

The regulation of VOD services from the prism of diversity



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Diversity and VOD Services

1. Share of European works – 2018 AVMSD

VOD services should promote the production and distribution of European works by ensuring that their catalogues contain a minimum percentage of European works (recital 35)

▪ Article 13

1. States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 % share of European works in their catalogues (and ensure prominence of those works)

4. States shall report to the EC by 19.12.2021 and every two years thereafter on the implementation of paragraph 1

7. The EC shall issue guidelines regarding the calculation of the share of European works referred to in paragraph 1

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1. Share of European works – Questions

- **On what basis will the quota be calculated?**
No. of titles / No. of titles & chapters (serial fiction) / Duration of contents (no. of hours)
- **Who is going to monitor compliance with the quota?**
Spain – There is NO specific authority to ensure the proper functioning of the AV (media regulatory authority), nor is there a convergent authority:
 - **CNMC** ensures compliance with Law 7/2010, General Audiovisual Communication
 - **ICAA** for compliance with Law 55/2007, Film
- **What will happen if VOD service operators do not comply with the share?... Will there be sanctions?, What kind of sanctions?**

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1. Share of European works – Questions

How are VOD service operators going to meet the mandatory share?, What market strategies will they define?

Computer & Communications Industry Association (CCIA 2018: 48): the mandatory share “could either force US companies to buy large volumes of inexpensive European content or to reduce the number of non-European works in their catalogues”

What is “European work”?

The mandatory share can be filled through locally-produced works as well as qualifying titles produced in:

- other **EU Member States**

- European states participating in the ***European Convention on Transfrontier Television*** (1989)

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1. Share of European works – Questions

This definition of “European work” leads us to reflect on **the audiovisual production capacity of European countries...**

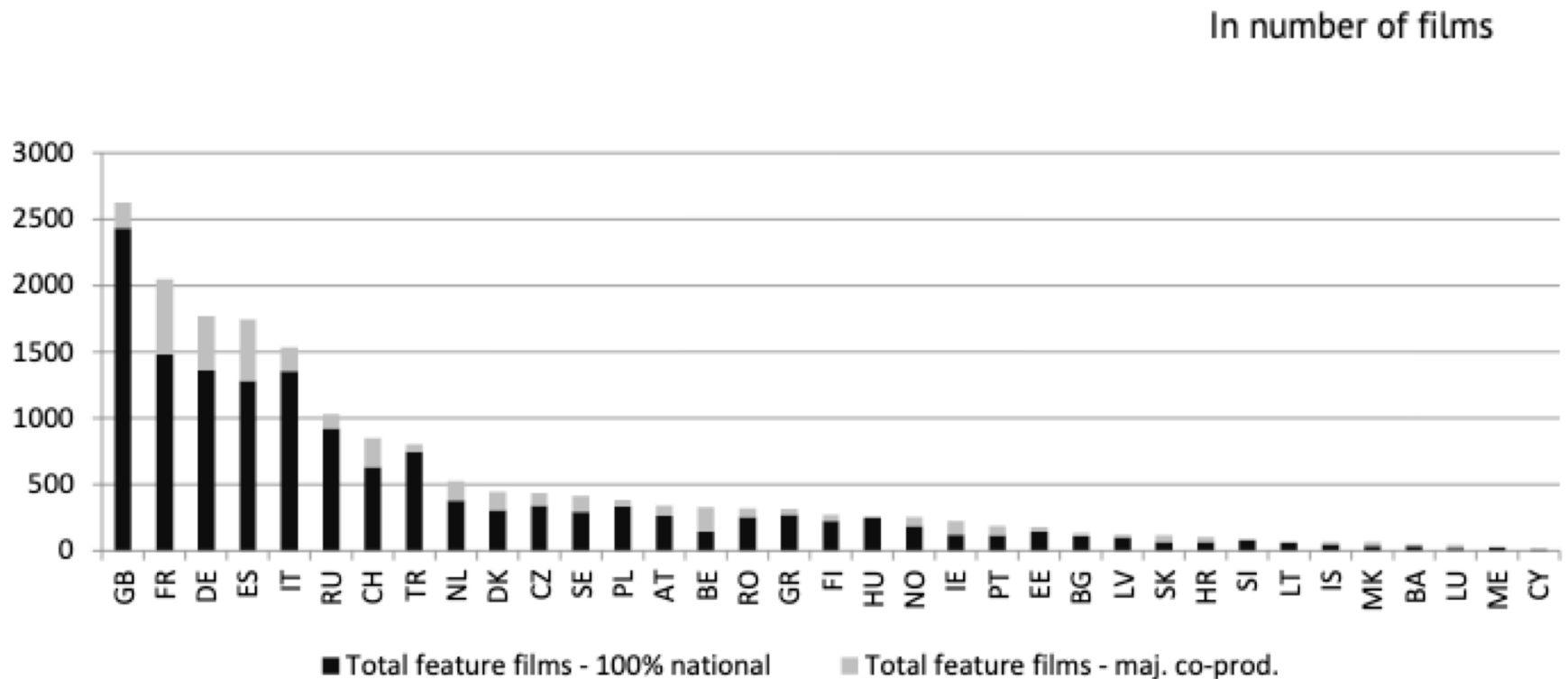
European Film production 2007-2016 (EAO/Talavera 2017):

- ✓ **More than 18,000 films were produced in Europe** (with overall production on the continent growing by 47%, from 1,444 feature films in 2007 to 2,124 in 2016)
- ✓ **The top–5 producing European countries – UK, France, Germany, Spain and Italy – accounted for 53.6% of overall production in the 36 countries covered in the analysis**
- ✓ **A total of 18 countries produced fewer than the average 25 films a year**

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1. Share of European works – Questions

Feature film production volume in Europe by country and type of production (100% national and majority co-production), 2007-2016



Source: European Audiovisual Observatory / Talavera (2017: 16)

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1. Share of European works – Danger!

- It is possible that the compulsory share will be monopolised by works produced in a small number of countries... There is therefore a risk that the share of European works does not reflect the rich diversity of all the producer countries in the region
- What about the remaining percentage of non-European works in the catalogues of VOD services?

In the case of US based SVOD services (e.g. **Netflix**), it is possible that this percentage - what can represent **70% of the entire catalogue!** - will be dominated by works produced by US companies

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1. Share of European works – Danger!

- **It is possible that the share of European works does not serve for the catalogues of VOD service providers (e.g. Netflix) in the markets of EU countries (e.g. Spain) to reflect:**
 - **Internal diversity** – presence of production of diversified origin within Europe
 - **External diversity** – the presence of production of diversified origin originating outside Europe
- **For us (Albornoz & García Leiva 2017) an audiovisual system that takes diversity as its mandate must offer works that show differences in relation to values communicated, identities represented and aesthetics showed.**
 - These works should reflect the multiplicity of groups that coexist in a given society – **internal diversity** – as well as the cosmogonies and expressions of foreign cultures – **external diversity**

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1. Share of European works – Proposals

- Perhaps a more appropriate measure to protect and promote AV diversity would be **to establish minimum share for national contents & maximum share for contents from a single foreign country**
 - ✓ e.g.: it could be proposed that the production of no country represents more than a certain % of a given catalogue (e.g. 20%)
- **Evaluate catalogues in terms of diversity / Design and employ a battery of indicators** that account not only for country of origin but for the presence of:
 - ✓ **independent production companies**
 - ✓ **new filmmakers**
 - ✓ **group of authors of AV works**: director, scriptwriter, director of photography & composer of music
 - ✓ **presence of women in the group of authors**
 - ✓ **language(s) used in the original version**

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2. Prominence of European work – AVMSD 2018

VOD services must give European works sufficient prominence

- **Prominence = promotion of European works by facilitating access to them**
- The **labelling of content metadata** (which allows a work to be qualified as European) should be promoted so that such metadata is available to VOD service operators
- **Prominence of European works** – means to guarantee it:
 - ✓ to create a dedicated section for works that can be accessed from the service home page
 - ✓ to make it possible to search for works in the search tool available as part of that service
 - ✓ to use works in campaigns of that service
 - ✓ to promote a minimum % of works (e.g. using advertisements or similar instruments)

2. *Prominence of European work – AVMSD 2018*

- Unresolved issue... UE guidelines early 2020
- Policy makers, scholars and professionals have indeed been involved in a debate that evolved from concepts such as **availability** and **visibility** to others like **discoverability**, **prominence** and even **serendipity**
- For the *Observatoire de la culture et des communications du Québec* (2018) **discoverability** is:

The intrinsic capacity of a content, a product or a service available on the Web to be easily discovered by the user, or to stand out spontaneously from the lot without the user having searched for this particular content.

This is the potential to capture the attention of the user, to position themselves, using various techniques and tools, so as to be easily identifiable and discoverable.

2. Prominence of European works – Proposition

- It is key to avoid that local/regional AV works have little visibility within catalogues made up of thousands of titles, or that **they are marginalized as low-profile niches**
- Agência Nacional do Cinema recommended (Ancine, 2017: 35–36):
 - ✓ **the dissemination of domestic AV works** –including independent productions– **through ‘balanced visual exposure at the interface of VOD services**, even in cases where mechanisms to suggest works are used’
 - ✓ **the prominence of domestic AV works in the visual interfaces used by VOD services** – to make these AV works available in a transversal way in the different windows presented to the user, avoiding in doing so the creation of exclusive though isolated niches of domestic production

3. Funding obligations – Spain

Legal regime of the obligation to pre-finance certain European audiovisual works - Law 7/2010, General Audiovisual Communication [art. 5], and, Royal Decree 988/2015.

Concerned companies:

- ✓ TV service providers
- ✓ Programme catalogue service providers, regardless of the form of broadcasting (unless they exclusively broadcast films x)
- ✓ Electronic communication service providers broadcasting TV channels

Beneficiary works:

- ✓ cinematographic films, TV films & series, documentaries & animated films & series

3. Funding obligations – Spain

Requirements to be obligated:

- ✓ To be established in Spain
- ✓ To offer a service with national or regional coverage
- ✓ To have editorial responsibility for TV channels or programme catalogues
- ✓ To broadcast on such channels or catalogues content less than seven years old from the date of production

How much? Every year...

- **Private operators** – 5% 5% of the income accrued in the previous year in accordance with its operating account, corresponding to channels that broadcast content less than 7 years old from the date of production
- **Public operators** – 6%

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AUDIOVISUAL MEDIA SERVICE PROVIDERS	PERCENTAGE OF REVENUES (article 6)	DISTRIBUTION OF OBLIGATORY FINANCING		
PRIVATE OWNERSHIP	5 %	≥ 60 % cinema films	≥ 60 % any of Spanish's official languages	≥ 50 % independent producers
				remainder: free
		remainder: free		
		≤ 40 % films, series, miniseries, documentaries and animation productions for TV	≥ 50 % films or miniseries for TV	
			remainder: free	
PUBLIC OWNERSHIP	6 %	≥ 75 % cinema films	≥ 60 % any of Spanish's official languages	≥ 50 % independent producers
				remainder: free
		remainder: free		
		≤ 25 % films, series, miniseries, documentaries and animation productions for TV	≤ 50 % films or miniseries for TV (fiction or animation)	
			remainder: free	

3. Funding obligations – Spain

- **Operators decide freely where to invest.** It does not go to a fund controlled by a public body (e.g. CNC, France)
- **Large private TV operators set up their own film production companies** while **TVE** (the main public operator) is channelled through **direct participation in national and international co-productions** (2016: investment of around € 23 M), and **acquisition of broadcasting rights**
- **SVOD service providers not established in Spanish territory** (e.g. Netflix - 158 M subscribers / 8.3 M users in Spain) **are not (yet) obliged to contribute to the financing of European works**

3. Funding obligations – AVMSD 2018

- In order to ensure sufficient levels of investment in European works, **States should be able to impose financial obligations on media service providers established in their territory**
 - direct contributions to the production and acquisition of rights of European works
 - payment of fees, to be remitted to a fund, on the basis of the revenue generated by the AV communication services offered in its territory and addressed to it
- Given the direct link between each State's financial obligations and cultural policies, the **AVMSD authorises states to impose such obligations on media service providers established in another EU state that address their territory**
 - financial obligations on revenues generated through the reception market audience

3. *Funding obligations – Problems*

- **Secrecy of SVOD service operators:** they do not report the number of customers they have in the markets in which they provide services or the revenues they earn in those markets... then::

On what basis will the percentage to finance Spanish/European audiovisual work be calculated?

- Principle: *tous les diffuseurs financent la création*
- Proposition: In terms of the diversity of the Spanish audiovisual industry, it is important to maintain positive discrimination in future regulations that affect:
 - **Spanish audiovisual work**
 - **independent producers**
 - **co-official languages existing in the Spanish territory** - Catalan, Basque, Galician (Let's remember the judgment of the European Court of Justice against UTECA)

3. *Funding obligations – Spain*

- **Financing of the RTVE Corporation** (Law 8/2009):
 - Commercial free-to-air TV operators (Atresmedia, Mediaset): 3% of their annual revenues
 - Pay-TV operators (Movistar, Vodafone TV, Orange TV): 1,5%
 - Telecommunications operators providing audiovisual services: 0,9 %
 - Contribution of TV operators for use of the radioelectric spectrum
- **To include Netflix and the rest of VOD services** - to be defined in a future public audience (before the end of the year?) - Possibilities:
 - “the Administration says that (...) different modalities are considered (...) from paying 3% (...) up to a specific rate of lesser amount according to ‘special circumstances’” (*El Español*, 25.6.2019)
 - “different sources indicate that [the Ministry of] Economy shuffles a range between 0,85 and 1,35 [%] of the annual revenues that should be set aside for this financing of public audiovisual services” (*El Confidencial*, 23.6.2019)

4. *Obligaciones fiscales*

- **Gran debate a nivel internacional** que va más allá de los servicios de VOD y abarca al conjunto de empresas tecnológicas que prestan servicios OTT
- Tendencia: **obligar a tributar a las compañías en los mercados en que efectivamente actúan**, más allá de que estén establecidos o no en los mismos

Recordemos que la reformada DSCOA flexibiliza el tradicional country-of-origin principle (país donde esté establecido el operador)

- Netflix opera en el mercado español desde el 20/10/2015... Recién a mediados de 2019 pagó impuestos...
 - ✓ Tributó por dos empresas – Los Gatos Servicios de Transmisión España y Los Gatos Entretenimiento España: 3.146 € en concepto de impuesto de sociedades en su primer ejercicio fiscal en España