'établissements de spectacles cinématographiques),\(^{73}\) which focuses on the price paid by spectators for access to the screenings of cinematographic works;
3. The Video and VOD Tax (Taxe sur la diffusion en vidéo physique et en ligne de contenus audiovisuels or the Taxe Vidéo eVoD)\(^{74}\) (cf. infra), which focuses on the income from the physical and online transactions of audiovisual and cinematographic content.

In 2017, the CNC had a total budget of €799.3 million, out of which €638.3 million (80%) came from the amount that was collected from the three different taxes.\(^{75}\)

Media law in France concerning the investment obligation of on-demand audiovisual media services providers, with regard to the production of European audiovisual and cinematographic works, is described in two legal frameworks:

- The 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)),\(^{76}\) provides the general description of the direct investment obligation for on-demand audiovisual media services providers (Articles 27 and 33 of the same law): "on-demand audiovisual media services providers should financially contribute to the production of audiovisual and cinematographic European works."
- Decree No. 2010-1379 of 12 November 2010, (Décret No. 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande),\(^{77}\) elaborates on the application of Articles 27 and 33 of the General Law on the Freedom of Communication. In particular, Decree No. 2010-1379 describes the provisions for the direct investment obligation for catch-up services, TVOD and SVOD services. It stipulates the percentages for the direct investment contribution for on-demand audiovisual media services providers (Articles 27 and 33 of the same law):

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\(^{72}\)https://www.legifrance.gouv.fr/affichCode.do;jsessionid=8AF1CE0F8A0534182673606CD60880C4.tplgfr32s_2?idSectionTA=LEGISCTA000036364823&cidTexte=LEGITEXT000020908868&dateTexte=20180809

\(^{73}\)https://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI0000034592334&IdSectionTA=LEGISCTA000006069577&cidTexte=LEGITEXT000006069577&dateTexte=20180712

\(^{74}\)https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGIARTI0000036364807&idArticle=LEGIARTI0000036364807&cidTexte=LEGITEXT000006069577&dateTexte=20180712

\(^{75}\)The TV Publishers and Distributors Tax: € 510.5 million (64%); the Tax on the Cinema Access: € 148.3 million (19%); the Video and VOD Tax: € 16.2 million (2%), of which it is estimated that € 2.4 million will be paid by Netflix.


\(^{76}\)https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023038244&dateTexte=20170502
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- SVOD and TVOD must contribute between 15% and 26% of their annual turnover of the previous year to European audiovisual and cinematographic productions;
- Catch-up services must contribute to cinematographic works at the same rate (3.2%) as the television services (Decree No. 2010-747), but only if their income is not included in the resources of the television service from which they originate. The contribution of catch-up services to audiovisual works is already captured in the contribution of the television service from which they originate under the terms of Decree No. 2010-747.

The regulation relating to the Video and VOD Tax (Article 1609 sexdecies B in the General Tax Code of France) describes the tax for services that sell and rent physical and online audiovisual and cinematographic content in France. On 21 September 2017 (Decree No. 2017-1364), an extension (Article 56, Law No. 2016-1918) to the Video and VOD Tax came into force to ensure that foreign companies such as Netflix and YouTube were also captured by the tax when the transactions concern cinematographic or audiovisual works or documents of a pornographic nature or incitement to violence.

3.5.2 Motivation for imposing the investment obligation

Investment in European works has always been a high priority on the French policy agenda. Already in 1989, with the adoption of the TWFd, the French insisted on quotas for European works and independent productions. Similarly, with the revision of the AVMSd (2007) France advocated forcefully for keeping the quotas in place. France even set a higher quota of 60% of broadcasting time for European works on linear services, of which 40% must be French content (Article 27, Law No. 86-1067).

In 2001, four decrees were adopted in order to reinforce the obligations for service publishers to contribute to the production of audiovisual and cinematographic works, as defined in the law of 30 September 1986. In August 2007, the Minister of Culture (Christine Albanel) was asked to send a letter of mission to "(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." This consultation led to negotiations with service publishers and organisations (representing audiovisual creation), which resulted in the amendment of the decrees to take account of the inclusion of applicable rates and the calculation of the contribution base and expenditure. These amendments were ratified between October 2008 and February 2010, resulting in the current legal situation, which also includes the decree for the contribution to audiovisual and cinematographic production by on-demand audiovisual media services providers (ratified in November 2010).

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78 https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT0000022423813&categorieLien=cid
80 https://www.legifrance.gouv.fr/eli/loi/2016/12/29/ECFX1629304L/jo
This motivation also coincided with arguments relating to the **countering of tax avoidance**. The motivation for imposing a direct investment obligation on on-demand audiovisual media services providers to create a level-playing field was repeatedly reflected in the motivations of the CSA to include non-domestic on-demand players. The CSA expressed its wish that the regime for on-demand audiovisual media services providers be comparable to that of linear services. The CSA was in favour of an increase in the share of European works in the catalogue of on-demand audiovisual media services providers over and above the initial proposal of the European Commission and also pleaded for the application of a contribution obligation from on-demand audiovisual media services providers, as well as an extension of the field of application for the directive's contribution obligation to cover video and social media platforms, which at this time still did not have editorial responsibility for the audiovisual services offered and, consequently, escaped the application of the AVMSd rules.

Today, the scope of the **Video and VOD Tax (2017)** has been extended to include all (free and paid, foreign and French) on-demand audiovisual media services providers (including video sharing platforms) that target French audiences. The CNC is expected to receive €2.4 million from Netflix and €3 million from YouTube in 2018, allowing the CNC to subsidise French original content (films, TV series, video games and digital programs).

### 3.5.3 Scope of application

On-demand audiovisual media services providers captured by the direct investment obligation should have an annual net turnover of over €10 million and offer at least 10 cinematographic or audiovisual works annually (Article 1 of Decree No. 2010-1379) and be established in France (Article 43-2 and 43-3 of Law No. 86-1067). Companies offering mainly works of pornography or violent content are excluded from this rule, as are those services that offer less than 10 cinematographic or audiovisual works per year.

The Video and VOD Tax is payable for (1) operations involving the selling and renting of videograms (physical and online) intended for the private use of the public in France; (2) services providing paid access to cinematographic or audiovisual works upon individual request through electronic communication networks, and (3) services providing free access to audiovisual content upon individual request through electronic communication networks. These networks and services, whether established in France or outside France (§2 of Article 1609 sexdecies B), have to contribute to the production of European works through payment of a tax (§1 of Article 1609 sexdecies B).

This scope of the Video and VOD Tax therefore **goes beyond the definition of an on-demand audiovisual media services provider as given in the AVMSd**. It ensures specifically that the first and third category of companies will be assessed under European State Aid law instead of under the AVMSd. Services such as YouTube are thereby captured under category 3, since they offer mainly free services to end users.

### 3.5.4 Definition of 'revenues'

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83 https://www.tax-news.com/features/The_Rise_Of_The_Netflix_Tax__574278.html
The **direct investment obligation** is calculated based on 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).

The **Video and VOD Tax** is calculated based on 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 (§3 of Article 1609 sexdecies B).

### 3.5.5 Tariffs and/or amounts

The French have a fairly complicated system in place for calculating the amounts for the **direct investment obligation**, whereby the actual financial contribution varies depending on **(1) the type of service on offer, (2) the size of VOD offers, or (3) the window(s) on offer after theatrical release.**

For **catch-up services**:  
1. **Contribution to cinematographic works.** Catch-up services are subject to an obligation to contribute to the production of European cinematographic works to the same extent as the television service from which they originate. If their income is included in the television service from which they originate, these services are not subject to the investment obligation (Article 3 of Decree No. 2010-1379). The rates for the investment obligation for television services are described in Article 3 of Decree No. 2010-747:
   - Television services offering more than 52 long-run cinematographic works in the catalogue on an annual basis must devote each year at least 3.2% of their net turnover from the previous year to cinematographic European works. At least 2.5% of their net turnover from the previous year must be spent on films of French original expression. The expenditure so devoted by the service publishers must be directly spent on the development of cinematographic works in the form of purchasing (exclusive) rights, investment in producer’s shares or payment to a participating fund.\(^{87}\)

2. **Contribution to audiovisual works.** Revenues from these services are included in the contribution base of the television services from which they originate (Article 8 of Decree No. 2010-747).

For **SVOD services**:  
The contribution to be paid by these services depends largely on when cinematographic and audiovisual works are made available (Article 4 of Decree No. 2010-1379):

1. If the services propose at least 10 cinematographic works with a window of less than 22 months after their theatrical release in France, they must invest 26% of their net turnover of the previous year in the development of European cinematographic and audiovisual works. At least 22% of their net turnover of the previous year must be spent on films of French original expression.

2. If the services propose at least 10 long-term cinematographic works with a window of more than or equal to 22 months and less than 36 months after their theatrical release in France, they must invest 21% of their net turnover of the previous year in the development of European cinematographic and audiovisual works. At least 17% of their net turnover of the previous year must be spent on films of French original expression.

3. If the services propose at least 10 long-term cinematographic works with a window of more than 36 months after their theatrical release in France, they must invest 15% of their net turnover of the previous year in the development of European cinematographic and audiovisual works.

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\(^{87}\) So if a service spends €3.2 on European works, €2.5 should go to French works.
audiovisual works. At least 12% of their net turnover of the previous year must be spent on films of French original expression.

In addition to these provisions, a further division is also made in terms of the amount of money flowing to the production of cinematographic or audiovisual works. This division is made in proportion to the shares represented by cinematographic and audiovisual works in the downloading or total viewing of consumers in the previous financial year.

For TVOD services (Article 5 of Decree No. 2010-1379):
These services must devote at least 15% of their net turnover of the previous year resulting from their exploitation of cinematographic works in the previous year to European cinematographic works. At least 12% of their net turnover of the previous year must be spent on films of French original expression. The same percentages apply for the exploitation of audiovisual works (except for pornographic and violent works).

The rate of the Video and VOD Tax (which is applicable to companies established in France, as well as to foreign services) "is set at 2% and raised to 10% when the transactions concern cinematographic or audiovisual works or documents of a pornographic nature or incitement to violence. The conditions under which the taxpayers identify of these works and documents are fixed by decree."

3.5.6 Calculation methods

The base for calculating the direct investment obligation is the net annual turnover, with the exclusion of the value-added tax and the Video and VOD Tax, resulting from the exploitation of cinematographic and/or audiovisual works in the previous year (Article 2 and 3 of Decree No. 2010-1379).

The base for the calculating of the Video and VOD Tax is the net annual turnover with the exclusion of the value-added tax, collected from:

1. In the case of selling and renting physical and online videograms in France intended for the private use of the public: the price paid in exchange for the sale and leasing of transactions (§3, 1° of Article 1609 sexdecies B).
2. In the case of services that give paid access upon individual request formulated by an electronic communication method: the price paid in exchange for access to cinematographic and audiovisual works (§3, 2° of Article 1609 sexdecies B).
3. In the case of services that give free access upon individual request formulated by an electronic communication method: the sums paid by the advertisers and the sponsors for broadcasting their advertisements and sponsorship messages on services broadcasting online audiovisual content. 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 €100,000 on the tax base (§5 of Article 1609 sexdecies B).

Not included in the calculation of the Video and VOD Tax (§4 Article 1609 sexdecies B) are amounts paid by advertisers and sponsors for the dissemination of their advertising and sponsorship messages on catch-up television services. These sums are already subject to another tax; namely, the TV Publishers and Distributors Tax.88

88https://www.legifrance.gouv.fr/affichCode.do;jsessionid=8AF1CE0F8A0534182673606CD60880C4.tplgfr32s_2?idSectionT A=LEGISCTA000036364823&cidTexte=LEGITEXT000020908868&dateTexte=20180809
3.5.7 Exemptions or reductions

Exemptions from the direct investment obligation (Decree No. 2010-1379) are granted to those companies that have an annual net turnover lower than €10 million, or offer less than 10 cinematographic or audiovisual works each year, or offer mainly works of pornography or violent content. Similarly, catch-up services are also exempt from the investment obligation for audiovisual works (but not for cinematographic works).

An exemption from the Video and VOD Tax is granted to (§4, 2° of Article 1609 sexdecies B):
- taxable persons established in France who already pay a similar tax in another Member State of the European Union, other than value-added tax.

An exemption from the Video and VOD Tax is also granted to services (§1, 3° of Article 1609 sexdecies B):
- whose audiovisual content is secondary,
- whose 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.

A reduction for the Video and VOD Tax is granted to services giving or allowing access to audiovisual content created by private users for purposes of sharing and exchanges within communities of interest:
- the tax base is reduced by 66% (§3, 3° of Article 1609 sexdecies B);
- the tax base is calculated after application of an abatement of €100,000 on the tax base (§5 of Article 1609 sexdecies B).

3.5.8 Applicable procedures

The direct investment obligation must be allocated directly to European cinematographic and audiovisual works in the form of the purchase of exploitation rights, investment in producer's shares or sums paid for the adaptation of works for the deaf or hard-of-hearing persons (Article 7 of Decree No. 2010-1379).

If on-demand audiovisual media services providers fail to satisfy their direct investment obligation, they will be punished by a fine of €75,000 (Article 79, 1° of Law No. 86-1067):

"Will be punished with the punishment 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 78, §1 of Act No. 86-1067 states:

"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: (...)"
Income derived from the Video and VOD Tax is allocated to the CNC (§6 of Article 1609 sexdecies B) and the tax is payable under the same conditions as those applicable to value-added tax:

"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."

The CNC is funded for the purpose of supporting the cinema, audiovisual and multimedia industry. In 2017, the gross proceeds of the taxes allocated to the CNC amounted to €675 million, a slight decrease of 0.5% compared to 2016 (€678.7 million), of which €16.2 million was contributed through the Video and VOD Tax.90

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3.6 Germany

3.6.1 Basic provisions for on-demand audiovisual media services providers

The main legal framework for the promotion of European and local audiovisual content in Germany is the Rundfunkstaatsvertrag (RStV) in its latest version dating from 2016, hereafter referred to as the Interstate Broadcasting Agreement. It focuses on regulations for the publishers of audiovisual material (see RStV §§6, 58 III 2, 2 III No. 5). In the preamble, the Interstate Broadcasting Agreement states:

"Through this state treaty, but above all through further regulations and development projects in the Federal Republic of Germany, the production of new European television productions should be sustainably supported."

However, no specific financial obligations are described in the Interstate Broadcasting Agreement. The main legal framework in national media law that deals with financial obligations concerning European film promotion is the Filmförderungsgesetz (FFG), hereafter referred to as the Film Promotion Act. The Film Promotion Act provides the legal basis for the establishment of the Filmförderungsanstalt, a federal agency, and includes, among other things, the legal basis for collecting a film levy. The Film Promotion Act is the most important legal document relating to investment obligations for European film promotion. It was first enacted in 1967. It works on the basis of a management contract, comparable to how the Flemish Audiovisual Fund works. The ongoing contract runs from 2017 until 2022. In 2014, Germany decided to create a parafiscal levy on on-demand audiovisual media services providers, including providers established outside Germany who distribute films via the internet in the German language to customers in Germany. The European Commission approved this system in 2016.

3.6.2 Motivation for imposing the investment obligation

Motivations for imposing investment obligations on on-demand audiovisual media services that also include foreign services and an explanation of the tasks of the Filmförderungsanstalt are to be found in the general aims of the Film Promotion Act. The idea is essentially to guarantee the economic and cultural sustainability of the German film industry. Mentioned objectives are:

- promote German film;
- improve the structure of the German film industry;
- support the macroeconomic concerns of the film industry in Germany;
- improve the international orientation of German film-making;
- support German-foreign co-productions;
- reflect and take into account the current technical and economic developments.

3.6.3 Scope of application

The Film Promotion Act sets out several requirements to define which on-demand audiovisual media services providers are captured by the levy. This includes a definition of an on-demand audiovisual service (following the AVMSd) and the more specific requirement that only film providers to German audiences are captured. The Film Promotion Act defines on-demand audiovisual media services providers as follows (FFG, §40):

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92 https://www.ffa.de/download.php?f=a8aa7d2a4a9f9c74f714bc64b7d7e218&target=0
"(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."

Additionally, the Film Promotion Act further states that (FFG, §153):

"(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 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."

Based on these two paragraphs, the capture requirements can be summarized into the following points. On-demand audiovisual media services providers have to:
- provide films via the internet, and
- provide films that users can access at their requested time, and
- provide films at users' individual requests.

Also, they have to:
- hold licensed rights to films, and
- have sales from films in Germany that exceed €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.

Additionally, they should:
- not already pay a similar financial contribution to film funding in the country in which the provider is established.

But it is specifically stated that it is not a requirement for the service:
- to have a program catalogue, or
- to receive payment for individual films.

The above means, for instance, that Netflix is obliged to comply with the parafiscal levy. The company started offering services to German consumers in 2014. The Dutch company Netflix International and its US parent company Netflix Inc. started a lawsuit against the German State, arguing that the Film Promotion Act is based on a misinterpretation of the AVMSd and violates the freedom to provide services, the freedom of establishment, and EU’s State Aid regulations. Netflix lost the lawsuit in May 2018. The European Court of Justice argued that Netflix is 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 European Court of Justice, Netflix and other on-demand audiovisual

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media services providers who are not established in Germany have to retroactively pay the levy on all income generated in Germany from 2014 onwards.

3.6.4 Definition of ‘turnover’

The levy on on-demand audiovisual media services providers is based on the annual turnover from the net sales of cinema films in Germany. This implies all income that is generated by the provision of cinema films. No further definitions are provided.

3.6.5 Tariffs and/or amounts

On-demand audiovisual media services providers with up to €20 million turnover from sales of cinema films in Germany have to pay 1.8% of that turnover to the Filmförderungsanstalt (FFG, §152(2)1). On-demand audiovisual media services providers whose turnover exceeds €20 million have to pay 2.5% (FFG, §152(2)2).

3.6.6 Calculation methods

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 sales in the year of issue. The Film Promotion Act (FFG, §153) states:

"For the determination of the sales limits, the sales of the previous year shall be used. If sales have only been achieved during a part of the previous year, annual sales are calculated by multiplying the average monthly sales of the previous year by twelve. If no previous year’s sales are available, the turnover limits can be calculated on the basis of monthly sales in the year of issue."

3.6.7 Exemptions or reductions

The exemptions for certain video-on-demand service providers are inherent in the scope of application (3.6.3). Germany has established a turnover limit. Companies whose net turnover is below €500,000 are not captured by the parafiscal levy.

3.6.8 Applicable procedures

The Film Promotion Act provides the legal basis on which the Filmförderungsanstalt is established and sets down how it can operate and is structured. Additionally, the Film Promotion Act has paragraphs that shed interesting light with regard to the obligations and the general collection procedures for the film levy from on-demand audiovisual media services providers (the applicable laws are highlighted below).

No special measures are described with regard to the obligations and procedures for on-demand audiovisual media services providers that are established outside Germany. Non-domestic players are captured within the same procedures applicable to all media service providers. The following obligations are described:
- the obligation of audiovisual content providers 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);
- the obligation of on-demand audiovisual media services providers to pay the levy, even if objection and annulment actions are initiated;
- the obligation to pay the levy monthly by the 10th of the following month.

Additionally, the Film Promotion Act defines the obligations relating to information disclosure and use of data.
- The obligation for all applicable on-demand audiovisual media services providers to provide a list of information (FFG, §164(1)).
- The obligation to provide this information is also imposed on companies who do not meet the turnover limit (as described above) (FFG, §164(1)).
- The obligation to provide the list of information and proof to support it upon request (FFG, §165 (3)).
- The obligation to provide the list of information and proof to support it upon request (FFG, §165 (3)).
- The obligation to provide the list of information and proof to support it upon request (FFG, §165 (3)).
- The right of the Filmförderungsanstalt to verify the information given through third parties (FFG, §166).
- The right of the Filmförderungsanstalt to make estimates to prove liability in the event that the VOD provider refuses to provide the necessary information (FFG, §167).
- The right to publish and distribute the information provided for specific means and to certain agencies (FFG, §§168-169).

On the basis of that information, which needs to be capable of verification and can be checked, the Filmförderungsanstalt sends out official orders to collect the levy. The Film Promotion Act states:
- "§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."
3.7 Italy

3.7.1 Basic provisions for on-demand audiovisual service providers

The Consolidated Law for Audiovisual and Radio Media Services, Decree-Law No. 177 of 31 July 2005 (Testo unico dei servizi di media audiovisivi e radiofonici), hereafter referred to as the Consolidated Law, sets down the obligations imposed on on-demand audiovisual media services providers. These provisions have been updated and consolidated in 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). The decree was also adopted in line with the provisions of Law No. 220 of 14 November 2016 concerning Cinema and the Audiovisual Arts (Disciplina del cinema e dell’audiovisivo), which provided that the existing media law should be updated and made more specific, especially with regard to the promotion of Italian and European works, for both linear and non-linear services.

Accordingly, Article 2 of Decree-Law No. 204/2017, pursuant to Article 44-quater of the Consolidated Law, updates the obligations of on-demand audiovisual media services providers. The provisions are applicable from 1 January 2019 and read as follows:

- § 1. Suppliers of on-demand audiovisual media services subject to Italian jurisdiction must promote the production of European works and access to them by jointly respecting:
  1. the obligation to reserve **30% of their catalogue to recent European audiovisual works** produced within the last 5 years;
  2. the investment obligation to **invest a minimum of 20% of their annual net revenues** derived in Italy in European audiovisual works produced by independent producers, with particular reference to recent works, disseminated within 5 years of their production.

Importantly, Article 44-quater §2 stipulates that from 1 January 2019 the obligations referred to in paragraph 1, b, shall also apply to providers of on-demand audiovisual media services that target consumers in Italy, even if established in another Member State.

3.7.2 Motivation for imposing the investment obligation

Article 34 of Law No. 220/2016 charges the Italian Government to adopt, within one year from the date of its entry into force, one or more legislative decrees for the reform and rationalization of the legislative provisions with regard to the existing tools and procedures for the promotion of Italian and European works by linear and non-linear audiovisual media services providers. The following principles and criteria are highlighted:

- introduce more transparent and effective procedures with regard to the investment and planning obligations of Italian and European works by audiovisual media service providers, with particular reference to requirements, technical procedures for performance obligations, as well as more specific criteria for possible derogations or flexibility mechanisms with respect to these obligations;

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97 http://www.cinema.beniculturali.it/Notizie/4206/66/legge-14-novembre-2016-n-220-recante-%E2%80%9Ddisciplina-del-cinema-e-dell-audiovisivo%E2%80%9D/
- define with greater consistency and certainty the rules and the scope for the obligations to be fulfilled by linear and non-linear audiovisual media services providers, in relation to the different distribution platforms;
- strengthen market mechanisms to increase competition, obtain a greater number of possible editorial lines and mechanisms for training and the fair distribution of value rights to exploit the works; this includes favouring agreements between the categories of ‘audiovisual media services providers’ and ‘independent producers’, in line with the new technological and market context and with consideration of their respective financial, productive and creative contributions to the realisation of the works;
- provide a reformulation of how these rules are applied to non-linear audiovisual media services providers;
- provide a reformulation of the definition of ‘independent producer’, as well as of other issues that directly address the promotion of European and Italian works;
- provide an adequate system of verification, control, evaluation of effectiveness and an appropriate system of sanctions.

In a Report to the Government dated February 2016, AGCOM highlights the imbalances in regulation that exist between television operators and other players, such as over-the-top services providers, particularly those established in a different Member State but still competing with ‘national’ players. The document sees it as being necessary to harmonise the legal framework in order to level the playing field among the players that currently supply audiovisual products but fall under different liability regimes.

3.7.3 Scope of application

Decree-Law No. 44 of 15 March 2010 (Attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l’esercizio delle attività televisive), pursuant to the Consolidated Law, offers updated definitions of audiovisual media services providers. According to Article 4, §2 of the decree:

  - b) “a ‘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) “a ‘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.”

3.7.4 Definition of ‘revenues’

The investment obligation is calculated on the basis of the annual net revenues of audiovisual media services providers. Article 4 of ANNEX A to resolution No. 66/09/CONS of 13 February 2009 (Regolamento in materia di obblighi di programmazione ed investimento a favore di opere europee e
di opere di produttori indipendenti adottato ai sensi degli articoli 6 e 44 del decreto legislativo 31 luglio 2005, n. 177), pursuant to the Consolidated Law, defines the annual net revenue as follows:

"Annual net revenue for programming, as indicated in the profit and loss account of the last regularly approved financial statements, for production, financing, pre-purchase and purchase of European works by independent producers. The revenues are those that the obliged party obtains from advertising, teleshopping, sponsorships, contracts and agreements with public and private subjects, from public provisions and from paid television offers for non-sporting programs for which it has editorial responsibility, including those disseminated or distributed through diffusive or distributive platforms of third parties."

The 2017 decree foresees that the Italian media regulator AGCOM shall issue in forthcoming legal documents resolutions aimed inter alia at further detailing the definitions for 'annual total revenues' and 'annual net revenues', as well as setting out technical specifications for complying with quota obligations and relevant exemptions.

3.7.5 Tariffs and/or amounts

Article 2 of Decree-Law No. 204/2017 (pursuant to Article 44-quarter of the Consolidated Law) stipulates the following:

- the obligation to directly invest a minimum of 20% of the services' annual net revenues derived in Italy in European audiovisual works produced by independent producers within the last 5 years;
- 50% of these must be works of Italian expression.

3.7.6 Calculation methods

Resolution No. 66/09/CONS stipulates that, in the case of companies that operate both free-to-air and pay-television, the revenues are "calculated separately on the basis of the revenues deriving from the free program listings and the revenues deriving from the paid program listings."

In the case of companies that are part of the same group:

"If one or more issuers or providers of television content are controlled, pursuant to Article 43, paragraph 14 of the Consolidated Law, by a single company, for the verification of compliance with the investment quotas referred to in this article, both the investments made by the issuer or the provider of television content and the investments made by parent companies, subsidiaries or companies subject to joint control is limited to the portion allocated to the Italian market. In this case, the investment portion is calculated net of intercompany items."

A public consultation aimed at updating the 'Regulation on planning and investment obligations in favour of European works and works by independent producers' is currently ongoing. The working
Obligations on audiovisual media services providers to contribute financially to the production of European works

document, consultation No. 184/18 CONS of 11 April 2018,\textsuperscript{101} addresses the financial contribution of foreign providers whose editorial responsibility falls under the jurisdiction of another EU Member State, but targets Italian consumers. In this case, the text proposes that the investment be calculated based on the net annual revenue achieved by the service provider through its services in Italy. Information on the annual net revenue is acquired either through the regulatory authority in the respective Member State or through the European Regulators Group for Audiovisual Media Services (ERGA).

3.7.7 Exemptions or reductions

Article 4, §1 of Decree-Law No. 44/2010 stipulates that the definition of 'audiovisual media service' excludes the following:

- services that are primarily non-economic, such as private internet sites and services that provide or distribute audiovisual content generated by private users for the purposes of sharing or exchanging information and interest within the community;
- all forms of private correspondence, including e-mails;
- services whose main purpose is not the provision of programs;
- services in which the audiovisual content is merely incidental and does not constitute its main purpose, such as: (a) internet sites containing purely ancillary audiovisual elements, such as animated graphic elements, short advertising spots or information relating to a non-audiovisual product or service; (b) online games; (c) search engines; (d) electronic versions of newspapers and magazines; (e) autonomous text services; (f) gambling games with money, with the exception of transmissions dedicated to games of chance and luck.

Article 44-quinque §2 of the Consolidated Law foresees the following exemptions for audiovisual media services, which are in line with the general provisions laid out in the AVMSd:

- "the thematic nature of the palimpsest or of the catalogue for which it has editorial responsibility does not allow it to obtain supplies from independent European producers or does not allow the purchase, pre-purchase, production or co-production of European audiovisual works, including original works of Italian expression produced anywhere;
- the audiovisual media services provider has a market share below a certain threshold established by the regulatory authority;
- the audiovisual media services provider has not made any profit in either of the last two years of operation."

3.7.8 Applicable procedures

The Italian media regulator AGCOM is in charge of collecting and enforcing the investment obligation.

Article 44-quinque §3 of Decree-Law 204/2017 stipulates the following procedure, which will be in place from 2019:

"If a supplier of audiovisual media services has not fully fulfilled the investment obligations envisaged in the year, any fluctuations in default, up to a maximum of 10\% with regard to the total quota requested in the same year, shall be communicated to the regulatory authority, together with the reasons for the said fluctuations, without delay and in any case no later than ten days from the date of approval of the financial statements of the year.

\textsuperscript{101} \url{https://www.agcom.it/documents/10179/10121440/Allegato+9-5-2018+1525874253367/3405bac1-3217-4471-9d80-5768b662e9b6?version=1.0}
Obligations on audiovisual media services providers to contribute financially to the production of European works

...In the event that the regulatory authority deems the reasons given to be unfounded, the missing elements with respect to the total quota must in any case be recovered from the supplier of audiovisual media services, in addition to the investment obligations due for the current year, within six months of approval of the financial statements for the year in which any fluctuations in default were made.

The regulatory authority checks the reasons given, also taking into account the existence of one or more of the circumstances referred to in paragraph 2 of this article, and decides within thirty days after receiving the communication, according to the modalities and criteria established by the regulation. ... In the event that the regulatory authority deems the reasons given to be unfounded, the missing elements with respect to the total quota must in any case be recovered from the supplier of audiovisual media services, in addition to the investment obligations due for the current year, within six months of approval of the financial statements for the year in which any fluctuations in default were made."

The regulatory authority will, moreover, submit to Parliament, by 31 March of each year, a report on the fulfilment of the obligations to promote European audiovisual works by the suppliers of audiovisual media services, on the measures taken and on the penalties imposed.
3.8 Portugal

3.8.1 Basic provisions for on-demand audiovisual services providers

Article 45 of Law No. 27/2007 of 30 July 2007, and consolidated in 2015, hereafter referred to as the Television Act (Lei da Televisão e dos Serviços Audiovisuais a Pedido)\(^{102}\) stipulates that on-demand audiovisual services providers must contribute to the promotion and visibility of European works, in particular by making a financial contribution to their production or by gradually incorporating them into their catalogues.

Law No. 55/2012 (Lei da arte cinematográfica e do audiovisual)\(^{103}\) of 6 September 2012, hereafter referred to as the Cinema Act, modifies the Portuguese framework for the cinema and audiovisual industry, as established by Law No. 42/2004 of 18 August 2004, and stipulates that on-demand audiovisual media services providers must invest a minimum of \(1\%\) of their annual revenues in national cinematographic works. According to Article 16, §2, the investment may be used for: the co-financing of a film, without involvement in the production; the co-production of a film; advances to productions in the form of minimum guarantees; or the acquisition of distribution rights for national cinematographic works.

Article 16, §3 also stipulates that on-demand audiovisual media services providers need to ensure the promotion of national works through the creation of a dedicated area on their platforms, in which aided works and other national productions are made available. Investment amounts that remain unspent at the end of the calendar year must be transferred by the providers to the Portuguese Institute of Cinema and Audiovisual Media, hereafter referred to as the ICA, IP.

Article 10, §1 of the Cinema Act, further defined by Decree-Law 9/2013\(^{104}\) of 24 January 2013, also foresees the payment of a 'display fee' of \(4\%\) of the price paid by advertisers to audiovisual services, including on-demand audiovisual media services providers.\(^{105}\) The proceeds are transferred to the ICA, IP and the Cinemateca Portuguesa-Museu do Cinema, hereafter referred to as the Cinemateca, IP.

3.8.2 Motivation for imposing the investment obligation

The Portuguese Cinema Act does not contain any concrete motives for imposing the investment obligation on on-demand audiovisual media services providers. However, the main amendment introduced in 2012 does focus on the objective of increasing the sources of financing for audiovisual production.

The law includes the following objectives:
- to encourage the creation, production, distribution, display, dissemination and editing of national cinematography and audiovisual works, in particular through support and incentive measures;
- to encourage the quality, cultural diversity, artistic uniqueness and economic viability of cinematography and audiovisual works, in particular through the allocation of support, with a view to their widespread dissemination and enjoyment of their value by creators;
- to promote the rights of authors, producers and performers;

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\(^{102}\) https://dre.pt/web/guest/pesquisa/-/search/636409/details/maximized
\(^{103}\) https://www.anacom.pt/render.jsp?contentId=1136975#V_fzMnDi-k
\(^{104}\) https://www.anacom.pt/render.jsp?contentId=1151245
\(^{105}\) The liquidation, collection, payment and inspection of the display fee are defined by Decree-Law 9/2013 and collected by the Institute of Cinema and Audiovisual, IP (ICA, IP)
- to promote Portuguese language and culture;
- to promote of the interaction of the independent production sector with the exhibition, distribution, broadcasting or cinematography sectors;
- to encourage international co-productions;
- to deepen cooperation with Portuguese-speaking countries;
- to contribute to the strengthening of the business community in the cinematographic and audiovisual sectors through the creation of incentives and other support measures, in particular the promotion of investment in small and medium-sized national enterprises, with a view to creating value and employment;
- to encourage the exhibition, dissemination, promotion and economic exploitation of national cinematographic and audiovisual works;
- to contribute to the internationalisation of cinematographic and audiovisual works and the national and international recognition of its creators, producers, performers and technical teams;
- to promote the conservation and valorisation of the Portuguese cinematographic and audiovisual heritage.

It should be noted that these are the general motivations laid out in the act, not specific motivations to support investment obligations for on-demand audiovisual media services providers.

3.8.3 Scope of application

Article 2(n) and Article 2(r) of the Cinema Act offer the following definitions for on-demand operators (Operador de serviços audiovisuais a pedido) and non-linear audiovisual services (Serviço audiovisual a pedido ou serviço audiovisual não linear):

- "'on-demand audiovisual service operator' means the natural or legal person responsible for the selection and organization of audiovisual content on request, in the form of a catalogue, and for making it available on national territory."
- "'on-demand or non-linear audiovisual service' means the provision to the general public of a catalogue of cinematographic and audiovisual works, programs and accompanying text content, namely subtitling and electronic programming guides, selected and organized under the responsibility of an on-demand audiovisual service operator, for the viewing of a user, at the individual's request and at a time chosen by him, by means of electronic communications networks."

Article 3, §1(b) of the Television Act states that the provisions of the law apply to on-demand audiovisual media services made available by providers who submit their offer under the jurisdiction of the Portuguese State.

3.8.4 Definition of 'revenues'

Decree-Law 124/2013 of 30 August 2013 defines the rules for granting financial support for cinema and audiovisual works. According to Article 45, §2, the investment obligation is to be calculated from revenues earned by the on-demand audiovisual media services provider in the previous year.

3.8.5 Tariffs and/or amounts

Article 16, §1 and §3 of the Cinema Act stipulate that:

106 https://www.anacom.pt/render.jsp?contentId=1172454
- A direct investment of **minimum 1% of the revenues of on-demand audiovisual media services providers** must be invested annually in national cinematographic works.
- Rights holders are entitled to a **minimum of 50% of the revenues** obtained from the rental or sale of the national works that on-demand services are required to promote on their platforms through a dedicated area.

### 3.8.6 Calculation methods

For the purpose of calculating the value of the investment obligation applicable in the reporting year, Article 45, §2 of Decree-Law 124/2013 stipulates that on-demand audiovisual media services providers must report the amount of revenues earned in the previous year to the ICA, IP by 30 June of each following year.

According to Article 45, §3 of the same decree, the verification of compliance with the investment obligation will be made by the ICA, IP, based on information that must be communicated by the on-demand audiovisual media services provider before 31 January of the year following the investment year. The information required refers to details of the investments made by the on-demand audiovisual operators, according to the obligations stipulated in Article 16 of the Cinema Act.

### 3.8.7 Exemptions or reductions

The following services are not captured by either of the two relevant legislative acts:
- any form of communication of a **private nature**;
- **audiovisual content produced by private users** to be shared, preferably within groups with common interests;
- **electronic versions of newspapers and magazines and supplementary audiovisual content**.

These exemptions follow the exemptions for audiovisual media services listed in the AVMSd.

### 3.8.8 Applicable procedures

Article 45, §4 of the Television Act foresees that compliance with the rules for the promotion of European works shall be subject to annual scrutiny by the Regulatory Entity for Social Communication. Article 86-B of the same act stipulates that the Regulatory Entity for Social Communication may prevent the provision of programs included in the catalogues of on-demand audiovisual media services providers that violate the provisions of Article 27, §2 and §10, with regard to programming that is discriminatory or does not protect minors.

According to Article 86-B, §2-5, in the case of on-demand audiovisual media services providers from other Member States of the European Union, the Regulatory Entity for Social Communication is required to inform the Member State of origin and, in some cases also the European Commission, of existing violations and the restrictive measures to be taken. In urgent cases the regulator may also impose direct restrictive measures before notifying the other parties involved. These provisions are in line with the AVMSd requirements and are thus also applicable in other EU Member States.
3.9 Slovenia

3.9.1 Basic provisions for on-demand audiovisual media services providers

With the adoption of the Act on Audiovisual Media Services (Zakon o avdiovizualnih medijskih storitvah), which has been in effect since November 2011, the jurisdiction of the Agency of Communication Networks and Services of the Republic of Slovenia (AKOS) has expanded to cover the field of non-linear audiovisual media services.

Articles 16, §2 and §3 of the Act on Audiovisual Media Services contains an obligation for the providers of on-demand audiovisual media services to reserve at least 10% of their catalogue programs for European works or, alternatively, to make a financial contribution of at least 1% of revenues to promote European works:

- "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."

The providers of on-demand audiovisual media services also have to make a small annual payment for registration with the AKOS, in accordance with Article 38 of the same law. This payment for registration in the official record of the providers of on-demand audiovisual services is used to cover the costs incurred by the AKOS when exercising its powers in accordance with the act. In 2017, the AKOS generated around 12% of its operating revenue from payments by media services (which include television broadcasting licenses and/or entries in the official register of the providers of on-demand audiovisual media services).

3.9.2 Motivation for imposing the investment obligation

The obligation imposed on the providers of on-demand audiovisual media services is in line with Slovenia’s strategic objective to enhance the quality and the audience reach of high quality Slovenian and European audiovisual works. The adoption of the Audiovisual Media Services Act in October 2011 was an important step in providing for the monitoring of the areas of responsibility delegated to the AKOS by the AVMSd. The AKOS has made this a priority in its efforts to promote European works.

3.9.4 Scope of application

The definition of a provider of on-demand audiovisual media services in the law reproduces the wording of the AVMSd.

3.9.5 Definition of ‘revenues’

http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6225
All revenues earned from the provider’s offer of audiovisual media services in the previous calendar year.

### 3.9.6 Tariffs and/or amounts

At least 1% of all revenues earned by the provider from its audiovisual media services in the previous calendar year. These revenues must be reported to the AKOS.

### 3.9.6 Calculation methods

A provider of on-demand audiovisual media services has to submit an annual report, which contains 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. In the event that the provider fails to comply with his obligations on time, Article 18 of the act stipulates that the provider must give an explanation for this failure to the AKOS.

### 3.9.7 Exemptions or reductions

No information is given in the legislation with regard to exemptions or reductions.

### 3.9.8 Applicable procedures

The providers of on-demand audiovisual media services must, by the end of February each year, submit an annual report to the Ministry of Culture, as well as the AKOS, to demonstrate their compliance with the requirements of the Act on Audiovisual Media Services.

Article 43, §8 of the Act on Audiovisual Media Services introduces a penalty ranging from €6,000 to €60,000 if the proportion of European audiovisual works in the program content of the on-demand audiovisual media services 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 provider of on-demand audiovisual media services that fails to submit an annual report faces the imposition of a fine of up to €10,000.
3.10 Spain

3.10.1 Basic provisions for on-demand audiovisual services providers

Investment obligations for on-demand audiovisual media services providers are set down in Law No. 7/2010 of 31 March 2010 on Audiovisual Communication, hereafter referred to as the General Act (Ley General de la Comunicación Audiovisual). The law states that **30% of the catalogue of on-demand audiovisual media services providers must be reserved for European works.** Half of those works should be in one of Spain’s official languages.

Article 5, §3 of the General Act obliges on-demand audiovisual media services providers to **allocate 5% of their reported income to the production of European works** (including cinematographic works, films and series for television, as well as documentaries and animation films and series). The obligation, which can be used to meet production costs and/or to pay for the acquisition of rights, applies to services whose programming schedules include films that are less than seven years old with reference to their date of production.

Article 5, §3 also provides that audiovisual communication services that offer exclusively or for more than 70% of their total annual broadcasting time a single type of content (whether it be cinematographic films, television series, animation productions or documentaries) **may only invest in that type of content.** Although this paragraph refers to 'broadcasting time', a subsequent paragraph in the same article states that the providers of on-demand audiovisual media services are also subject to the financing obligations set out in this article.

3.10.2 Motivation for imposing the investment obligation

The preamble to the General Law underlines the need for a legal framework for digital services and the new business models that flow from them. The preamble states that "the regulations must evolve with time and must adapt to new technological developments". The preamble further underlines the uncertainties and unpredictable nature of technological progress. Bearing this in mind, the General Law seeks to:

- ensure the safety of companies;
- protect citizens from dominant positions, opinions or restrictions of access to universal content that could be of interest or value;
- enable the creation of audiovisual business groups with the ability to compete on the European market;
- guarantee pluralism and the protection of civil rights.

3.10.3 Scope of application

Article 2, §16 defines the provider of a program catalogue service (Prestador de un servicio de catálogo de programas) as follows:

"The individual or legal entity recognized 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,

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110 Spanish, Catalan, Galician and Basque
television films and series for television in a fixed, portable or mobile player with access to IP networks."

3.10.4 Definition of 'revenues'

The amount of the investment is calculated on the basis of income earned in the previous financial year. Royal Decree 988/2015 of 30 October 2015 regulates the legal regime for the financing obligation in respect of audiovisual works. According to Article 6, §1, for the providers of privately owned services the computable income to determine the amount of the financing obligation is based on the following:

- income derived from advertising marketing;
- revenues obtained from the sale to third parties of the contents produced or co-produced by the service provider;
- income from subscription fees;
- income obtained by the direct exploitation of content by the provider, regardless of the mode used;
- income obtained from the commercialization of channels that give rise to the financing obligation, whose editorial responsibility rests with a third party, from which the payments made to the channel editor will be deducted;
- income derived from the lease of licenses;
- income from aid and public contributions, whatever their denomination, which have the legal nature of subsidies.

Article 7 excludes the following forms of income from the calculation:

- those obtained from the exploitation of channels or catalogues of programs that do not fall under the financing obligation.
- those generated by the lease or sale of equipment for the reception or installation of antennas, as well as for the hiring and maintenance of the technical equipment used to receive the service, and the revenues from technical connection or services related to dissemination infrastructures;
- those derived from activities not related to the audiovisual activity of the provider.

3.10.5 Tariffs and/or amounts

Commercial on-demand audiovisual media services providers must make a direct investment of 5% of their reported income in the production of European works. Public on-demand audiovisual media services providers (in casu the public broadcasters) 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.

3.10.6 Calculation methods

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 were established by Royal Decree 988/2015. According to Article 16, §1 and §3, both private and public audiovisual media services providers must confirm their income to the National Commission of Markets and Competition by submitting the following documentation:

- the annual accounts duly audited and deposited in the Mercantile Registry, in those cases where this is necessary to comply with applicable mercantile regulations.

- the annual accounts, accompanied by reliable proof of their deposition in the corresponding registry, if the said deposition is mandatory or, otherwise, in the case of companies incorporated under laws other than Spanish law, proof of certification of the annual accounts in accordance with the regulations applicable in the country in question.
- a breakdown of the elements necessary to determine the computable income.

Article 16, §2 stipulates that the breakdown of the elements necessary to determine the computable income must meet one of the following conditions:
- be compiled by an external auditor.
- be compiled by an independent expert accredited by the Official Register of Account Auditors.
- in the case of the providers of electronic communications services, be compiled by means of a Report of Agreed Procedures, carried out in accordance with the model in Annex II.

According to Article 17, privately owned service providers whose social year does not coincide with the calendar year will calculate their financing obligation with reference to the period between the first and the last day of their corresponding fiscal year.

3.10.7 Exemptions or reductions

The investment obligations do not cover on-demand audiovisual media services providers of pornographic material.

According to Article 3, §2, exemptions from the Law also include:
- the electronic communications networks and services used for the transport and broadcasting of the signal of audiovisual communication services, their associated resources and the technical equipment necessary for the reception of audiovisual communication (these matters fall under the regime of 'telecommunications');
- individuals or legal entities that only disseminate or transport the signal of audiovisual programs whose editorial responsibility rests with third parties;
- audiovisual communications of an economic nature, with the exception of the non-profit community of audiovisual communication services, as well as services that do not constitute a means of mass communication, and, in general, any activities that do not compete for the same audience as television broadcasting; in particular, websites owned privately and those whose content is audiovisual content generated by private users are excluded from the scope of the law.

3.10.8 Applicable procedures

According to Article 14, §1-3 of Royal Decree 988/2015, service providers must complete a declaration report on the website of the National Commission of Markets and Competition, in which they indicate the manner in which they have complied with the financing obligation, and this before 1 April of each calendar year. Providers whose fiscal year does not coincide with the calendar year may submit their declaration three months after the end of their fiscal year, but before 31 July.

According to Article 47, §1, the State Council for Audiovisual Media is responsible for enforcing the investment obligation. It should also arbitrate in any cases of conflict that might arise; for example, when negotiating the rights in respect of a co-production.

In the event of a serious and repeated infringement of Spanish media legislation, the competent audiovisual authority of the state may, exceptionally, and in accordance with the provisions of Article

58
2 bis of Directive 89/552/EEC, limit the freedom of reception of audiovisual media services. This rule applies across the full extent of the legal provisions of Spanish media law and therefore is not exclusively applicable to investment obligations.
4. Conclusions

4.1 What financial obligations exist across Europe?

In essence, there are three ways of promoting investment in European works by on-demand audiovisual media services:

1. quota for carrying audiovisual works in catalogues;
2. direct investment obligations based on a percentage of revenue;
3. investment obligations in the form of a levy to be paid to an audiovisual fund.

The first option is foreseen by the AVMSd: it requires that 30% of the catalogues of audiovisual on-demand services providers consists of European works, and that European content be prominently featured. This study focused on the other two forms of investment obligations. For these, the derogation of the 'country of origin' principle applies, which means that the rules of the 'receiving' market are also applicable for players targeting a specific European market, while being based in another market:

- Obligations to invest directly in the production of European works by the acquisition of rights and/or (co-)production of on-demand audiovisual media services;
- A levy or tax paid to government agencies, such as a film fund or other agencies that support the creation of European (or specifically local) works.

In total, nine countries in the EU27 impose financial obligations on the providers of on-demand audiovisual media services: Belgium (both communities), Croatia, the Czech Republic, France, Germany, Italy, Portugal, Spain and Slovenia. Out of these, only four, France, Germany, the Flemish Community of Belgium and Italy have a so-called ‘Netflix tax’ in place, meaning they also foresee obligations for non-domestic providers of on-demand audiovisual media services. Table 2 gives a detailed overview of all investment obligations in place.113

- Germany is the only country that foresees a levy or tax to be paid by on-demand audiovisual media services providers to a film fund or a similar agency.
- Four countries set rules for providers of on-demand audiovisual media services to invest directly in European productions: Slovenia, Spain, Italy and Portugal. Spain and Italy also determine how much of the investment should be specifically allocated to local works or works of national cultural expression. Slovenia allows providers of on-demand audiovisual media services to choose between including a quota of European works in their catalogue or making a direct financial investment.114
- Two countries allow a choice between a levy or direct investment: Belgium: both the French and the Flemish Communities, and Croatia.
- Two countries have joint obligations, thereby requiring liable companies both to contribute to a fund and to directly invest a percentage of their revenue in European works: France and the Czech Republic. The Czech Republic allows the on-demand audiovisual media services providers to choose either to include a quota of European works in their catalogue or to make a direct financial investment.

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113 These investment obligations are not to be confused with the quota for audiovisual works for on-demand audiovisual media service providers, which are applicable in most countries. Direct investment here refers to a percentage of the revenue/income/turnover 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.

114 Portugal requires on-demand audiovisual service providers to also pay a display fee on advertising (4% of the price paid by advertisers to the audiovisual services), with the proceeds allocated to the Portuguese Institute of Cinema and Audiovisual Media and to the Cinemateca Portuguese (Cinema Museum).
While several Member States have some sort of investment obligation in place, the means of transposing this principle into law and practice are very diverse.

It should be noted that, in addition to the above investment obligations, **various other investment obligations are also in place** in Europe to support domestic audiovisual production, some of which can be associated with on-demand audiovisual media services providers. This includes, for example, advertisement fees to be paid to audiovisual funds (such as the display fee for on-demand audiovisual media service providers in Portugal), investment obligations for cable and other distributors (such as the Incentive Scheme in Flanders), or taxes paid to regulatory bodies in charge of supervision and licensing. Examples of the latter include Luxembourg and Lithuania. These are of secondary importance in this study and are not included in the investment obligations for on-demand audiovisual services providers.

Requiring a direct, levy-based financial contribution to a film fund or other agency supporting the creation of audiovisual works seems to be the most straightforward way to ensure on-demand audiovisual media services providers are contributing to the production of European works.

### Table 2. Overview of specific financial investment obligations, December 2018 (Source: authors)

<table>
<thead>
<tr>
<th>Member State</th>
<th>Investment in...</th>
<th>Legal basis</th>
<th>%</th>
<th>Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LEVY</strong></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>DE</td>
<td>Levy paid to Filmförderungsanstalt</td>
<td>Filmförderungsgesetz (FFG) (2017) Film Promotion Act</td>
<td>1.8%</td>
<td>Turnover from sales of cinema films in Germany ...if turnover ≤ €20m</td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>2.5%</td>
<td>...if turnover &gt; €20m</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>N/A</td>
<td>...if turnover &lt; €500K</td>
</tr>
<tr>
<td><strong>DIRECT INVESTMENT</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IT</td>
<td>Acquisition of recent audiovisual works, particularly of Italian expression</td>
<td>Decree-Law 204/2017, Law 220/2016 on Cinema and Audiovisual Arts, consolidated text for audiovisual and radio media services, Decree-Law 177/2005</td>
<td>Min 20%</td>
<td>Annual net revenue in Italy</td>
</tr>
<tr>
<td>PT</td>
<td>Co-financing, (co-)production, guarantee minimums, rights acquisition of national cinematographic works; if amounts are not assigned to investment, the rest shall be delivered to the ICA, IP</td>
<td>Cinema Act no. 55/2012, Decree-Law 124/2013</td>
<td>Min. 1%</td>
<td>Annual revenues from on-demand audiovisual services activities</td>
</tr>
<tr>
<td>ES</td>
<td>Participation in production or acquisition of rights of</td>
<td></td>
<td>5%</td>
<td>Annual reported income of...</td>
</tr>
</tbody>
</table>

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115 Portugal has a display fee on advertising, paid to the Institute of Cinema and Audiovisual Media and the Cinemateca Portuguesa-Museu do Cinema. Basis: Law No. 55/2012 (Cinema Act), further defined by a decree law and the provisions of the General Tax Law and the Code of Procedure and Tax Procedure. In Portugal, 4% of advertisement display revenue is paid into this support fund.
<table>
<thead>
<tr>
<th>Country</th>
<th>Obligations</th>
<th>Financial Contributions</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SL</strong></td>
<td>Quota of 10% for European film in catalogues OR invest in (co-)production or rights acquisition of European works¹¹⁶</td>
<td>Act on Audiovisual Media Services (2011)</td>
<td>1% Annual revenues from audiovisual media services activities</td>
</tr>
</tbody>
</table>
| **BE (FR)** | Finance co-production or pre-purchase of audiovisual media works OR a levy paid to the Cinema and Audiovisual Centre | AMS Decree (2009) Article 41 for publishers, Article 80 for distributors | 1.4% For publishers: Turnover (gross revenues) of payments from advertising, sponsorship and distributors/third parties (+/−index) OR a levy paid to the Cinema and Audiovisual Centre (€300K–5m (+/−index)) OR a levy paid to the Cinema and Audiovisual Centre (€5–10m (+/−index)) OR a levy paid to the Cinema and Audiovisual Centre (€10–15m (+/−index)).
| **BE (NL)** | Finance (co)production of (Flemish) television series (fiction, documentary or animation) OR financial contribution to the Flemish Audiovisual Fund (VAF) | Media Decree (2009), consolidated version of 2014, Article 184 Implementation Decision BS 03/04/2014 | 2% Annual revenues in previous year |
| **HR** | Quota of 20% of European film in catalogue OR investment in production or rights acquisition of European works AND a levy paid to the Croatian Audiovisual Centre | Electronic Media Act, Article 21 (1)-(3) (2009) Law on Audiovisual Activities (2011), Ordinance on the criteria and manner of increasing the share of European Works, 2015, Art. 5 | 2% Annual gross income from on-demand audiovisual media services |

¹¹⁶ 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.

¹¹⁷ The percentage is provisional and only applies to non-linear broadcasting organisations, and not on-demand audiovisual players which fall under ‘service providers’ and are captured by the Incentive Scheme.
<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
<th>Relevant legislation</th>
<th>Tax / Levy details</th>
</tr>
</thead>
<tbody>
<tr>
<td>FR</td>
<td>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</td>
<td>Decree No. 2010-1379 of 2010 (originating from Law No. 86-1067 relating to freedom of communication)</td>
<td>For SVOD: Net annual turnover ... if &gt;€10M and ≥10 cinematographic works are made available with a window of: ...&lt;22 months after theatrical release in France</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>... ≥ 22 months and &lt; 36 months after theatrical release in France</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>... ≥ 36 months after their theatrical release in France</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>For TVOD: ...Net annual turnover if &gt;€10 M</td>
</tr>
<tr>
<td></td>
<td>A large share of the investment must be made in works of French cultural expression.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CZ</td>
<td>Quota of 10% of European film in catalogue OR investment in production or rights acquisition of European works</td>
<td>Act 132/2010 on On-demand Audiovisual Media Services</td>
<td>1% Total revenues generated by the service in a reporting period</td>
</tr>
<tr>
<td></td>
<td>Fee paid to the Czech Film Fund</td>
<td>Act No. 496/2012 on Audiovisual Works and Support for Cinematography</td>
<td>0.5% Price paid by the end user as the product of the audiovisual charge base and the charge rate</td>
</tr>
</tbody>
</table>
4.2 What criteria are in place to determine the scope of application?

In order to determine which on-demand audiovisual media services providers are captured, the EU Member States have adopted different approaches, but almost all countries follow the definition of on-demand audiovisual media services providers that is set down in the AVMSd.

Most EU Member States aim to capture domestic on-demand audiovisual media services providers. Factors such as the location of the headquarters, the place of work of the majority of employees, editorial decision, first activities, etc. are used to determine whether a company is established in an EU Member State or not. For example, Article 2, §3 of the 2010 Italian decree, which updated the criteria to determine whether audiovisual media and radio services providers fall under Italian jurisdiction, deems a provider of audiovisual media and radio services to be established in Italy:
- when the provider's headquarters and the editorial decisions relating to the audiovisual media services are taken in Italy;
- when a significant part of the staff performing the audiovisual media service activity operate in Italy, if the provider's head office is located in Italy but the editorial decisions on the audiovisual media service are taken in another EU Member State, or vice versa;
- when a significant part of the staff performing the audiovisual media service activity operates in Italy or in another Member State, but the provider's main office is located in Italy.
- if the provider uses a land-satellite connection (up-link) located in Italy;
- if the provider uses an Italian satellite capacity.

Additionally, other Member States refer to services that:
- provide audiovisual content online through a program catalogue and provide the service on individual request at a time chosen by the user.

Some legislation additionally specifies the importance of editorial responsibility, requiring that programs are offered to the public and that the audiovisual content so offered informs, entertains and educates (in accordance with the European regulations for audiovisual services). Some countries exclude providers on the basis of the type of content offered (for example, niche content or pornography). This is in line with the definition of on-demand audiovisual media services providers in the AVMSd.

Some countries go beyond the AVMSd and define additional criteria. These are listed in Table 3 below. If they are applicable for one country and one kind of investment obligation only, they are cumulative criteria (if not otherwise indicated). These criteria relate to:
1. the size of the on-demand audiovisual media services provider (for example, a minimum turnover, audience share or sales);
2. the business model of the on-demand audiovisual media services provider (for example, sales on movies need to be generated).

France is the only country to purposefully and observably go beyond the scope of the AVMSd definition of an on-demand audiovisual media services provider, since its tax captures most providers of on-demand services, 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 AVSMd and the European State Aid rules.
Particularly interesting are the countries who already have regulation in place to capture the foreign on-demand audiovisual media services providers who target their domestic markets. These are Germany, France, and, starting from 2019, Belgium (Flanders), and Italy. They foresee the capture of foreign services when:

1. the service is in the local language and/or directed at the local audience;
2. sales are generated in the country by the service;
3. they don’t already pay a similar investment obligation in another Member State.

Imposing an investment obligation on on-demand audiovisual media services providers will be most sustainable when Member States stay within the scope of 'on-demand audiovisual media services' as defined by the AVMSd. Adding further conditions (in fact, often repeating in different words what is already in the AVMSd) or widening the scope will increase the risk of successful legal opposition against the national system.

<table>
<thead>
<tr>
<th>Member State</th>
<th>A video-on-demand provider is captured, if..</th>
<th>Investment obligation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium (French Community)</td>
<td>&gt; €300K (+ index)</td>
<td>Direct or levy</td>
</tr>
<tr>
<td></td>
<td>Turnover of income from advertising,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>sponsorship and distributors/third parties</td>
<td></td>
</tr>
<tr>
<td>Belgium (Flemish Community)</td>
<td>Unknown</td>
<td>Direct or levy</td>
</tr>
<tr>
<td></td>
<td>Annual revenues (excluding VAT)</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>&gt; €10m</td>
<td>Direct investment</td>
</tr>
<tr>
<td></td>
<td>Annual net turnover</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>≥ 10 works</td>
<td>Direct investment</td>
</tr>
<tr>
<td></td>
<td>Cinematographic works annually</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>≠ AV service mainly devoted to pornography</td>
<td>Direct investment</td>
</tr>
<tr>
<td></td>
<td>or violence</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>= Sale and rent of videograms</td>
<td>Tax for film fund</td>
</tr>
<tr>
<td>France</td>
<td>= Availability of paid or free access to</td>
<td>Tax for film fund</td>
</tr>
<tr>
<td></td>
<td>cinematographic or AV works upon individual request formulated by an electronic communication method</td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>≠ On-demand 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</td>
<td>Tax for film fund</td>
</tr>
<tr>
<td>France</td>
<td>≠ Pay a similar tax in another Member State of the European Union</td>
<td>Tax for film fund</td>
</tr>
<tr>
<td>France</td>
<td>= Carry out a service for persons that are not subject to tax and reside in France (for private use) (no need for service to be established in France)</td>
<td>Tax for film fund</td>
</tr>
<tr>
<td>Country</td>
<td>Obligation</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
<td>------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Germany</td>
<td>&gt; €500K</td>
<td>Sales of films in Germany per year</td>
</tr>
<tr>
<td>Germany</td>
<td>=</td>
<td>Hold licensed rights to films</td>
</tr>
<tr>
<td>Germany</td>
<td>=</td>
<td>Commercially exploit films (via paid or ad-supported services), if the video-on-demand provider is domiciled and established in Germany</td>
</tr>
<tr>
<td>Germany</td>
<td>= or</td>
<td>Offer German-speaking video-on-demand services and generate sales in Germany, if the video-on-demand provider is NOT domiciled and established in Germany</td>
</tr>
<tr>
<td>Germany</td>
<td>≠</td>
<td>Already pays a similar financial contribution to film funding in the country where the video-on-demand provider is established and domiciled</td>
</tr>
<tr>
<td>Italy</td>
<td>≠</td>
<td>Specific genre in catalogue, below certain market share (still to be defined by AGCOM), no profit in last two years</td>
</tr>
<tr>
<td>Portugal</td>
<td>≠</td>
<td>Private communication, AV produced by private users shared in groups of common interests, electronic versions of newspapers, magazines</td>
</tr>
</tbody>
</table>
4.3 What is the motivation to impose investment obligations?

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). It should be noted that not all laws include motivations that go beyond the intention of complying with the latest version of the AVMSd. The identified motivations can be clustered into the following categories:

- **Economic reasons**: for example, "Enabling the creation of audiovisual business groups"/"structuring a strong French industry"/"Allowing new business models"
- **Cultural reasons**: for example, "Preservation of the Croatian language and Croatian cultural identity"/"Devoting attention to our cultural heritage and supporting contemporary cultural creation".
- **Legal coherence and level-playing field**: for example, "Degree of commitment for video and social media platforms"/"Make non-linear services comparable to linear services"/"Remove the increasing incoherence of current legislation"/"Bring clarity to uncertainties in the current legislation"/"Bring current legislation into line with the directives of the European institutions".
- **Internationalization/cooperation**: for example, "Improve the international orientation of German film-making"/"Deepen relations with Portuguese-speaking countries"/"Create conditions for co-production".
- **Technological reasons**: for example, "Adapt to new technological developments"/"Reflect and consider current technical and economic developments".

Investment obligations seem most solid when they are based on various objectives and, preferably, combine legal, economic and cultural motivations. Ensuring the continuation of local production and a level-playing field are economic and cultural objectives that are legitimate and have characterized the media policy of the European Union and the Member States for decades.
4.4 What are the applicable tariffs, amounts, percentages and variations?

Most countries calculate the financial obligation in terms of a (sometimes variable) percentage of a monetary basis. The percentages range from 0.5% to 26%. The financial obligation is based on four different money flows derived from on-demand audiovisual media services:
- **Revenue/income from the exploitation of on-demand audiovisual services**
- **Turnover**
- **Price paid by the end user**
- **Number of subscribers.**

In the Flemish Community of Belgium, there are several calculation bases. Providers of television signals (which also includes some on-demand audiovisual players) pay a contribution based on the number of subscribers, whereas foreign providers of on-demand audiovisual media services will have to pay a percentage of revenues in the Flemish market. The price paid by the end user is used by the Czech Republic when calculating the levy or tax for the film fund. Germany, France, Slovenia and the French Community of Belgium apply variable percentages, depending on the following criteria:
- the level of turnover or revenues generated by the on-demand audiovisual media services provider;
- the kind of content that is offered (for example, pornographic content, violent content, content that is offered soon after its theatrical release, or not). This only applies in the case of France.

The applicable tariffs, amounts, percentages and variations for comparison and their bases are listed in condensed form in Table 2.

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A system that takes turnover as the calculation basis for domestic on-demand audiovisual media services providers seems most convenient to use, since domestic companies are obliged to submit their financial statements to the national authorities every year. For foreign on-demand audiovisual media services providers, a system based on revenues seems to be the only possible option, since turnover will most likely not be split for each country of activity. In this case, revenues must be defined clearly and should include not only pay-services, but also advertising income. A variation in percentages may be regarded as desirable from a redistribution point of view, but with a view to limiting the administrative burden of the system such variations are best kept to a minimum.
4.5 How is the basis for the financial obligation defined and calculated?

Most EU Member States claim that the turnover or revenue is **based on figures for the previous financial year**. This current study was not able to find details of how revenues, income, turnover and the price paid by end users are defined in all of the investigated cases. Listed below are some of the elements that are used in the definitions of the calculation base in a selection of the case studies.

The French Community of Belgium defines the turnover on which the financial obligation is based in more detail. **Turnover** is defined as:
- the amount of gross revenues invoiced;
- without the deduction of commissions and discounts;
- including advertising and sponsorship;
- including all other gross revenues;
- including gross receipts from any service distributor or third party for obtaining television services;
- including gross receipts generated by the content of the programs of those services;
- any participation in co-production or pre-purchase made under another legal obligation or enjoying any legal advantage that cannot be accounted for in the context of the contribution referred to in the current legislation.

The Czech Republic defines the **price paid by the end user**, on which the financial obligation is based, in more detail. The price paid by the end user is:
- the price paid for the one-time provision of the service
- or the price paid for provision by any other manner than by one-time presentation of the work,
- also including all forms of pre-payment,
- provided that the service includes the presentation of at least one cinematographic work.

The **AV fee** is further defined in the following terms:
- value-added tax shall not be included in the base for the calculation of the audiovisual fee;
- the base for the audiovisual fee shall be rounded upwards to whole crowns;
- the audiovisual fee shall be calculated as the product of the audiovisual fee base and the charge rate;
- the fee is based on a calendar year;
- the payer of the fee shall include the fee for the provision of on-demand audiovisual media services into the price to be paid by the end user for those services.

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:
- 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);[^118]
- 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.

[^118]: Article L115-6 - L115-13 of Cinema and Audiovisual Code, https://www.legifrance.gouv.fr/affichCode.do;jsessionid=8AF1C0F8A0534182673606CD60880C4.tplgfr32s_2?idSectionTA=LEGISCTA000036364823&cidTexte=LEGITEXT000020908868&dateTexte=20180809
Italy defines revenues as:
- annual net revenue for programming,
- as indicated in the profit and loss account of the last regularly approved financial statements of the provider,
- for the production, financing, pre-purchase and purchase of European works by independent producers.
- The revenues are those that the obligated party obtains from:
  - advertising,
  - teleshopping,
  - sponsorships,
  - contracts and agreements with public and private subjects,
  - from public provisions, and
  - from paid television offers for non-sporting programs for which it has editorial responsibility, including those disseminated or distributed through the diffusive or distributive platforms of third parties.

In the case of turnover, the turnover of the previous financial year as published in the annual report of the company can be taken as the calculation basis. When defining revenues, it is best to keep the definition simple and to include all income derived from activities in the country that is imposing the investment obligation. This includes, but is not limited to, income from commercial communication, SVOD, TVOD, catch-up, etc. EU Member States should require foreign on-demand audiovisual media services providers to disclose all necessary information required to determine the calculation basis.
4.6 What are the applicable procedures in place?

Member States deal with the applicable procedures to control the financial obligations of on-demand audiovisual media services providers to support European content in very different ways. Four groups can be distinguished with regard to procedures:
- structural and competence procedures;
- payment and financial procedures;
- procedures for the provision of information;
- procedures in the event of infringements or non-compliance.

**Procedures relating to the regulatory authority:** countries that apply this type of procedure mainly describe the regulatory frameworks and the government agencies responsible for them.
- **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 State Council for Audiovisual Media in Spain). In Germany and the Czech Republic, 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 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 further amended by the responsible ministries.
- **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 Luxembourg, there is a regulatory statute additional to the law, which describes how on-demand audiovisual media services providers are required to register themselves. In France, the relevant media law states that its procedures and obligations are controlled under French tax law.

**Payment and financial procedures.** If these kinds of procedures are described in the applicable laws, information is usually given about 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.
- **Schedule of payment.** Several countries have clear rules about when the taxes or levy must be paid: in Germany, this is monthly; in Croatia, it is at least once every three months.
- **Other financial obligations and regulations.** In Germany, the legislation clearly specifies that the financial obligations of video-on-demand service 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 video-on-demand providers to fulfil their investment obligation for the production of European works by starting with a lower percentage of contribution, with the full percentages only needing to be met in the third year.
Procedures for the provision of information. All countries include obligations for VOD providers to declare (for example, Croatia, France, Belgium) and/or submit information upon request (for example, Germany, Slovenia, the Flemish Community of Belgium). In the former case, the obligation to submit information is the responsibility of the service provider. This description of this obligation in the legislation may include a schedule, a clear list of what information needs to be provided, what can be done with the information and how the information must be handled.

- **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, 15 February in the French Community of Belgium, 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 in the French Community of Belgium).

- **What information needs to be provided?** 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, video-on-demand service providers are obliged to submit general information (name, address, number of users, type of service, etc.), records of program 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).

- **What can be done with this 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.

- **How must the information be handled?** 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 video-on-demand service providers (in other words, providers who do not meet the turnover limit). The French 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 program 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.

Procedures in the event of infringements or non-compliance. Some of the relevant laws clearly state what actions should be taken and which procedures will apply if the on-demand media service 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.** Croatia and Slovenia have very detailed lists of which offences committed by video-on-demand service providers can lead to fines. In the context of the financial obligations, this is the case, amongst other things, if the providers fail to fulfil the obligation, do not submit the necessary information, or do not allow access to this information. Lithuanian legislation states that providers will receive a fine of €100,000 in the cases where it is difficult or impossible to calculate overall annual income. The laws often impose different fines, depending on the legal situation of the offender. Generally, for a legal person the fines fall within a predefined range.
Obligations on audiovisual media services providers to contribute financially to the production of European works

(in Croatia HRK 10,000-50,000, in Slovenia €6,000-€60,000, in the Czech Republic CZK 1,000,000-2,000,000).

- **Other penalties.** Croatia has a protective measure that prohibits video-on-demand service 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. In Slovenia, the law states that 'measures' can be taken to remedy irregularities (without clarifying what these measures are) and also that procedures in accordance with the Minor Offenses Act can be instigated, so that a criminal offence and criminal charge can be brought. In Lithuania, funds that are not properly transferred in accordance with the law can be recovered in court.

- **Other rules.** German legislation states that even though a video-on-demand provider might contest its obligation to pay the film fund levy, payment must nonetheless still be made until non-applicability has been proven.
5. References and Annexes

5.1 References


AGCOM (no year). Segnalazione al Governo ai sensi dell’articolo 1, comma 6, lett. c), n. 1) della legge 31 luglio 1997, n. 249 - Articolo 44 del Testo unico dei servizi di media audiovisivi e radiofonici, recante “Promozione della distribuzione e della produzione di opere europee” (Report to the Government pursuant to article 1, paragraph 6, lett. c), n. 1) of the law of 31 July 1997, n. 249 - Article 44 of the Consolidated Law on Audiovisual and Radio Media Services, on “Promotion of the distribution and production of European works”). [Link]


Briel, R. (2017). RTL Belgium refuses to be ruled by CSA. [Link]

Broadband TV News (2018). European SVOD market to nearly double by 2022. [Link]


Court of Justice of European Union. Judgement of the General Court (Eight Chamber) 16 May 2018. [Link]

CSA (2013). Deux années d’application de la réglementation de 2010 relative à la contribution des éditeurs de services de télévision au développement de la production audiovisuelle (Two years from the application of the regulation on the television broadcasters in development of audiovisual production). [Link]
Obligations on audiovisual media services providers to contribute financially to the production of European works


Econopolis (2017). Doorlichting Vlaams audiovisueel beleid (Review of Flemish audiovisual policy). Wilrijk, Econopolis

Federal Ministry of Justice and Consumer Protection (no year). Gesetz über Maßnahmen zur Förderung des deutschen Films (Film Promotion Act), https://www.ffa.de/download.php?f=a8aa7d2a4a9f9c74f714bc64b7d7e218&target=0


Obligations on audiovisual media services providers to contribute financially to the production of European works


5.2 Overview of Annexes

Annex 1: Full list of legal sources used
Annex 1: Full list of all sources underlying Table 1

Annex 1. Overview of obligations to promote European or local work for VoD providers in all Member States’ applicable laws (December 2018).

<table>
<thead>
<tr>
<th>Member State</th>
<th>Main legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(Consolidated 04.12.2018), Art. 40</td>
</tr>
<tr>
<td>BELGIUM (French/bilingual)</td>
<td>Decree for Audiovisual Media Services (Décret coordonné sur les services de médias audiovisuels), 2009 (Consolidated 21.08.2018), Art. 41, 46, 80</td>
</tr>
<tr>
<td>BELGIUM (Dutch/bilingual)</td>
<td>Media Decree concerning radio broadcasting and television (Decreet betreffende radio-omroep en televisie), 2009 (Consolidated in 2014), Art. 184/1, new article Implementation Decision of 21 March 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) 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) (forthcoming)</td>
</tr>
<tr>
<td>BELGIUM (German Community)</td>
<td>Decree concerning radio broadcasting and television (Decreet betreffende radio-omroep en televisie), 2005, Art. 157</td>
</tr>
<tr>
<td>BULGARIA</td>
<td>Law on radio and television (ЗАКОН ЗА РАДИОТО И ТЕЛЕВИЗИЯТА), Art. 19 (Supplemented, SG No. 93/2005, amended, SG No. 12/2010)</td>
</tr>
<tr>
<td>CROATIA</td>
<td>Electronic Media Act (Zakon o elektroničkim medijima), 2009, Art. 21 Ordinance on the criteria and manner of increasing the share of European Works, 2015, Art. 5 Law on Audiovisual Activities (Zakon o audiovizualnim djelatnostima), 2011 (in effect from 19.07.2018), Art. 25</td>
</tr>
<tr>
<td>CYPRUS</td>
<td>The Radio and Television Organizations Laws (Ο περί Ραδιοφωνικών και Τηλεοπτικών Οργανισμών Νόμοι του), 1998 (Amended 2012)) Art. 31</td>
</tr>
<tr>
<td>CZECH REPUBLIC</td>
<td>Act 132/2010 on 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, Art. 7 Act No. 496/2012 on Audiovisual Works and Support for Cinematography and on Amendment to Certain Acts (Audio/Video Act), 2012, Section. 27 (in effect 01.01.2016)</td>
</tr>
<tr>
<td>DENMARK</td>
<td>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), Art. 11</td>
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<td>Country</td>
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<td>ESTONIA</td>
<td>Media Services Act (Meediateenuste seadus), 2010, Art. 24</td>
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<td>FINLAND</td>
<td>Information Society Code (Tietoyhteiskuntakaari), 2014, Art. 209</td>
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<td>FRANCE</td>
<td>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), Art. 27 and Art. 33</td>
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<td>On-demand Audiovisual Services Decree No. 2010-1379 (Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande), 2010, Chapitre 1er</td>
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<td>TCA - Tax on sales and rentals of video recordings for the private use of the public (TCA - Taxe sur les ventes et les locations de vidéogrammes destinés à l'usage privé du public), 2010, Section B</td>
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<td>Decree No. 2010-747 on the contribution to the production of cinematographic and audiovisual works of terrestrial television services (Décret n° 2010-747 du 2 juillet 2010 relatif à la contribution à la production d'œuvres cinématographiques et audiovisuelles des services de télévision diffusés par voie hertzienne terrestre), 2010 (Consolidated 26.11.2018)</td>
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<td>Decree No. 2017-1364 (Décret n° 2017-1364 du 20 septembre 2017 fixant l’entrée en vigueur des dispositions du III de l’article 30 de la loi n° 2013-1279 du 29 décembre 2013 de finances rectificative pour 2013 et des I à III de l’article 56 de la loi n° 20)</td>
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<td>Film Promotion Act (Filmförderungsgesetz (FFG)), 2017, Art. 146-159</td>
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<td>GREECE</td>
<td>Presidential Decree (Προεδρικό Διάταγμα) 109/2010, Art. 14</td>
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<td>HUNGARY</td>
<td>Act CLXXXV on Media Services and Mass Communication (2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációkról), 2010 (Consolidated 1 July 2015), Art. 20, 177, 203</td>
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<td>IRELAND</td>
<td>S.I. No. 247/2012 - European Communities (Audiovisual Media Services) (Amendment) Regulations 2012, Art. 2,11.1, 2 and 3</td>
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<td>ITALY</td>
<td>Consolidated Law of Audiovisual and Radio Media services (Decree-Law No. 177) (Texto unico dei servizi di media audiovisivi e radiofonici), 2005, Art. 44</td>
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<td>Resolution No. 66/09/CONS of 13 February 2009 (Regolamento in materia di obblighi di programmazione ed investimento a favore di opere europee e di opere di produttori indipendenti adottato ai sensi degli articoli 6 e 44 del decreto legislativo 31 luglio 2005, n. 177), Annex A</td>
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<td>Decree-Law No. 44 of 15 March 2010 (Attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l’esercizio delle attività televisive)</td>
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<td>Law no. 220 of 14 November 2016 (Disciplina del cinema e dell’audiovisivo), Art. 34</td>
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<td>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, Art. 2</td>
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<td>Latvia</td>
<td>Electronic Media Law (<a href="#">Elektronisko plāšsaziņas līdzekļu likums</a>), 2010 (Consolidated 12.07.2018), Section 23</td>
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<td>Lithuania</td>
<td>Law on the Provision of Information to the Public (<a href="#">Visuomenės informavimo įstatymas</a>), 1996 (Consolidated 12.01.2018), Art. 31, 40</td>
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<td>Luxembourg</td>
<td>Grand-ducal regulation (<a href="#">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</a>), 2015, Art. 1,2,3</td>
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<td>The Netherlands</td>
<td>Media Act of 2008 as amended by Act no 552 - Art. 3.29c (<a href="#">Mediawet</a>), Art. 3</td>
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<td>Poland</td>
<td>Broadcasting Act of December 29, 1992 (<a href="#">USTAWA z dnia 29 grudnia 1992 r. o radiofonii i telewizji</a>), 2016, 47f</td>
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<td>Portugal</td>
<td>Law no. 27/2007, on Television and Audiovisual Service On-Demand (<a href="#">Lei da Televisão e dos Serviços Audiovisuais a Pedir</a>), 2007 (Consolidated in 2015), Art. 45</td>
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<td>Law no. 55/2012, the Cinema Act (<a href="#">Lei da arte cinematográfica e do audiovisual</a>), 2012, Art. 2, 3,16</td>
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<td>Decree-Law 124/2013 (<a href="#">Decreto-Lei n.º 9/2013</a>), 2013, Art. 45</td>
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<td>Romania</td>
<td>The Audiovisual Law 504/2002 (<a href="#">Legea audiovizualului</a>), 2002 (Consolidated 17.11.2017), Art. 23</td>
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<td>Slovenia</td>
<td>Act on Audiovisual Media Services (<a href="#">Zakon o avdiovisualnih medijskih storitvah (ZAvMS)</a>), 2011, Art. 16</td>
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<td>Spain</td>
<td>General Act No. 7/2010 of 31 March on Audiovisual Communication (<a href="#">Lev General de la Comunicación Audiovisual</a>), Art. 2, 35</td>
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<td>Royal Decree 988/2015 of October 30 (<a href="#">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</a>), 2015, Art. 6, 7, 14, 16, 17</td>
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