

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.

Since the notification of the implementation legislation as laid down in the Media Act 2008 no new regulation regarding the implementation of article 13 AVMS has been introduced.

The legal provision laid down in Article 3.29c of the Dutch Media Act 2008 as a consequence of the Implementation Bill¹ contains almost identical wording to Article 13 of the AVMS Directive: "A media service provider offering a commercial on-demand media service promotes the creation and access to European productions as meant in article 1 of the European Directive". In the Explanatory Memorandum² to the Implementation Bill, some further guidance is provided by the Dutch legislator. There it is stated that the Dutch Media Authority, the *Commissariaat voor de Media* (CvdM) will investigate on a regular basis whether media service providers comply with this obligation. The outcomes of these investigations will serve as information in the reports supplied to the European Commission every 4 years. In its assessment the CvdM will have to take into account the situation of the media service provider since the AVMS Directive states that the obligation is to be fulfilled "where practicable and by appropriate means".

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.)

The main feature of the Dutch approach is that the obligation is applicable to all on-demand media service providers. There is no minimum share of European works or financial contribution specified in the Media Act 2008, neither in policy guidelines of the CvdM.

¹ Wet van 10 december 2009 tot wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten (Act of 10 December 2009 amending the Media Act 2008 and the Tobacco Act to implement the Audiovisual Media Services Directive) *Staatsblad* (State Journal) 2009 552.

² Memorie van Toelichting bij de wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten (Explanatory Note to the amendment of the Media Act 2008 and the Tobacco Act to implement the Audiovisual Media Services Directive) TK, 2008–2009, 31 876, nr. 3.

At the beginning of this year, the CvdM drafted an instruction form which media service providers should use when reporting each year on the promotion of European works in their on-demand media services. The CvdM decided to use the indicators which are laid down in the updated reporting guidelines of the European Commission. See for the draft instruction form the attachment (unfortunately at this moment only available in Dutch).

Regarding the share of European productions made available, it is stated that media service providers should report each year on the amount of European works in their catalogue on at least one reference date picked by them each year. So the reference date can differ each year. Share is defined in terms of duration of videos and the CvdM explains which programme categories should be left out of the calculation because they should be considered as games, news or current affairs items.

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.).

Every year the media service providers should calculate the amount of European works in their service and report to the CvdM who checks the data submitted. The first report should act as a kind of zero base measurement. When data over the years after will follow it will be possible to identify and understand the main trends. When we would notice that the amount of European works would decline (significantly) we will address this observation in our contact with the stakeholders and we will ask the media service providers to explain these trends and ask whether they see room for improvement. These reports could provide useful up-to-date information about developments in the European AV sector and serve as input for national and European AV media policies and regulation.

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?

The CvdM felt it was necessary to test whether the system did not create too many administrative burdens for media service providers and whether the data asked for was relatively easy to monitor and evaluate. Therefore it organised an experts meeting in March 2013. The relatively small but representative group of stakeholders attending the meeting welcomed very much the opportunity to share their experiences and thoughts with the CvdM. For the CvdM the workshop provided more insight information into the possible effects of implementation of its policies.

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.

We can not deliver specific data at the moment. Our general impression is that VoD services offer a significant amount of European works. Usually Dutch productions are labelled as such and are easily accessible by tags and search tools. In at least one VoD service it is also possible to search on any other European country of production of languages used in the film or documentary.

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

From the experts meeting in March 2013 we learned that there is high preference amongst service providers to report on numbers of titles of videos and NOT on the total duration of the videos offered in the catalogue. According to them it is much easier to report on numbers of videos instead of total duration.

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?

We are not in favour of applying minimum share obligations for service providers. To our opinion a large amount of European works in a catalogue is not a guarantee at all they will also be consumed by the public. If you have 90% European and 10% USA or other non-European productions it can still mean 90% of the consumed videos is from the USA, just because they are more popular. This was also expressed by participants in the experts meeting we organized earlier this year. Several parties stated they had considerable doubts whether reporting obligations will serve the objective of promoting European works.

More prominence and better accessibility of European works are considered to be more helpful in comparison with minimum share or financial contribution requirements.

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.)

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,
- 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?

When media service providers report to the CvdM they need to address the following questions, which can be answered relatively easily:

- Can the user search within the catalogue for videos labelled as European works? For instance, are tags or labels regarding nationality/origin used?
- Has the service provider developed tools in order to recommend European works to users?
- Does the catalogue, website or EPG contain a special section dedicated to European works?
- Does the service provider use any other instruments to facilitate access to European works?

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).

Every year the media service providers should provide information about the prominence tools they use and report to the CvdM who checks the data submitted.

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

We tend to consider prominence tools more useful than minimum share requirements because it could increase accessibility of European works and possible lead to higher consumption.

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?

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.

We do not have such data available at the moment.

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 before we can imagine that prominence tools are more useful. But you have to bare in mind that nowadays the same VoD service will be usually offered simultaneously on several devices and platforms:

- On a website accessible via the open internet;
- On an app for smart phone;
- On an app for tablet;
- On an app for smart TV;
- On a digital network like cable;
- On a digital network like IPTV.

On every single device and platform the look and feel of a service and hence the way European works are presented can differ a lot. This is of course depending a lot on the navigation possibilities that a certain device, screen or platform has to offer.

So the main issue here is:

Do we consider these as individual media services and should be reported on every single service, regarding prominence?

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.)

Regarding the financial contribution to European productions, it is stated that media service providers should report each year on the percentage of budget dedicated to European works in their catalogue on at least one reference date picked at random each year. So the reference date can differ each year. The CvdM explains which programme categories should be left out of the calculation because they should be considered as games, news or current affairs items.

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.

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).

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.

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?

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

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?

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.

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

Reporting on share and prominence tools.

In the yearly reports on European works we will ask media service providers to inform us whether their service is accessible from another territory outside the Netherlands. Due to copyright issues the access to most VoD services is restricted to national territory. When a consumer or subscriber is located in another country access will usually be blocked on the basis of IP address. In order to stimulate more transfrontier access to and consumption of European works national copyrights restrictions need definitely to be lifted. As a media authority we are not directly involved in these matters but we think facilitating multi-territory licensing should be one of the top priorities for European media policy makers in future!

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

Our basic approach here is that reporting obligations should be relatively easy in order to keep administrative burdens as low as possible for all stakeholders.

Therefore we have opted for those indicators which can be applied relatively easily in practice in order to keep administrative burdens as low as possible. For media service providers collecting and reporting the data should not be too time-consuming an exercise. And the same goes for the CvdM when it comes to checking the data's validity and reliability and monitoring compliance with European productions obligations.

Instead of sanctions we think it is much more appropriate to have an ongoing discussion with the media service providers and understand what is going on. If we can identify and understand the reasons of eventual declining trends regarding European works it is also easier for national and European policymakers to respond with appropriate measures and actions.

One of the remaining issues is whether niche (like special thematic) and small services should be treated more leniently. The reporting obligations seem to make sense mainly for VoD film services (rental or download to own) and catch-up services but not for the many news video services since news programmes do not count towards the quota of European works within linear services. Yet, one could question why news, games and sports programmes should be left out of the calculation in light of the fact that the creation of these works also contributes to the European audiovisual sector. Also, one could think of granting exemptions to media service providers which are very small in terms of users or revenues. One could consider an approach more or less comparable to the domain of linear media services. Following the revision of the guidelines of the European Commission, member states are now allowed to exempt from reporting on European quotas those linear channels whose market share remains below the threshold of 0.3%. It does not seem reasonable and fair to treat small on-demand media services in that respect more strictly than small linear media services.

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

See above.

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.

In the discussions during the experts meeting the following remarks and observations were made from the side of the media service providers:

- The most time-consuming exercise for media service providers is to assess the origin and nationality of audiovisual content offered. This is regardless of whether or not this content is part of a schedule and broadcast or part of a catalogue and offered within an on-demand media service.
- Figures about actual consumption are not always easy to deliver by media service providers.
- Figures about share and turnover are not always easy to deliver due to the different business models of the media service providers.
- There is a preference amongst service providers to report on numbers of titles of videos and not on total duration of the videos offered in the catalogue.
- There are considerable doubts whether reporting obligations serve the objective of promoting European works.
- No one feels it is necessary to report on European works at all when it is clear all content is of national origin.
- Many service providers stress the importance of ensuring a level playing field with non-EU based competitors.

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

Yes.