

Questionnaire on the tools used in the application of Article 13 AVMSD
(Promotion of European works in on-demand services)

The European Commission Services would like to ask your input for a reflection about best practices and experiences regarding the means used in application of Article 13 AVMSD (Directive 2010/13/EU). We would therefore be grateful if you could provide us with your comments on the following issues **by 10 October 2013** the latest.

1. Since your Member State notified its measures to the Commission related to the implementation of Article 13 AVMSD, has there been any modification to the legislation or the other notified measures? In the case you have not yet notified such measures to us, please indicate if you have adopted any such (implementing) measures in the meantime? Please indicate also any additional co- or self-regulatory initiatives in this field and any other similar measures that have not been notified. Please provide specific details about the form and content of such measures.

The AVMS Directive was implemented in Italy by Legislative Decree no. 44/2010, which amended the Italian Broadcasting Code so as to align it to the AVMS directive.

Article 44, para 4, of the AVMS Code¹ as amended entrusts AGCOM with the power to regulate the promotion of European works by on-demand service (ODS) providers, specifying that the promotion of the production and the access to European works by ODS providers has to be ensured gradually and taking into account the conditions of the market. Paragraph 8 of the mentioned Article² precises that AGCOM's regulatory power has to be exercised through co-regulatory procedures and mentions a set of possible measures that might be adopted for this purpose: a) financial contribution to the production of European works or the acquisition of rights on them; b) proportion of European works in the catalogue of programmes; c) prominence of European works in the catalogue of programmes. Pursuant to this primary law provision, AGCOM launched a technical table in September 2010³ in order to implement a co-regulatory procedure for the adoption of a Regulation and discussed the possible measures with stakeholders representing both AVMS providers and producers⁴. In April 2011 AGCOM adopted the final text of the Regulation⁵, as agreed by most of the participating stakeholders, which amended the general Regulation on European works⁶ no. 66/09/CONS by introducing a new article 4-bis devoted to the new provisions concerning European works provided on demand.

¹ Art. 44 (4) AVMS Code: "I fornitori di servizi di media audiovisivi a richiesta soggetti alla giurisdizione italiana promuovono, gradualmente e tenuto conto delle condizioni di mercato, la produzione di opere europee e l'accesso alle stesse, secondo le modalità definite dall'Autorità con proprio regolamento da adottare entro tre mesi."

² Art. 44 (7) AVMS Code: "L'Autorità provvede, mediante procedure di co-regolamentazione, alla predisposizione di una disciplina di dettaglio, sostitutiva di quella esistente, coerente con i principi di cui al presente articolo, a quelli di cui all'articolo 3-decies della direttiva 89/552/CEE del 3 ottobre 1989 del Consiglio, e successive modificazioni, secondo cui con riferimento ai servizi audiovisivi a richiesta la promozione può riguardare, fra l'altro, il contributo finanziario che tali servizi apportano alla produzione di opere europee e all'acquisizione di diritti sulle stesse o la percentuale ovvero il rilievo delle opere europee nei cataloghi dei programmi offerti dal servizio di media audiovisivo a richiesta, fermo restando quanto previsto dall'articolo 40-bis."

³ Resolution no. 476/10/CONS available at <http://www.agcom.it/default.aspx?DocID=4938>.

⁴ The participation to the Technical table was done on a voluntary basis and involved the following subjects: AERANTI CORALLO, APT, Associazione IPTV, ATDI, Fox International Channels Italy S.r.l., RAI S.p.a., RTI S.p.A., Sky Italia S.r.l., Telecom Italia S.p.A., Telecom Italia media S.p.A., UNIVIDEO.

⁵ Resolution no. 188/11/CONS available at <http://www.agcom.it/default.aspx?DocID=6115>.

⁶ Resolution no. 66/09/CONS available at <http://www.agcom.it/default.aspx?DocID=2872>.

The new rules introduced two of the three possible measures foreseen by the AVMS Code, focusing on the financial contribution to the production of European works and to the acquisition of rights and to the share in the catalogue devoted to European works⁷. In order to ensure a gradual implementation of the new obligations, the Regulation provides for a transition period within the first four years after its entry into force, taking into account market conditions and availability of transmission rights. During the transitory period the quotas are reduced⁸.

After its entry into force, the Regulation has not been amended, but is being tested as to its implementation in order to ascertain the opportunity of possible future improvements, which could possibly also include the reference to prominence tools.

2. In case you are applying a certain obligatory share of European works in catalogues:

2.1 Please describe any detailed rules in your national system regarding such a share [including any type of rules (legislative or non-legislative), but also recommendations, guidance, self-regulative measures etc.]

As mentioned above article 4-bis, para 1, of AGCOM Regulation on European works requires ODS providers to alternatively a share in the catalogue or a financial contribution.

If they opt for a share in the catalogue, ODS providers have to ensure that at least 20% of their catalogue consists of European works. This share in the catalogue has to be calculated in terms of the total number of programming hours made available each year in the same catalogue.

During the four years transition period, the share in the catalogue is reduced to 5% per year.

2.2 How do you monitor and enforce compliance with such requirements (please provide details regarding method/monitoring frequency/sanctions etc.) Beyond compliance, do you monitor and measure the efficiency of the measures (obligatory share in catalogues)? Please provide data about the findings of any such monitoring (see also question 2.4.).

⁷ Art. 4-bis (1) of EU works regulation:

“1. I fornitori di servizi di media audiovisivi a richiesta di cui al regolamento allegato alla delibera n. 607/10/CONS, promuovono, gradualmente e tenuto conto delle condizioni di mercato, la produzione di opere europee e l'accesso alle stesse, mediante l'adozione alternativa di una delle seguenti misure: a) riserva di una percentuale del venti per cento di opere europee nel proprio catalogo, calcolato sul monte ore messo a disposizione annualmente nell'ambito del medesimo catalogo; b) destinazione di un contributo finanziario annuale alla produzione o all'acquisizione di diritti sulle opere europee per i propri cataloghi pari ad almeno il cinque per cento dei ricavi specificamente attribuibili alla fornitura al pubblico di contenuti audiovisivi a richiesta nell'ambito dei medesimi cataloghi nell'anno precedente.”

⁸ Art. 4-bis (2 and 3) of EU works regulation;

“2. I fornitori di servizi media raggiungono gradualmente e compatibilmente con le condizioni del mercato e le condizioni di offerta dei diritti, la percentuale di messa a disposizione di opere europee di cui al comma 1, lett. a), o il contributo finanziario di cui al comma 1, lett. b), entro il quarto anno dall'entrata in vigore del presente regolamento.

3. Nel periodo di transizione di cui al comma precedente la percentuale di messa a disposizione di opere europee di cui al comma 1, lett. a) deve essere pari ad almeno il cinque per cento annuo o il contributo finanziario di cui al comma 1, lett. b), deve essere pari ad almeno il due per cento annuo.”

Monitoring is usually based on information provided yearly by providers themselves, which can at any time be integrated by specific requests of information and inspections. According to the AVMS Code, violations of the provisions concerning European and independent works are punished with sanctions from ca. 10.000 to ca. 260.000 Euros⁹. This means that if provisions are complied with, but not communicated, these sanctions do not apply. Lack of communication may be sanctioned under a general provision laid down by the law setting up AGCOM¹⁰ and range from ca. 500 to ca. 100.000 Euros. These sanctions are in practice applied very rarely and are limited to cases of deliberate lack of cooperation of the concerned operators.

AGCOM is currently collecting data for 2011-2012, due to some delay in the exercise of the option by ODS providers. According to the mentioned Regulation, the concrete measure – whether a share in the catalogue or a financial contribution – is left to the choice of ODS providers. Operators should therefore firstly have exercised the option provided by mentioned article 4-bis. Despite most providers had been attending the Technical table set up in 2010 to define with co-regulatory procedures the measures that were subsequently adopted in 2011, and thus should have been fully aware of the existing provisions, none of them have yet communicated the exercise of the option. AGCOM is therefore now going to make specific requests of information in order to proceed with the verification of the fulfilment of the obligations. As the thresholds applicable to the transitory period are quite low, it is reasonable to assume that most operators have complied with the obligations.

Learning from experience, from next year (collection of data for 2013) operators will be provided with a specific form, where both sets of obligations are reported so as to ensure consistency in the way data are provided and consequently ease monitoring activity.

2.3 On the basis of your experience in that field, do you consider such measures efficient? What are its advantages/disadvantages in your view?

Due to the fact that data are not yet available, an assessment about the efficiency of these measures is difficult. Considering the experience of other Member States it could be useful to enhance the share obligation in the catalogue with some prominence tools, such as the presentation of European works in electronic program guides and in search tools.

As mentioned above, this option is not taken into account in the existing Regulation and was not suggested by the operators participating to the Technical table apart from the association of independent digital televisions (ATDI). It was therefore not taken on-board in 2011 when adopting the final text. In the meantime the overall scenario has developed significantly in terms of offers available to consumers and business models, so AGCOM is currently exploring the feasibility of possible

⁹ Art. 51 of AVMS Code (legislative decree no. 177/05):

“1. L'Autorità applica, secondo le procedure stabilite con proprio regolamento, le sanzioni per la violazione degli obblighi in materia di programmazione, pubblicità e contenuti radiotelevisivi, ed in particolare quelli previsti: (...) g) in materia di tutela della produzione audiovisiva europea ed indipendente, dall'articolo 44 e dai regolamenti dell'Autorità; (...)

2. L'Autorità, applicando le norme contenute nel capo I, sezioni I e II, della legge 24 novembre 1981, n. 689, e successive modificazioni, delibera l'irrogazione della sanzione amministrativa del pagamento di una somma: (...) d) da 10.329 euro a 258.228 euro, in caso di violazione delle norme di cui al comma 1, lettera g); (...).

¹⁰ Art. 1 (30) of law no. 249/97: “I soggetti che non provvedono, nei termini e con le modalità prescritti, alla comunicazione dei documenti, dei dati e delle notizie richiesti dall'Autorità sono puniti con la sanzione amministrativa pecuniaria da lire un milione a lire duecento milioni irrogata dalla stessa Autorità.”

amendments to the existing Regulation in order to launch a public consultation in the first months of 2014.

2.4 If possible, please provide data regarding the real presence of European works in the catalogues (e.g. in percentages, but if you have such data also regarding the time that the works remain in the catalogues, please share also that data), and if available, data regarding consumption of European works

The first data will be available at the end of 2013, see answer to question 2.2.

2.5 How could such a system be improved in your view, based also on your experience?

In order to improve the current system some new measures aimed at facilitating the access to European works could be worth being attempted. This could in particular include search tools through which the programs can be searched with reference to their country of origin, the display of year of production or the country of origin in addition to its title, content and right holder.

Moreover, as being requested by producers who have participated to an on-going public consultation on a draft regulation on copyright protection launched by AGCOM in July 2013¹¹, producers and editors are urging for introducing adequate rules for the protection of intellectual property rights in the digital environment. What has appeared is that works made available for an on-demand consumption are largely affected by piracy and illegal distribution. Obligations relating to the publication of a basic set of information in respect of the concerned work could possibly also be positive in the light of the needs of an effective copyright protection.

2.6 If you are not using such a measure in your national system, do you have a view about such a system, including reasons why you opted against the introduction of such rules?

Not applicable.

3. In case you are applying obligations related to the use of prominence tools:

3.1 Please describe any detailed rules in your national system in that regard (including any type of rules (legislative/non legislative) but also recommendations, guidance, self-regulative measures etc.)

Not applicable.

3.2 In particular, do you have elaborated any specific prominence tools in your system, such as for example:

- indication of the country of origin in the description of the works in the VoD catalogue,

¹¹ Resolution no. 452/13/CONS available at <http://www.agcom.it/default.aspx?DocID=11563>.

- titles searchable on the basis of the origin of works in the catalogue,
- displaying European works on the front page of the catalogue / in the start-up menu,
- creation of specific sections dedicated to European works in the catalogue,
- specific marketing features / recommendation tools related to European works,
- use of trailers to promote European works / giving special prominence to trailers of European works,
- other means of giving special prominence to European works in catalogues,
- promotion of European works in all media (not just in the VoD catalogue itself),
- Any other?

If yes, are such tools laid down by legislation / obligatory rules or in a different way (guidance, recommendations, self-regulative measures)? Could you provide a list of these specific tools?

Not applicable.

3.3 How do you monitor and enforce the compliance with such rules? (please provide details regarding method/monitoring frequency/sanctions etc.) Do you measure and monitor the efficiency of these rules? Please provide data about the findings of any such monitoring (see also question 3.6).

Not applicable.

3.4 On the basis of your experience, do you consider such measures efficient? What are their advantages/disadvantages in your view?

Not applicable.

3.5 How could such a system be improved in your view, based also on your experience? Do you have specific recommendations for particular prominence tools?

Not applicable.

3.6 Could you provide data regarding the effect of such prominence tools in terms of their influence on consumption? Give examples regarding the particular ways to measure efficiency: increase of number of views after the use of a particular measure/prominence tool (e.g. the effect of appearance of the work / the trailer on the front page in terms of increased viewing figures). Please provide data in general regarding the consumption of European works in the catalogues in relation to the prominence tools applied.

Not applicable.

3.7 If you are not using such measures in your national system, do you have view about such a system, including reasons why you opted against the introduction of such rules?

As mentioned above, the new rules were adopted by AGCOM inviting all potentially interested subjects to take part to a Technical table set up in order to introduce the new provisions by co-regulatory procedures as requested by the AVMS Code. During the discussions made at the Technical table attention was mainly focused on the two options of defining a share in the catalogue and a financial contribution. Basically, there was no concrete proposal nor interest at that time in introducing an obligation related with prominence tools. This does not imply that this particular measure is not valuable. On the contrary, examples from other member States are showing that these tools can play a very significant role in ensuring European works be known and made easily accessible.

4. In case you are applying obligations related to a financial contribution:

4.1 Please describe the detailed rules regarding a financial contribution in your national system. (e.g. on which players is it imposed, how is the required contribution defined/calculated including the basis of the imposition, how does it have to be fulfilled.)

Alternatively to a share in the catalogue, ODS providers may opt for allocating an annual financial contribution to the production of or purchase of rights to European works for their catalogues. This financial contribution has to represent at least 5% of the revenues deriving from the provision of audiovisual content on-demand within the same catalogues in the previous year. As a compensative measure, ODS providers who fail to meet the financial contribution percentage under such requirement by less than 1%, must recover the missing part the following year.

During the four years transition period, the investment obligation is reduced to 2% per year.

4.2 Please describe how the imposed financial contribution is re-attributed if the system includes such reattribution (by which organism etc.) or how the financial contribution otherwise reaches the sector. In particular please describe who can benefit from this financial contribution, on which basis and how is it (re)attributed to them.

The financial contribution is directly attributed to the producers by the obliged operator.

ODS providers may alternatively directly invest in the production of original contents or purchase the transmission rights. There is no collecting organism in charge of possible redistributions of the invested sums, so the latter are directly devoted to the beneficiaries.

4.3 How do you monitor and enforce compliance with that obligation (please provide details regarding method/monitoring frequency/sanctions etc.) Do you measure and monitor the efficiency / effects of the financial obligations? Please provide data about the findings of any such monitoring (see also question 4.6).

See question 2.2.

4.4 Could you provide data regarding the overall effect of the financial contribution (how much was collected / invested by such players in production overall per year)? If you did not do so already above, if possible, please provide data regarding the consumption of European works in the catalogues.

Data will be available at the end of 2013, see answer to question 2.2.

4.5 On the basis of your experience in that field, do you consider this system efficient? What are its advantages/disadvantages in your view?

Financial contributions have been widely requested by producers, as being the most direct way of ensuring the production of new European works in a scenario where production costs are often hard to finance. Considering the monitoring experience from the linear world, where financial contributions have been in place for many years, it is also a fact that these quotas are easier and more objective to calculate if compared to obligations related to the share in a catalogue, where a qualitative assessment is needed in order to select the qualifying works.

On the other hand, financial contributions are often related to the market strength of operators being able to invest. From the experience related to linear works, most requests of exemption are related to financial difficulties of smaller providers: considering that the most attractive works are usually also the most expensive ones and that the remaining, more affordable ones are often not particularly attractive in terms of audience and may therefore lead to a drop in shares, which risk to make the product less attractive for advertisers, this is a vicious circle from which it might be hard to get out. Subscription based and integrated content providers and network operators are consequently in the position of making the best offers, making financial obligations particularly difficult to comply with for the smaller operators.

4.6 How could such a system be improved in your view, based also on your experience?

In order to improve the system, there is probably the need of market related measures, such as clear and transparent rules aimed at making access to European works easier for the smaller operators; the provision of incentives to the production of high quality ODS; the promotion of information campaigns on the provision of and access to such services; a stronger enforcement of copyright infringements.

4.7 If you are not imposing such an obligation in your national system, do you have view about such a system, including reasons why you opted against the introduction of such rules?

Not applicable.

5. If you use a different method for the promotion of European works in on-line services in the framework of Article 13 apart from the methods listed (financial contribution/share in the catalogue/prominence tools), please provide more detailed information regarding that method.

Not applicable.

6. Regarding the different methods mentioned above, which of them do you consider as most efficient?

Data are not yet available, but from the linear experience a combination of the measures could probably be a good regulatory mix: the share in the catalogue to ensure that works circulate, the prominence tools to allow potential viewers to be aware of their existence and the investment obligations to give room for new productions that can feed the catalogues and thus start the circle again.

7. Which one of the listed three methods do you consider as most burdensome for operators / which one imposes the lightest burden?

Considering the delay in the provision of data, there are no sufficient elements to provide an answer.

8. According to your experience in monitoring the fulfilment of such obligations, are there special difficulties regarding monitoring?

Despite the apparently clear wording of the new rules and the lack of judiciary challenge, it seems that the main difficulties derive from the implementation of the transition period, which might have given room for some confusion.

9. Please provide information regarding the view of VoD providers regarding such obligations. (What are their experiences in that regard / which do they consider as most efficient in their practice / which do they favour / do they have specific practical problems in implementing them?) Please do not hesitate to forward this questionnaire also to VoD providers and integrate their potential views in your answers to the questionnaire.

If possible, this answer will be integrated at a later stage.

10. Please indicate whether you agree to share your answers to this questionnaire with other Members of the Regulators Group.

Yes.