Institut für Europäisches Medienrecht
Institute of European Media Law
Institut du droit européen des médias

Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD –

Criteria for exempting certain providers from obligations concerning European Works

by

Professor Dr. Mark D. Cole

Director for Academic Affairs at the EMR

D-66121 Saarbrücken, Franz-Mai-Straße 6
Tel.: +49-681-99 275-11 • Fax: +49-681-99 275-12
emr@emr-sb.de • www.emr-sb.de

April 2019

Table of Contents

Executive Summary

1. The EU Audiovisual Media Services Directive (AVMSD) has been reformed in a substantial manner by Directive (EU) 2018/1808. Besides introducing rules concerning video-sharing platform services, the two-tier approach which distinguished significantly between linear (television) and non-linear (on-demand) services has been partly amended towards aligning the rules for both types of audiovisual media services. More specifically, a general rule about obligations for the promotion of European works was created by amending Article 13. This rule introduces the obligation for on-demand services to include a certain share of European works in their catalogues, but it also allows Member States to impose on any type of audiovisual media services financial obligations including to those providers that are not under their jurisdiction but that target the Member State with their service.

2. The new rule of Article 13 comes with potential new burdens for providers which necessitate investments as well as having procedural implications on the side of providers but also on the side of bodies that will be competent for the monitoring of compliance with the rule. Because of the additional burden the provision acknowledges that imposing it on all providers would be disproportionate. Therefore, Article 13 (6) includes an exemption rule according to which certain services of providers have to be excluded from such obligations. Those channels with a low turnover or a low audience are excluded by the rule in the Directive, in addition providers of other services can be exempted by Member States, namely if the obligations would be impracticable or unjustified because of the nature or theme of the service offered by them. Only for the categories of low turnover and low audience, because these are not clear from the wording, there is a mandatory task for the Commission laid down in Article 13 (7). It has to issue Guidelines on how these categories are defined after consulting the Contact Committee.

3. This study analyses the provision and develops guiding principles that need to be considered in the preparation of the Article 13 (7)-Guidelines. In doing so, the aim of the Directive and the provision specifically are presented in detail as well as the significance of having mandatory Guidelines accompanying the implementation of the Directive. In a further step, other areas with exemptions for small companies are analysed for comparison as well as the remaining guidelines provisions in the AVMSD. Finally, the results are applied to a model for calculation of low audience share that was introduced by the Association of Commercial Television in Europe (ACT) as a proposal to be used. The findings show that such a model would meet the criteria and be useful to ensure that the Guidelines contribute to a common approach in the implementation of the rules in order to keep the burden on providers proportionate. In the conclusions, the Guidelines provision is put into context with some other elements to be considered in the further application of the Directive.

4. The element which is of interest in the context of this study concerns the enlargement of Article 13 to linear media service providers. The original intention of the amendment was to increase the obligations for on-demand service providers in light of their increased economic power and market shares by obliging them to include a "quota" of

European works in their services in a similar way as the linear providers have been doing since the creation of the Television without Frontiers Directive by reserving the majority of airtime for such works. However, the minimum share is set only at 30%, so well below the more than half that is asked of linear providers. The alignment of rules is therefore not complete. In addition, the provision was changed further in the negotiation procedure by enabling Member States to introduce obligations for financial contributions to the production of European works also to those services that are "incoming", i.e. come from providers established outside their territory. This possibility includes linear service providers. On the other hand, the Member States are limited in their ability to introduce such obligations as the contributions can only be based on the revenues earned in the targeted Member State and parallel obligations in the country of origin shall take into account the contributions made in other (targeted) Member States. In addition, the Recitals acknowledge that linear service providers have already contributed significantly to the support of European works which is why they should be less burdened by new obligations than on-demand providers.

5. The reason for making accompanying Guidelines for the interpretation of the Directive mandatory is that they concern parts which are not left to the full discretion of Member States. Although the European works-provisions concern cultural policy goals which are in the competence of the Member States, the provision of Article 13 concerns the cross-border dimension of providing services and therefore a uniform approach to the imposition of obligations on such providers is necessary. In addition, the Directive intends to maintain a competitive environment in which all cross-border service providers can sustain and develop. The Guidelines themselves are not of binding legal quality but the fact that they are a mandatory interpretation ruleset for which the framework is defined by the Directive itself give them more weight than the pre-existing guidelines that the Commission applied in the monitoring of the European works-provisions as well as other guidelines of the Directive which are only encouraged by the Recitals or concern formal (procedural) and not substantive (definition-related) matters.

6. The previous non-binding guidelines that the Commission used in suggesting how to apply the European works-provision in the past, proposed a certain threshold of audience share which could serve as a limit below which obligations should not be imposed by the Member States. The number set in those guidelines (last updated 2011) as well as an assumed maximum of audience share to be reached by all exempted providers are not based on a specific reasoning and cannot simply be applied in continuation under the new Directive which now sets a framework for the (now mandatory) Guidelines. Although the rationale for applying exemption criteria remains the same, the principle of proportionality in light of the aims of the Directive and provision need a careful reasoning when defining what the appropriate threshold should be.

7. The goal of ensuring competitiveness and respecting the economic impact of rules is a guiding principle of the Directive. This also applies to provisions that have a specific goal such as promotion of European works as cultural policy aim. Therefore, obligations resulting from such goals should not disregard the effects on the economic position of providers of existing and potential new channels seeking to use the free movement of services possibilities. If support and availability of European works is the specific goal,

this can only be achieved if there is a sufficient number of services and economically viable business solutions that allow such investments. Basic investments e.g. into procedural management of compliance will be similar for all types and sizes of channels but become less burdensome if applied to a larger channel. This ensures a greater chance for a competitive playing field for small channels.

8. For the criteria of "low turnover" it is recommendable to use the existing Commission Recommendation concerning the definition of small and medium-sized enterprises which defines micro, small and medium-sized enterprises. It relies on staff headcount and maximum annual turnover (or balance sheet totals) figures and can be applied across sectors. In competition law and other areas of EU law this Recommendation is used as a standard and as long as there is no indication that audiovisual media service providers typically are structured very different than undertakings in other sectors, there is no reason to create a new set of figures instead of relying on this. In the interest of consistency, the Recommendation should be the reference point, but even if another solution would be searched for it would need to fulfil the same goal of identifying in a simple and clear way which companies should be exempted due to their "small" size (including the variety mentioned above). In defining the Guidelines, the Commission can decide to use the Recommendation as reference point, but if there is an opening clause for Member States to choose other approaches then these need to lead to the same result of differentiating by easily applicable criteria. It needs to be underlined that the SME-Recommendation leads to a large number of market participants to fall under the definition as the majority of companies active in the EU Member States are not large.

9. For the criteria of "low audience" it is evident that there is not one single figure that is the only possible threshold. However, in finding a concrete figure which makes the application of the provision clear and simple, the proportionality requirement means that the result has to reflect in an equitable way the burdens imposed on providers with the goals of the Directive. Most importantly, in order to give legal certainty to those providers that want to use the Directive's possibilities of cross-border dissemination of content, the calculation rules should be applied in a comparable way across the Member States. In doing so, the reference point needs to be individual channels, because the audience share should not be determined by the overall market position of a provider but the channel-oriented audience share. A provider with several channels on one market is not to be evaluated by the cumulative audience shares but the question of being below or above the threshold has to be answered for each channel.

10. The model for calculation of "low audience" for linear services that is analysed in this study is based on a database making available figures on audience shares across the EU, covering nearly all national markets. The model derives from the audience shares a pattern according to which a large majority of providers together only reach a small share of the audience, while a small number of providers reach a vast majority of viewing audience. The distribution is roughly an 80/20-portioning. With this interim result the model then checks the minimum audience share that all those channels reach which are in the group of the top 20% that cumulatively reach 80% of the audience. That number is used as a threshold to assume that all channels with less audience share are small in the sense of low audience. The model is further refined by applying this average not across all EU Member States but by grouping the latter into three categories of States

with small, medium and large populations as that figure determines the overall audience number and with that usually the amount of channels available and the level of competition for the audience between all these channels.

11. Testing the model and the different steps it proposes to reach a threshold number that is adapted to different market sizes, the study applies the guiding principles derived from the Directive for the issuing of the Guidelines. The result shows that the data source used fulfils the criteria of being representative and inclusive as well as using a measuring technique that is generally acknowledged as the "currency" deciding on market success for linear services. The audience share figure is an objective factor that is not subject to differing interpretation, but gives a clear standard which allows comparison irrespective of the size of providers. Using that to define what is a low audience share is therefore not dependent on an evaluation of providers but simply on the measurement of their reach. By differentiating according to market sizes – the data for which is from the official EU source – the model ensures that the figure does not oversimplify by ignoring market differences where especially in small markets only fewer channels have noteworthy market shares and therefore even small providers or channels reach higher audience shares.

12. As a result, the model proposed – which currently is the only concrete calculation model that has been publicly available in the stakeholder discussion during the consultation of the Commission – meets the standards of the Directive and can be used as a basis for the Guidelines. It does not mean that it is the only model that can be used or that the result demonstrating distribution of share is the only possible figure, but it can be shown that this figure and result would allow to reach the goal of the concretising Guidelines. It is therefore to be recommended to apply them. This holds especially true when considering that the common approach which allows a clear application to every channel in question still does not resolve other implementation problems. The need to find a highest possible level of common application in this question of cross-border dimension has the advantage of making it at least calculable for the providers to see whether or not they would be exempted in their home and targeted markets. Already, with the formulation of the Directive, certain elements such as the exemption due to the nature or theme of the service, will not necessarily be harmonised as the inclusion of their definitions in guidelines is not mandatory. The actual procedural implementation of this rule including the question of how revenues achieved in specific markets shall be collected and exchanged between regulators or competent bodies, remains a challenge. Considering the market reality of 2019 with the increasing importance of VSPs and the large market shares of different types of VOD services, it should be made sure in the implementation of the Directive that the long tail of broadcasters – that now typically also offer additional services – contributing to the EU's audiovisual policy goals are given the framework for a competitive environment in which they are not structurally disadvantaged. The model analysed in this study serves that purpose for the one aspect of exemption definition which is important because providing a clear and transparent solution that can be applied continuously by using updated data can help to avoid a contentious situation in which providers against authorities or Member States and even Member States between each other litigate claiming wrongful interpretation of the exemption criteria.

1. Background and Scope of Analysis

1.1. Background to the Analysis

The Audiovisual Media Services Directive (AVMSD)[1] as the cornerstone of European Union media law has been reformed recently in a substantial manner with the entry into force of amending Directive (EU) 2018/1808[2] on 18 December 2018. Although a lot of the attention of the reform was directed at the extension of the scope of application to so-called video-sharing platform services (VSPs), the changes to several other parts of the Directive are noteworthy.[3] As the title of the amending Directive suggests, the main goal of the reform is the adaption of the regulatory framework for audiovisual media services and comparable services in light of "changing market realities". Therefore, another important step forward is the alignment in many parts of the Directive of the requirements and obligations concerning providers of linear (television broadcasting) and non-linear (video-on-demand) services.

Although the new reform does not create a fully level playing field between these two types of services – the distinction between which had been introduced together

1 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, AVMSD), OJ L 95, 15.4.2010, p. 1–24. This version of the Directive is the codified Directive 89/552/EEC (Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23–30) including all changes made by the Directives 97/36/EC (Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202, 30.7.1997, p. 60–70) and Directive 2007/65/EC (Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27–45).

2 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92.

3 For an overview on all changes of the reform cf. *Institute of European Media Law*, AVMSD synopsis 2018, available at https://emr-sb.de/synopsis-avms/, with a comparison to the previous version and short contributions on the major changes; cf. also *Weinand*, UFITA 1/2018, 260 et seq. and *Kogler*, K&R 9/2018, 537.

with a graduated approach in 2007[4] –, and much less so in comparison with the reduced set of rules applicable to VSPs, concerning some major elements of the Directive an equal basis was created for both. Examples for this are the merging of the requirements to protect minors into one new rule, the application of the same standards concerning the prohibition of content inciting to violence or hatred or the application of co- and self-regulatory standards in achieving the goals of the Directive. The provision that is of interest in the context of this study concerns the provisions on the promotion of European works, especially the obligation of audiovisual media service providers to promote such works.

The specific rules about promotion of European works for "television programmes" (as per the title of Chapter VI of the Directive) remain unchanged and foresee what has become to be known as the quota provision laying down an obligation to "reserve… a majority proportion of their transmission time" for what is defined as a European work and in a variation of that to a smaller extent for works by independent producers (Article 16 and 17 AVMSD). The corresponding provision Article 13 in the version of the Directive so far was directed exclusively to on-demand providers and laid down some very much more general indications on how these should "promote the production of and access to European works". In the revised Directive Article 13 will now partly be applicable to on-demand providers but partly contains elements for both types of audiovisual media services. In addition, it has obligatory aspects which Member States have to include in their national transpositions and optional possibilities for additional requirements that these can impose on providers. The complexity of the newly structured provision is further increased by requiring that the Commission after consultation of the Contact Committee has to issue guidelines on how certain parts of that provision should be dealt with in practice by the Member States and the national regulatory authorities.

These changes are a significant alteration of the existing Directive 2010/13/EU and will shape the adjustment of national media regulation in the EU Member States in light of the meanwhile established "new players" on the market and the changing viewing habits. Nonetheless, the reform does not change the basis of the Directive which was created originally 30 years ago: the same fundamental principles continue to be applicable as they already were with the Television without Frontiers Directive (TwFD)[5], which includes the aim of the Directive to contribute to enabling and increasing the cross-border offer and reception of audiovisual content and creating a regulatory framework for a functioning competition taking into consideration the importance and value of this type of services.

4 Directive 2007/65/EC, see fn. 1.

5 Council Directive 89/552/EEC, see fn. 1.

1.2. Scope and Structure of the Analysis

Against this background, this study will analyse the provision of Article 13 in its new form and specifically the guiding principles when establishing the guidelines which further concretise the provision. It will do so by recalling the main elements of the provision and showing what discretion the Member States have in transposing it and the relevance of the still-to-be created guidelines. The main part of the study will be directed at interpreting the "guidelines obligation" as far as it concerns the definition of criteria to be applied to providers that will be exempt from obligations because they qualify as being different to others by having a "low audience or low turnover" in a market. As the transposition work in the Member States has started and the guidelines can shape this work for the provision of Article 13, the significance of the interpretation in this current timeslot is highly relevant.

The study was prepared on suggestion of the Association of Commercial Television in Europe (ACT) which is one of the supporting members of the Institute of European Media Law (EMR). It is linked to the current preparatory work of the Commission in drafting the guidelines and therefore in a final part will check the approach to the definition of criteria as suggested by the ACT and presented to stakeholders on 27 February 2019[6] against the general findings in the main part of the study.

[6] Cf. https://acte.be/events and for the position paper https://acte.be/library/61/54/AVMS-Implementation-ACT-suggested-Approach.

2. The revised European works-provision in Article 13 AVMSD

2.1. Overview of the extended scope of Article 13

Article 13 AVMSD was introduced originally to include obligations for non-linear audiovisual media service providers concerning the promotion of European works. As mentioned above, this provision intended to expand the existing obligations for providers of linear services to a very reduced extent and without requiring specific measures by the Members vis-à-vis on-demand providers. With the reform in 2018 this changed: in light of the increased relevance and economic potential of on-demand providers on the audiovisual media services market the provision was amended to significantly increase the obligations for these providers. Namely, an obligation to fulfil certain "quotas" for European works in their catalogues as well as an obligation to ensure prominence of these works in the catalogues, was added. This is now a rule that the Member States have to transpose and ensure respect of by those on-demand providers that are under their jurisdiction.

The provision of Article 13 AVMSD has changed in a lot of other parts in comparison to the version of 2010, as can be seen from the following synopsis[7]:

Directive 2010/13/EU	**Consolidated version of Directive 2010/13/EU with amendments by Directive (EU) 2018/1808**
CHAPTER IV **PROVISIONS APPLICABLE ONLY TO ON-DEMAND AUDIOVISUAL MEDIA SERVICES**	**CHAPTER IV** *deleted*
1. Member States shall ensure that on-demand audiovisual media services provided by media service 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 programmes offered by	1. Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure prominence of these works.

[7] For a full synopsis cf. *Institute of European Media Law*, AVMSD synopsis 2018, available at https://emr-sb.de/synopsis-avms/.

the on-demand audiovisual media service.	
	2. Where Member States require media service providers under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds, they may also require media service providers targeting audiences in their territories, but established in other Member States to make such financial contributions, which shall be proportionate and non-discriminatory.
	3. In the case referred to in paragraph 2, the financial contribution shall be based only on the revenues earned in the targeted Member States. If the Member State where the provider is established imposes such a financial contribution, it shall take into account any financial contributions imposed by targeted Member States. Any financial contribution shall comply with Union law, in particular with State aid rules.
2. Member States shall report to the Commission no later than 19 December 2011 and every 4 years thereafter on the implementation of paragraph 1.	4. Member States shall report to the Commission by 19 December 2021 and every two years thereafter on the implementation of paragraphs 1 and 2.
3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.	5. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraphs 1 and 2, taking into account the market and technological developments and the objective of cultural diversity.
	6. The obligation imposed pursuant to paragraph 1 and the requirement on media service providers targeting audiences in other Member States set out in paragraph 2 shall not apply to media service providers with a low

	turnover or a low audience. Member States may also waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services. 7. The Commission shall issue guidelines regarding the calculation of the share of European works referred to in paragraph 1 and regarding the definition of low audience and low turnover referred to in paragraph 6, after consulting the Contact Committee.

The relevant recitals giving background to these changes are the following:

(35) Providers of on-demand audiovisual media services should promote the production and distribution of European works by ensuring that their catalogues contain a minimum share of European works and that they are given sufficient prominence. The labelling in metadata of audiovisual content that qualifies as a European work should be encouraged so that such metadata are available to media service providers. Prominence involves promoting European works through facilitating access to such works. Prominence can be ensured through various means such as a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example by using banners or similar tools.

(36) In order to ensure adequate levels of investment in European works, Member States should be able to impose financial obligations on media service providers established on their territory. Those obligations can take the form of direct contributions to the production of and acquisition of rights in European works. The Member States could also impose levies payable to a fund, on the basis of the revenues generated by audiovisual media services that are provided in and targeted towards their territory. This Directive clarifies that, given the direct link between financial obligations and Member States' different cultural policies, a Member State is also allowed to impose such financial obligations on media service providers established in another Member State that target its territory. In that case, financial obligations should only be charged on the revenues generated through the audience in the targeted Member State. Media service providers that are required to contribute to film funding schemes in a targeted Member State should be able to benefit in a non-discriminatory way, even in the absence of an establishment in that Member State, from the aid available under respective film funding schemes to media service providers.

(37) Broadcasters currently invest more in European audiovisual works than providers of on-demand audiovisual media services. Therefore, if a targeted Member State chooses to impose a financial obligation on a broadcaster that is under the jurisdiction of another Member State, the direct contributions to the production and acquisition of rights in European works, in particular co-productions, made by that broadcaster, should be taken into account, with due consideration for the principle of proportionality. This is without prejudice to the Member States' competence to establish, in accordance with their cultural policy and subject to compatibility with State aid rules, the level of financial contributions payable by media service providers under their jurisdiction.

(38) A Member State, when assessing, on a case-by-case basis, whether an on-demand audiovisual media service established in another Member State is targeting audiences in its territory, should refer to indicators such as advertisement or other promotions specifically aiming at customers in its territory, the main language of the service or the existence of content or commercial communications aiming specifically at the audience in the Member State of reception.

(39) Where a Member State imposes financial contributions on media service providers, such contributions should strive for an adequate promotion of European works while avoiding the risk of double imposition for media service providers. In this way, if the Member State where the media service provider is established imposes such a financial contribution, it should take into account any financial contributions imposed by targeted Member States.

(40) In order to ensure that obligations relating to the promotion of European works do not undermine market development and in order to allow for the entry of new players in the market, providers with no significant presence on the market should not be subject to such requirements. This is particularly the case for providers with a low turnover or low audience. A low audience can be determined, for example, on the basis of a viewing time or sales, depending on the nature of the service, while the determination of low turnover should take into account the different sizes of audiovisual markets in Member States. It might also be inappropriate to impose such requirements in cases where, given the nature or theme of the audiovisual media services, they would be impracticable or unjustified.

The differences between the old and new provision as well as the details about the rules in the different paragraphs will be presented in more detail in the next sections, but in sum the provision now contains the following rules:

Paragraph 1 is the basic rule concerning the obligation of on-demand providers. These need to fulfil a quota of 30% and ensure prominence of these works in their catalogues. It is the duty of the Member States to enforce this obligation for providers under their jurisdiction. Paragraph 2 enables Member States as an optional measure to require financial contributions to the production of European works in a direct or indirect manner. If they do so they have the further option of expanding this obligation under certain conditions also to media service providers – meaning not only on-demand but also linear service providers – that are not under their jurisdiction but target audiences in that specific Member State. The limitations

of this obligation and the basis on which it should be calculated are mentioned in paragraph 3. Paragraphs 4 and 5 concern reporting obligations of the Member States to the Commission and the latter to the European Parliament and Council on how these measures were implemented. Paragraph 6 sets exceptions concerning companies for which the obligations under paragraph 1 and 2 cannot be imposed or for which the Member States can decide not to impose them. Finally, paragraph 7 requests from the Commission to develop guidelines for certain aspects of the provision, specifically on how the calculation of the share of works in catalogues shall be made and which criteria should be used to define the exempted companies in paragraph 6.

2.1.1. The provision in detail

As has been shown above, the revised Article 13 is a complex provision made up of binding elements, areas of limited discretion for the Member States, procedural elements and a legal basis for the detailing the provision in further texts. The reason for including all these elements in one provision is that the aim of the provision to promote European works in a way that can be applicable to all kinds of media service providers instead of only to television broadcasters. Given this aim as combining factor one could have considered also to include the (additional) rules about European works that concern only linear providers in this same provision, but because Article 16 and 17 remain untouched, the decision was obviously made to leave those at their existing position.

2.1.1.1. *The quota obligation in paragraph 1*

Article 13 (1) introduces for on-demand providers a concrete obligation by requesting that they "secure at least a 30 % share of European works in their catalogues and ensure prominence of those works". These two different elements necessitate that providers consider in their preparation and dispatching of their catalogues that this quota is reached, while it at the same time has to happen in a way that gives them prominence. The first condition is – at least in theory – very clear and precise by giving an exact percentage, the second condition on the other hand is very open as it does not specify instruments or methods to create prominence. Concerning the first condition the Commission is obliged to develop calculation methods in the guidelines (Article 13 (7), see below 2.3) which are also the focus of this study as far as they will concern the exemption in paragraph 6. These guidelines according to the wording do not extend to the clarification regarding prominence. Recital 35 does this to a certain extent by mentioning that "prominence involves promoting European works through facilitating access to such works" and exemplifies such measures that are regarded as adequate by the legislating bodies of the EU such as the creation of a "dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of

European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example by using banners or similar tools".

Some of these measures require the tagging ("labelling") of the works in order to function, which is why this form of "signposting" should be encouraged, too, without giving details whether these labels should be generally visible to or accessible for the user (beyond being in the metadata) or in what form the different measures interplay. However, already in the previous version of the Directive it was explicitly mentioned that the "prominence of European works" could be one form of promotion that Member States could impose on on-demand providers in making these works more accessible. Therefore, there is a limited amount of experience with such measures which could be used as starting point for the further development of „prominence measures".[8] In light of the different systems established and different cultural goals that may be aimed for in the Member States, a "one-size-fits-all"-approach was not intended. However, especially the regulatory authorities have indicated some concern that the openness of the provision might lead to an inconsistent implementation of this element of Article 13 across the EU.[9] This concern can expand to the actual quota as the provision requires the meeting of a 30%-requirement "at least", which allows Member States to maintain or introduce also higher quotas.[10] Currently, the methods for calculating the share of the catalogue are very different in the Member States: they are typically based on the number of hours or the number of titles. Furthermore, there are variations of the calculation based on number in case of episodes of series and more impact-oriented calculation methods, such as focusing on the share of the actual viewing time, or combining the quota with a prominence-like measure, which consists of looking at the percentage of European works on the service homepage.[11]

8 In its Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 45, the ERGA names "Monitoring of promotional intensity (i.e. the proportion of European works among the various promotional tools used by the providers) of European works on various promotional channels; Monitoring the proportion of promotional spaces dedicated to European works on home pages of providers at any time; Measuring (point-based system of 14 criteria) the performance of a provider regarding the respect of the prominence obligation; (annual) Mandatory reporting by the service providers annually on their activities, including prominence measures".

9 ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 44.

10 For example 60% of the cinematographic and audiovisual works featured in VOD catalogues in France and 50% of the works featured in VOD catalogues in Austria and Lithuania, cf. on this: Mapping of national rules for the promotion of European works in Europe, European Audiovisual Observatory, Strasbourg, 2019, p. 89.

11 ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 42.

2.1.1.2. *The possibility of financial obligations in paragraph 2*

Article 13 (2) concerns a possibility of Member States to foresee other types of support mechanisms that can be requested from audiovisual media service providers other than the quotas of Article 13 (1) and Articles 16 and 17. As these are optional it also means that already existing systems of financial support in some Member States such as e.g. in France[12] can be maintained or new and changed systems of „direct investment in content and contribution to national funds" can be introduced. As mentioned above, if (and only if) such systems exist in Member States concerning providers under their jurisdiction, the new wording of Article 13 (2) now explicitly allows Member States to expand such obligations to foreign providers "targeting audiences in their territories". The wording of accompanying Recital 36 clarifies that the main criterion here is the "targeting" of the viewers in a given country.

Although the provision itself gives no details as to what constitutes such a targeting, Recital 38 lists a number of indicators besides the language of the offer such as "advertisement or other promotions specifically aiming at customers in its territory, … or the existence of content or commercial communications aiming specifically at the audience in the Member State of reception". In connection with the circumvention rule Directive 2010/13/EU already contained in Recital 42 some explanations of what was to be understood by "wholly or mostly directed towards its territory": those indicators, besides the language of the service, were "the origin of the television advertising and/or subscription revenues, … or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received". Apart from the fact that in both version the reliance on "language of the service" is difficult when it concerns countries in which the same language is spoken, the criteria are not identical but similar. They make clear what the goal of this condition is: only in cases in which there is a commercial gain at the target destination, providers should be obliged to invest some of the gained income that they managed to accumulate in that territory. This also results from the condition that the contributions to which the providers are obliged have to be "proportionate and non-discriminatory". Although the aim of securing a sufficient amount of investment in European works (Recital 36) allows such contribution obligations both for providers under a Member States' jurisdiction as well as for foreign providers, these need to respect the fundamental principles of EU law. Besides having to be applicable to all comparable providers without

12 In France, VOD providers with a turnover above 10M€ per year, offering more than 10 cinematographic or audiovisual works, shall invest at least a specific percentage of their previous year's turnover in the development of the production of European cinematographic works and audiovisual works, including works whose original language is French.

discriminating against providers from other EU Member States, proportionality limits the level of obligation that can be put on providers.

2.1.1.3. *The limits for financial support mechanisms according to paragraph 3*

These conditions are further elaborated in Article 13 (3) which makes a declaratory statement that any contribution obligations have to be in line with Union law. This in practice mainly concerns the need for compliance with State Aid rules. The explicit possibility of extending obligations to non-established providers codifies the results from competition law decisions about such obligations until now.[13] The limitation of proportionality is fixed for such foreign providers in Article 13 (3) as meaning that the obligation can only be derived from the "revenues earned in the targeted Member States". In addition, the state with jurisdiction (the country of origin) shall consider in its own possible calculation of financial obligations for such providers the extent to which they have already been charged by the "destination countries". This shall avoid a double imposition of funding obligations, as Recital 39 underlines, because it would mean that the content triggering the obligation for contributing in the targeted state would be the basis for a charge twice. In that way, the goal for accumulating sufficient funds for the production of European works would be disproportionate compared to the requirements and economic participation that the providers have to fulfil. How the "taking into account" of already made contributions elsewhere will be managed in practice is a challenge to be seen as the Directive itself does not precise whether it will depend on providers giving such information or e.g. regulatory authorities exchanging such information between themselves across the borders of the countries concerned.[14]

2.1.1.4. *The significance of the accompanying recitals*

Considering the competence of the Member States to define their cultural policies and the significance of film funding policies as one important example the approach of the Directive aims at finding the right balance between setting the framework in EU law whilst leaving the decision about the introduction of measures and their design to the Member States. Whether this is reached in practice will depend largely on the way this option will be used by the Member States. Even though the Directive

13 Most notable the General Court, 16 May 2018 (Case T-818/16 – Netflix), declared inadmissible an action against the Commission Decision clearing the German system of obliging such providers to contribute to the film fund. The company had unsuccessfully argued that applying the obligations against it would violate not only competition law rules but also its fundamental freedoms. See also General Court, 27 July 2018, Case T-101/17 – Apple, with the same result, but the decision has been appealed and it is pending before the CJEU (C-633/18 P).

14 This is an expectation raised in the ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 26, 46 et seq.

does not harmonize this question, it needs to be underlined that the Directive clearly mentions the limits of the Member States' discretion.

Not only is the general principle of proportionality referenced, but there are specific constellations in which the consequence of the principle and a non-discriminatory approach are defined clearly: on the one hand, those that financially contribute should also be able to profit from potential funding by the system to which they contribute (Recital 36 sentence 7). This includes the targeting providers. On the other hand, Recital 37 explains why in light of the principle a differentiation needs to be made between providers that are already contributing to reaching the goal of the provision and have additional obligations in that sense. Therefore, if a Member State decides to apply measures under Article 13 (2), there is a limit set by Recital 37. The Member States then have to do it in a less burdensome way for broadcasters as these already invest to a much higher degree in the production of European works. The Recital even curtails the discretion of the Member States to extend financial support mechanisms to foreign broadcasters by expecting that "the direct contributions to the production and acquisition of rights in European works, in particular co-productions, made by that broadcaster, should be taken into account" in each relevant case. This will necessitate a system which allows the identification of investments made in a specific case along the lines of a general calculation scheme. These will have to be considered in a way that – as a concrete result of the principle of proportionality – may lead to a reduced or even no financial obligation for a specific provider. The task of finding an appropriate system and exchanging reported figures between the monitoring or implementing bodies of the Member States concerned without having an orientation on EU level is going to be a challenge.

2.1.1.5. *The requirement for detailing guidelines according to paragraphs 6 and 7*

Overall, Recital 37 shows that the provision of Article 13 that now combines for some of the (possible) obligations both non-linear and linear service providers under one framework aimed at creating a "more level" situation between these two types of providers by increasing the obligations of the non-linear service providers while being cautious of not putting an additional burden on providers of linear services. This conclusion is even more evident when taking a closer look at Article 13 (6) and the related guidelines that the Commission has to issue according to Article 13 (7) after consultation of the Contact Committee.

In order to meet the proportionality requirement, paragraph 6 explicitly exempts certain types of providers from obligations imposed on comparable providers under paragraphs 1 and 2. The distinguishing line is whether the providers concerned have "a low turnover or a low audience", in which case the obligations are not applicable to them. The discretion on how to achieve a proportionate approach concerning the extent to which providers are obliged to contribute to the availability and access to European works is pre-defined by the Directive and not left to the Member States.

Recital 40 gives further indications on how the two elements of low turnover or low audience share are to be understood by mentioning e.g. that the specificities of the audiovisual markets in the respective Member States have to be taken into account and that sales numbers or viewing time can be used as basis for finding out whether the provider stays under the threshold. Interestingly, Recital 40 sees "low audience" and "low turnover" as two examples of a more general phrasing that is the rationale behind Article 13 (6), namely that those providers should be exempted that have "no significant presence on the market". It is also noteworthy that no mention is made of previous guidelines that the Commission used in monitoring the European works provisions, even though these guidelines contained a specific proposal for a figure below which a provider was assumed to be too insignificant with its service to justify support obligations (see more detailed below at 3.1).

Besides these obligatory reasons for exempting providers below the threshold, Article 13 (6) as well as Recital 40 gives for another element full discretion to the Member States. These can also exempt providers if an imposition of the obligation would be "impracticable or unjustified by reason of the nature or theme" of the service provided. Here, Member States retain the power to decide whether or not to apply further exemption justifications and if so in which way exactly the reasons for exemption should be construed. In this case, Recital 40 only repeats the wording of the provision without giving further indications how Member States should approach the matter if they decided to also exempt other providers than those that have a low audience or turnover.

This leaves the delimiting of which types of services have a character, mainly due to their theme, which might make it nearly impossible if not disproportionate to expect them reaching certain shares of European works or even contributing at all to their promotion (e.g. for a very obvious example, if a channel operates as a thematic or special interest channel covering only productions from a certain (non-EU-) territory). If such a channel is licensed (in case of broadcasting) then it would make it very difficult for the provider of that channel to contribute to the promotion of European works at least in that specific channel. Already existing exemption rules in some Member States concern the same genres that are mentioned in the context of Article 16 and which do not count towards the reaching of the "majority proportion of … transmission time" such as news, sports etc. as well as specific adult content. In some cases, also foreign language channels are exempted.[15]

The detailed indications in Article 13 underline that all parts of the provision are relevant including the limitations set towards the Member States by illustrating how the principle of proportionality plays out concretely. The fact that Article 13 (7) requires in a mandatory way that the Commission has to issue guidelines on

15 For a brief overview cf. ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 53.

applying certain elements of that provision does not replace the Member States' involvement in deciding how exactly to find systems and rules that are in accordance with the principle of proportionality. Recital 40 puts the "golden rule" in its explanation of the provision first which has to be a guiding principle also in establishing the guidelines: the balancing between interests of the providers and the obligations imposed on them in order to achieve the goal of supporting European works shall "not undermine market development and … allow for the entry of new players in the market". Keeping in mind the market development necessitates to carefully revise each measure taken or planned in light of the impact it has on providers and whether their further development would be negatively impacted. This could e.g. also include that the administrative efforts in connection with the imposed obligations (e.g. reporting obligations for the providers) are considered carefully so as not to create the need for high investment. The obligatory creation of guidelines has the goal of ensuring a common approach which in itself contributes to reducing the burden compared to a situation in which a cross-border active provider has to consider different standards in each of the Members States concerned.

2.1.1.6. *The procedural aspects of paragraphs 4 and 5*

Finally, the remaining parts of Article 13 contain procedural elements in paragraphs 4 and 5 on how the implementation is to be monitored. There are reporting obligations and a study to be undertaken that will accompany the evaluation when the Commission has to prepare an evaluation report to inform Parliament and Council of the application of the provision in practice in light of "the market and technological developments and the objective of cultural diversity".[16]

[16] Although the parts of the provision concerning the reporting are newly inserted they build upon earlier reporting obligations that existed for Member States and the Commission concerning the European works-provision, cf. for example Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010 - Promotion of European works in EU scheduled and on-demand audiovisual media services, COM/2012/0522 final, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52012DC0522; in recent years there was a lack of follow-up reports, but the Commission has announced that these will be provided retrospectively in the coming months, cf. Contact Committee, Minutes 49th Meeting, p. 9-10.

2.1.2. Comparison with rules in Directive 2010/13/EU

The newly shaped Article 13 is one of the most important and significant changes of Directive (EU) 2018/1808. The formerly separate chapter for on-demand services has been replaced as the provision such as Article 13 at least in parts are applicable to all types of audiovisual media services providers. Compared to 2007 when on-demand services were already discussed concerning the impact these would have, the new rules are stricter in this regard and a further degree of harmonisation is achieved. Until now, the margin for the Member States to react was wide, as in 2007 the legislators acknowledged that on-demand services only „have the potential to partially replace television broadcasting"[17]. For the reform it is assumed that this has changed significantly which is why the rather softly formulated "obligation"[18] of 2007 according to which on-demand service providers shall „promote, where practicable and by appropriate means, the production of and access to European works" without specific implementation details, was replaced with some mandatory and some more specifically formulated instruments. These were made more stricter during the negotiation of the final outcome, when compared to the initial Commission proposal.

Differing ways to achieve a support of European works were chosen by Member States after 2007, e.g. expecting the acquisition of licences by providers for European works, catalogue shares for on-demand providers or by using a prominent positioning of the European works.[19] With the new provision of Article 13 (1) the changed market reality was supposed to be reflected and the diversity in Member State approaches concerning obligations of video-on-demand providers harmonised. From a description of exemplary measures that could be a result of non-linear providers contribution to supporting European works, this has now become an obligatory requirement. The quota is set at 30% (as a minimum) and therefore still differs significantly from the one applicable to linear service providers that need to reserve the majority of airtime for such works. In light of the economic strength of the most important of these players such as "Netflix"[20] or "Amazon

17 Cf. recital 48 of Directive 2007/65/EC.

18 In the discussions during the reform that lead to 2007/65/EC many argued that introducing more measures than what was included, would have been too restrictive in light of the development of these types of providers at that moment in time; cf. for the discussion *Nikoltchev S. (ed.)*, Video on Demand and the Promotion of European Works, IRIS Special, European Audiovisual Observatory, Strasbourg 2013, p. 23.

19 Cf. On this: *Nikoltchev S. (ed.)*, Video on Demand and the Promotion of European Works, IRIS Special, European Audiovisual Observatory, Strasbourg 2013, pp. 100 ff; Mapping of national rules for the promotion of European works in Europe, European Audiovisual Observatory, Strasbourg, 2019.

20 Based on figures by the United States Securities And Exchange Commission, Annual Report 2018, Netflix had an annual turnover of 1.2 Billion USD in 2007, tripled that in 2012 and had multiplied it by 10 in 2017 with a turnover of 11.7 Billion USD and

Prime" this is not necessarily an obvious choice. This reduced level of expectation as to how many European works have to be offered and given prominence in catalogues of on-demand providers irrespective of market shares is counterbalanced by the impact of Recital 37. This Recital underlines that the principle of proportionality makes it necessary to take into account the contributions linear providers have already and continue to do for supporting European works which is why potentially equally applicable new rules should be interpreted in a way that reduces their burden compared to the ones of non-linear providers.

The additional measure besides the share and/or prominence in the catalogues that Directive 2010/13/EU mentioned as a possible form of supporting instrument by non-linear service providers were financial contribution obligations towards the production and rights acquisition of European works. This was not turned into an obligation as was the case with the quota provision. Instead it is now reshaped completely as a separate (possible) instrument by Member States which these can apply to both types of audiovisual media services providers. The possibility includes a limitation as to how foreign providers can be included in the financial obligation schemes. As a result, the new provision establishes two obligations that have to be imposed on on-demand providers by the competent Member States (namely shares and prominence) and adds one possibility left to the discretion of Member States. This latter possible obligation of financial investments cannot replace the other two obligations (as far as on-demand service providers are concerned) but adds to these two possibilities. In order to avoid that a multiplication of obligations, e.g. for linear providers resulting from not only the possible implementation of Article 13 in such a way but also from Articles 16 and 17 AVMSD, imposes too strict measures that would have a detrimental effect on the economic position of the providers, the need to develop and apply all these instruments with careful consideration of the principle of proportionality (which is defined more concrete also in the recitals) is explicitly and repeatedly highlighted.

It is important to refer to the obligations of Articles 16 and 17 when considering the obligations imposed on the different types of providers because although the supporting measures that are included in Article 13 are applicable partly to both and partly only to on-demand providers, the obligations for the latter are outweighed by the stricter equivalent obligations for linear providers. The reformulation of Article 13 (2) allowing Member States to expand financial obligation instruments to any type of audiovisual media service provider accessing the market of a specific Member State even without being established there, was proposed in a relatively advanced stage of negotiations by a motion of the Council.[21] The goal

increasing further to 15.79 Billion USD in 2018, https://d18rn0p25nwr6d.cloudfront.net/CIK-0001065280/a6bf9700-eab8-4e15-96cd-391c961e6240.pdf.

[21] While the Council documents about the discussions on 15 November 2016 (ST 13934 2016 REV 1, available at https://data.consilium.europa.eu/doc/document/ST-13934-2016-REV-1/en/pdf) still have a limitation of the scope of Article 13 (2) to on-

of introducing Article 13 (1) was to align at least to a certain extent the obligations of the two types of providers.[22] This goal cannot be contradicted by subsequently increasing significantly the obligations of linear providers as is made in principle possible through the possibilities of Article 13 (2). Such a solution would not respect the principle of proportionality as formulated specifically in this provision by the legislating bodies.

As mentioned previously, the insertion of a "guideline provision" which mandates in an obligatory manner the Commission to develop – after consultation of the Contact Committee details – on how to interpret some parts of Article 13, is completely new. In the previous version of the Directive "guidelines" were only proposed in the context of the strengthening of self-regulatory bodies[23] or as part of recommendations. As far as the monitoring and reporting obligations are concerned, the previous Directive already contained similarly worded rules as in Article 13 (4) and (5). The reporting period is reduced by half to now every two years and will have to cover all measures taken by a Member State according to paragraphs 1 and 2.[24]

2.2. Systems of financial contributions to the production of such works

Directive (EU) 2018/1808 mentions two types of financial contributions towards supporting the production of European works: direct investment in content and (indirect through) contribution to national film funds. The details of the different already existing national provisions are very diverse.[25]

Direct investments lead to a financial remuneration at the source of production. Besides this commonality differences concern the level of investments to be made, how the investment is calculated and whether this is laid down specifically in law. Very specific investment rules can be found in some Member States in particular for

demand providers, this formulation was dropped according to the report on 19 December 2016 (ST 14580 2016 INIT, available at https://data.consilium.europa.eu/doc/document/ST-14580-2016-INIT/en/pdf). In the first mentioned document there is an explanation (in fn. 87) that the Member States "EL, HR, IE, LT, PL, PT, RO and SI proposed to extend the possibility for a Member State to impose a levy also to linear service providers established in a different Member State, but targeting its territory".

22 Cf. the observation also of ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 27.

23 Cf. Recital 44 of Directive 2010/13/EU.

24 Although not in the substantive provision text, Directive 2010/13/EU already mentioned in Recital 69 that financial obligations imposed on providers should also be mentioned and presented in the reporting from Member States to Commission.

25 Cf. on this and following: Mapping of national rules for the promotion of European works in Europe, European Audiovisual Observatory, Strasbourg, 2019.

public service broadcasters requiring the investment of fixed amounts. Fixed sums have the obvious advantage from producer's perspective that it is clear in advance what amount of money for which period of time will be available in principle. For the providers subjected to such obligations a fixed sum can be very difficult as such a system does not reflect the (potentially changing) economic situation of a company or the competitive environment. This applies especially for commercially operating private media service providers. For that reason, more typically percentages are mentioned in national laws concerning investment obligations. Such a measurement can again be attached to very different sums, such as turnover, profit, specific budget parts (e.g. income from commercial communication) or shares of the licence fee (or comparable; for public service media). Finally, differences also stem from the temporal dimension. It is possible to use a prognostic view based on the budget planning, on results from the past, e.g. for a fixed period of time preceding the next investment phase, or on average values for certain lengths of time.

The rules concerning direct investments differ in the details, but leave it to the obliged media companies to select which productions of European works they want to invest in in order to fulfil their obligation. Only this allows investments that are suitable for the programming purposes of the specific provider and at the same time respect the freedom to conduct the business in the way chosen by the company. In a way, this liberty in how to invest balances the actual obligation in that it at least leaves the widest possible margin in how the money is allocated and into what type of production. Direct investment obligations can therefore also contribute to one of the other goals of the supporting systems for European works, which are not only aimed at creating European works as such, but contribute to diversity in these works, too.[26]

Indirect obligations of financial nature leave much less discretion to the concerned providers. Here, the principle is that the money is collected for a fund from which investments are then made into the production of European works which typically happens on application by the producers. The calculation criteria can be comparable to the ones for direct investment obligations (concerning level of funds, criteria for calculating the obligation, period of time based on which the calculation is effectuated). The distribution of the collected money is organised based on economic and cultural criteria and it needs to be organised in a way that satisfies state aid rules.[27] Therefore, the exact structure of the management of the funds

[26] ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 26.

[27] Such as the "Film Communication" laying down how the Commission applies EU state aid rules for this sector, cf. Communication from the Commission on State aid for films and other audiovisual works, 2013/C 332/01, 15 November 2011, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013XC1115(01).

and their distribution is as important as the guidelines on how applications are evaluated. The procedures have to be transparent and defined in advance.

2.3. Detailing the provision in Guidelines

2.3.1. The "Guideline provision"

According to Article 13 (7) Directive (EU) 2018/1808 the Commission shall issue guidelines regarding the calculation of the share of European works referred to in Article 13 (1) and regarding the definition of low audience and low turnover referred to in the exemption of Article 13 (6), after consulting the Contact Committee. This final version of the "guidelines provision" is consistent with the political agreement reached that the Contact Committee contributes to facilitating an effective implementation of Directive 2010/13/EU and therefore should be regularly consulted on any practical problems arising from its application according to Recital 52. There is no specific Recital explaining further the "guideline provision" but the authorship of the Commission with inclusion in a consultative manner of the Contact Committee shows that a more uniform approach to applying the promotion of European works-provision across the Member States shall be achieved in those parts which are not to full discretion of the Member States. This also means that the guidelines do not create a form of delegation of decision-making power to the Commission which would move beyond or outside the framework set by the provision itself. The guidelines are meant to ensure that e.g. calculation methods to define the obligatory share in catalogues of on-demand service providers are applied in a way that the measures taken at Member States level are comparable in the future reporting.

This idea of a more uniform approach in applying the AVMSD at Member State level would also give more certainty for providers especially if they are active in several Member States. While it is a clear-cut distinction between having an obligation to contribute financially to the production of European works or not, differences in applying standards as to what constitutes a valid calculation for shares in a catalogue or whether a provider is covered by the exemption provision would make it much more difficult and administratively burdensome for providers. Finding a harmonised approach to implementing these rules of the AVMSD in practice would result in achieving a more "level playing field" not only between different types of providers, but also across locations for which the different criteria that are relevant to find out whether providers are exempted from the obligations. This type of harmonization and levelling of the competitive environment has been and still is the overarching aim of the AVMSD.

2.3.2. Procedure for establishment of Guidelines and legal quality

Article 13 (7) mentions by which institution the guidelines should be established and which body is to be consulted. Beyond that there are no indications about the procedure or the legal quality of the guidelines.

As mentioned above, the Contact Committee is to be involved regularly in discussions about all areas of the implementation of the Directive especially if problems occur. Although the provision on the Contact committee (Article 29) remains entirely unchanged in the revised Directive, the revision does actually emphasise the role of the Committee. Throughout the new Directive it is now explicitly mentioned that the Commission is to inform the Committee, but especially in all cases in which additional interpretative documents are to be issued by the Commission, this has to happen following consultation of the Contact Committee. The composition of the Committee with representatives of the Member State authorities in charge of creating and implementing the media policy as well as dealing with question of international or cross-border relevance ensures that the discussion reflects the national frameworks and in turn the results will be considered in the national frameworks. In addition to the representatives of the competent ministry a number of Member States additionally participate in the Contact Committee meetings with a member from the national regulatory authority.

The procedure of the consultation is not defined but the same approach is chosen as is established practice for cooperation within this (and comparable) committees on EU level. Concretely, this means a first round of consultation on the matter is organised by the Commission in which the Member States and also stakeholders can contribute with their opinions on what should be covered by these guidelines. After that the Commission prepares a draft of the guidelines and presents it to the Contact Committee for discussion.[28] Although Member States indicated that for some guidelines to be prepared by the Commission the complexity of the *materiae* to be dealt with and the different interests would necessitate lengthy consultation with stakeholders and reflection about the contents, a procedure was chosen that is meant to lead relatively fast to a proposal to be entered into the formal procedure foreseen by mid-2019.[29] The decision to take this path was made in order to reach the goal of a most widely possible endorsement of the guidelines in the transposition process by the Member States. Consultation does not mean a co-decision power for the Contact Committee but the Commission needs to consider the input of the Committee and especially if this would be negative on some aspects justify by giving relevant reasons in case the Commission decides to retain its position on a specific aspect. The Commission has a legal obligation under Article 13 (7) to issue

28 Cf. on the procedure Contact Committee, Minutes 49th Meeting, p. 5-6.
29 Contact Committee, Minutes 49th Meeting, p. 5-6.

guidelines with the content mentioned in the provision. Therefore, it will adopt them as a "Commission Communication".[30]

The legal quality of the guidelines is not entirely clear. The instrument of using this type of "soft law" to give supplementary interpretation indications or informing about the application in practice of a specific provision is quite common in EU law. Especially in competition law, for which the European Commission has direct executive responsibilities, there are numerous guidelines defining the way primary law and the accompanying Regulations and Directives are applied by the Commission. In the context of this study it is not necessary to analyse in-depth the general nature of such guidelines and how they are taken into account by the Court of Justice in case of disputes concerning a legislative act for which such a guideline exists. It is sufficient to point out that the guidelines do not qualify as such as binding in contrast to the different legislative acts mentioned in the TFEU. However, when guidelines frame a specific practice of the Commission, then these guidelines (respectively the practice of the Commission) are seen as binding the Commission to stick to the contents of the guidelines for all cases which are comparable in order to guarantee legal certainty. In that way they have a self-binding force for the Commission.[31] Nonetheless, if such guidelines are contrary to the provision(s) which they concern, the Court of Justice will interpret the binding law irrespective of what has been "regulated" in the guidelines.[32]

Of interest in the context of this study is a comparison of the different guidelines mentioned in the AVMSD in order to establish whether the guidelines of Article 13 (7) have a special status. Foremost, it is worth noting that these guidelines are the only ones that are obligatory according to the provisions of the Directive and concern a substantive element by requiring that i.a. the criteria to identify providers exempted from certain obligations are to be laid down. Another guideline which shall detail further the scope of application of the Directive by defining what constitutes an "essential functionality" is only an optional opportunity for the Commission enabled by Recital 5.[33] The other guidelines that need to be established

30 Contact Committee, Minutes 49th Meeting, p. 5. The Commission here also indicated to the members of the Contact Committee that a unanimous approval of the still to be developed guidelines when giving its opinion in the consultation would be helpful to ensure majority within the Commission; this is only a political observation, but has no value for the interpretation of the decision-making process needed to meet the requirements or the legal quality of the adopted guidelines.

31 This is also the viewpoint of the Commission concerning the guidelines mentioned in Article 13 (7) AVMSD, cf. procedure Contact Committee, Minutes 49th Meeting, p. 6.

32 Cf. for further details *Craig*, EU Administrative Law, 3rd ed., Oxford 2018, p. 631 et seq.

33 This recital concerns the definition of video-sharing platform services in Article 1 (1) (aa) and mentions the possibility of guidelines in the following way: "[i]n order to ensure clarity, effectiveness and consistency of implementation, the Commission should, where necessary, issue guidelines, after consulting the Contact Committee,

according to a provision concern a procedural aspect, namely the reporting about measures taken by Member States to promote media literacy. Therefore, the guidelines concerning share calculation and the exemption in the European works-provision are different to the other ones and certainly from a legal perspective the most relevant because of their obligatory character and the potentially far-reaching content. For this reason, the legislators, when deciding to leave this interpretation to a guideline of the Commission, framed it in a limiting way: procedurally by involving the Contact Committee with a consultative voice and materially by giving indications in the Recitals (40) on what should be considered in the guidelines ("can be determined, for example, on the basis of a viewing time or sales, depending on the nature of the service; should take into account the different sizes of audiovisual markets in Member States"). Such a limitation can also be found in the previously mentioned guidelines provision of Recital 5 which requires that these "should be drafted with due regard for the general public interest objectives to be achieved by the measures to be taken by video-sharing platform providers and the right to freedom of expression".

The Commission is therefore not free in deciding on the content of the guidelines that are of interest here: it does not have a choice whether or not to issue them and it is bound in developing more details about the calculation and exemption criteria by the provision's aim itself and the explanations in the Recitals. Therefore, guidelines about which providers should not be covered by obligations stemming from the European works-provision or its national transposition(s) have to be prepared in light of the framework of the provision itself but also in its context with the rest of the Directive which will be analysed further below.

Although the expression "guidelines" appears in several other provisions or recitals of Directive (EU) 2018/1808, these are different from the ones mentioned above. They concern guidelines developed by stakeholders in the context of self-regulation (Recital 14), which shows that they are meant to be even less of a binding nature than a guideline that shall define how one of the provisions should be applied by the Member States, or guidelines of other institutions and organisations that can be referred to (such as in Recital 28). The increased significance of the new guidelines concerning Article 13 (1) and (6) can also be seen from a comparison to a "softer" version of guidelines concerning the European works provision for television/linear services providers. The Commission – without a mention of this in the Directive's text – has already in the past issued (later revised) "Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services (AVMS) Directive"[34] with which it wanted to explain to Member States how the oversight of the application of the quota provision by the providers should take place. These

on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service'".

34 https://ec.europa.eu/digital-single-market/en/news/revised-guidelines-monitoring-application-articles-16-and-17-audiovisual-media-services-avms.

guidelines explicitly mention in point 1.2 that the "document as such has no mandatory legal force and is merely intended to clarify certain provisions of the Directive", which was clear from the fact that there was no instruction to the Commission in Directive 2010/13/EU to create them. Now there is an obligation to issue the guidelines which concern some aspects of the European works-provision that – partly – can apply to both types of audiovisual media service providers. This enhances the significance of the guidelines which are passed only after a consultation with the Member States' representatives in the Contact Committee and the integration of the results there. Irrespective of the legal nature of such guidelines, once an agreement for the mandatory AVMSD-Guidelines is found, the outcome should be regarded as binding in the implementation of the underlying rules by the competent national regulatory bodies.

3. The exemption for companies with low turnover or audiences

In the first two sections of the study the structure and content of Article 13 was presented and analysed. In this section, the specific obligations stemming from Article 13 (6) will be looked at more in-depth, finding out basic requirements when establishing the criteria for providers that are exempted from the obligations under Article 13 (1) and (2). The focus here will be on the obligatory exemptions which also concern linear service providers. In other words, the criteria to be laid down with which the calculation for shares of works in a catalogue are to be processed as well as the non-mandatory further exemption that Member States can introduce for providers whose services do not justify applying a European works-supporting obligation will not be dealt with here. There will only be some brief comments about the latter, which can also concern providers of linear services, below and in the conclusions.

The relevance of the two elements "low turnover" or "low audience" in the provision results from the fact that although it seems to be a matter that can be dealt with mathematically, there is no clear single possibility which fulfils these elements and at the same time whatever solution is applied, this must comply with legal requirements. Before looking at an actual proposed calculation model for "low audience" in the next section, in this section the basis shall be laid by identifying these legal requirements for any calculation model. In addition, for the element "low turnover" a comparison will be made with other examples of EU law that include a "*de minimis*"-exception for companies that are below a certain threshold.

3.1. The elements of Article 13 (6) AVMSD in context

Concerning the two characteristics of providers that lead them to being exempted from obligations, Article 13 (6) only refers to the level of "low" without further precising it and connects this to either the case of low "turnover" or low "audience". In Recital 40 the motivation for these exemptions is mentioned: it shall ensure that the potential of the market to further develop is not undermined and especially the "entry of new players in the market", which typically can be smaller companies than the dominating players at the moment, shall not be stifled by imposing too many obligations on these. For the audience share element, Recital 40 gives one example on how this could be established, namely by referring to "viewing time or sales" (the choice of which depends on the type of service). The turnover element is not further defined e.g. by referring to existing definitions, but it is underlined that the turnover threshold should consider the diversity of audiovisual markets in the different Member States, some of which are very small compared to others.

Although the previous version of the Directive did not contain specific exemption rules, there are already a variety of exemptions in Member States for specific types

of providers due to the formulation of the old Article 13.[35] This had requested from Member States to impose promotion obligations on on-demand providers "where practicable and by appropriate means". Some of these exemptions concern (as it will be obligatory in the future) the "size" of the provider concerned. This in turn is typically dependent on the annual turnover, although there is also a model in which the calculation for the application of exceptional rules is based on the (absolute) amount the provider would have to pay as a contribution to the promotion of European works and for which there is a minimum level before the obligation to pay in a given year is triggered.[36] As far as the experience from Member States is reported so far, the exemption is sometimes not based on the overall turnover of the company, but on the specific turnover generated e.g. by the offer of films (as the main type of European work that is to be supported).

A further comparison to the old Directive 2010/13/EU is possible concerning the quota provision for providers of television programmes. Again, there was no specific exemption threshold mentioned there, but the formulation of the provision had (and continues to have) the same limitation "where practicable and by appropriate means" as Article 13 (1). Therefore, some Member States applied comparable forms of exception rules for small size providers. As the provision required the Member States to report on the achieved quota results and the Commission to publish comparing reports, the Commission wanted to rely on comparable data. For this reason, first a group of experts, later the Contact Committee drew up "Suggested

35 For an extensive overview see Mapping of national rules for the promotion of European works in Europe, European Audiovisual Observatory, Strasbourg, 2019; exemplified by current practices in some Member States in ERGA, Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 52-53. Already in the earlier stocktaking of the Commission the input from stakeholders showed that the differences were significant and also that thresholds for exemption do not mean that only rarely these are met, but that much to the contrary it is common that most providers are below a certain threshold ("Countries with minimum thresholds report that only a few operators are reaching the threshold."), cf. European Commission, Promotion of European works in practice, 2014, Input Stakeholders, p. 7, 8.

36 More on this ERGA, Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 53.

guidelines for the monitoring of the "Television without Frontiers" Directive".[37] The latest version of these guidelines date from July 2011.[38]

Firstly, it needs to be underlined that these guidelines do not resemble the Guidelines which are a mandatory task for the Commission to draft under the new Directive (EU) 2018/1808. All versions of those earlier guidelines acknowledged that the "document as such has no mandatory legal force and is merely intended to clarify certain provisions of the Directive"[39].

Secondly, in the latest version of the guidelines, apart from listing all service providers which are exempted qua the Directive's provisions themselves (such as e.g. a news channel), there is an indication on how Member States could apply their margin of discretion when deciding for which providers it would not be practicable to require such reporting. The size of a provider was used as the main example. The guidelines refer to this as "a certain degree of flexibility" granted to the Member States. The Commission insisted that a "common framework" on how to use this flexibility would be appropriate, without the suggested approach being binding or mandatory ("slight deviations may… be possible").[40] But the Guidelines then mention as threshold for the size not a figure concerning the provider, but the audience share of a specific service. Without giving any reasoning it is suggested that providers of services with a share below 0.3% would be unjustifiably burdened if they had the obligation to report about how many European works are featured in their channel. Further, those Guidelines mentioned which reference point should be applied (daily audience share measure by the "industry standard measurement" in a specific market) as well as that the application of these exemptions should not amount, in principle, to more than a 10% share of the total audience in a Member State (i.e. providers exempted when added should not surpass that threshold).[41] But again, there is no reasoning given why these figures should be applied.

37 Cf. Annex 1 to Third Communication from the Commission on the application of Articles 4 and 5 of Directive 89/552/EEC for the period of 1995-96 of 3 April 1998, COM (1998) 199 final, p. 65 et seq. Revised subsequently as "Suggested new guidelines for monitoring the application of Articles 4 and 5 of the "Television without Frontiers" Directive", Annex 1 to Fourth communication from the Commission on the application of Articles 4 and 5 of Directive 89/552/EEC for the period 1997-8, COM (2000) 442 final.

38 Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services (AVMS) Directive, Doc CC AVMSD (2011) 2 of July 2011, available at https://ec.europa.eu/digital-single-market/en/news/revised-guidelines-monitoring-application-articles-16-and-17-audiovisual-media-services-avms.

39 Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services (AVMS) Directive, p. 2.

40 Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services (AVMS) Directive, p. 3.

41 Revised Guidelines for Monitoring the Application of Articles 16 and 17 of the Audiovisual Media Services (AVMS) Directive, p. 3-4.

Therefore, these guidelines do not pre-empt in any way the criteria to be laid down in the new Guidelines, now based on a binding provision (for their creation, not necessarily for their legal status, see above).[42] The rationale for applying exemption criteria is the same, but for the new Guidelines it will have to be demonstrated that the underlying principles, namely the principle of proportionality, are complied with when setting thresholds and exemption levels.

Finally, although again not directly referring to exemptions for specific providers because of their size or place on the market, Recitals 36 and 37 of Directive (EU) 2018/1808 should be mentioned. These Recitals make it clear that the application of the support-obligation provision to certain providers has limitations, which can also be seen as a duty to not apply to the full extent the relevant obligations to these providers. Considering these limitations is a further safeguard that the goal of balancing adequately the cultural goals of the provision with the burden it places on providers is achieved. On the one hand, those providers that are asked as "non-established" providers to contribute to a film fund in a targeted Member State have to be able to receive aid under that scheme irrespective of the lack of establishment. On the other hand, in an unequivocal way, Recital 37 establishes that broadcasters should not be overburdened in comparison to providers of non-linear services because they already invest more in production of European works. In other words, although not a direct exemption *per se*, the investment level reached by a provider in one Member State also has to be considered by the targeted Member State if the latter decides to impose a financial obligation on that provider. The practical problems that this may cause are mentioned in the concluding section of this study, but for the purpose of identifying the aim of Article 13 (6) these two Recitals give further clarity.

3.2. Interpretation of criteria determining "low"

3.2.1. Main approaches including aim

Against the above described background of the provision that does not define itself what the exact criteria are that trigger the exemption for a provider, it is necessary to interpret what "low" shall constitute of. Using literal interpretation will not lead to a clear result because although the meaning of the word "low" reflects a clear notion in comparison to other value levels it does not give any type of measurement, not least because it is not linked to a specific relative (other) value. Therefore, the criteria which make up "low" in connection with turnover or audience need to be developed in light of the aim of the provision and its context. As a starting point, it is necessary to remind that the European works-provision is part of the original

[42] Also ERGA, Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, only cautiously refers to these as "a relevant point of reference", but the "exact same approach" can no longer be used, p. 82.

Television without Frontiers-Directive which (just as its successor) has a twofold goal. It regulates a specific service which has a dual nature. While broadcasting (and now audiovisual media) services have a cultural aspect to them which is connected to the role media play in democratic societies, it is also – and this is long acknowledged – an economic market. The development of the latter as a single market opening new commercial opportunities (beyond the aspect of free flow of information) was the main reason to create the Directive in the first place and determined the legal basis in the EC Treaty (now: Treaty on the Functioning of the European Union) on which it was founded. The Directive struck the balance between these two aspects. On the one hand, leaving Member States sufficient discretion to implement cultural policies and regulate services under their jurisdiction in a way that was deemed appropriate by that State within the framework set by the Directive. On the other hand, defining the rules in a way that allows economically viable offering of services by providers that aim at cross-border activity, most notably by the introduction of the country of origin-principle. The functioning of this market with commercially operating providers is crucial for the goal of the Directive, to increase the amount of offers available to viewers by enabling diversity of operators.

This goal of ensuring competitiveness can be found throughout the Recitals of the different versions of the Directive. In Recital 1 of Directive (EU) 2018/1808 the last phrase mentions the need to achieve a balance between competitiveness and other goals of the Directive. Directive 2007/65/EC mentioned in Recital 1 the goal to "ensure optimal conditions of competitiveness … for Europe's information technologies and its media industries and services". In Directive 97/36/EC concerning the European works provision, Recital 28 motivates the rules as that it is necessary to create conditions for improving the competitiveness of the programme industry while having to take into account "developments in the field of television broadcasting". More concretely, when it comes to balancing the general interest objectives with the impact of obligations, the Recitals limit the obligations in light of the principle of proportionality. For (future possible) Member State rules concerning prominence of certain content Recital 25 of Directive (EU) 2018/1808 clearly says that such "obligations should only be imposed where they are necessary to meet general interest objectives" and "they should only impose proportionate obligations on undertakings in the interests of legitimate public policy considerations". Earlier, Recital 30 of Directive 97/36/EC explicitly said this same conclusion about the level of European works to be included in programmes, namely that these proportions "must be achieved taking economic realities into account".

The balancing of the interests of providers and their economic position with the obligations contained in the Directive or the national transpositions to reach the goal of supporting European works therefore needs to reach a result in which the functioning of the market is not curtailed by overburdening providers, because this would ultimately lead to less providers and less production, dissemination and

diversity of offer of such works. This is especially relevant for new market entrants that do not yet have an established position as well as for small players in the market that will always be in a more fragile position compared to larger competitors when it comes to burdens that have a scalable effect. Such burdens can be of financial nature, but also for example administrative requirements which necessitate some basic investment which is the same for all providers and only increases to a limited extent when scaling the use of the administrative procedure for more or larger portions of offers of a provider. Especially reporting obligations which are not standardised and require the setting up of procedures with every provider are much more burdensome for a provider that can subsequently use the reporting procedure only for a smaller volume or for a service that reaches less profit than an offer by a larger provider. Recital 40 of Directive (EU) 2018/1808 therefore indeed limits obligations to be imposed on providers with low audience and turnover as a means for giving providers with "no significant presence on the market" – and therefore not time-limited – an advantage in order to be able to compete continuously on the market. The principle of proportionality does not only require to establish whether a measure is at all necessary and proportionate (as part of the above-mentioned balancing), but also whether such a measure, if it qualifies in principle as being proportionate, can be applied to all providers or whether certain providers have to be exempted because for them the obligation would be disproportionate. This needs to be the target for the identification of the relevant criteria, to put the threshold at a level below which it is too burdensome for providers to comply with such obligations. That gives them the competitive advantage or, formulated differently, does not put them in a disadvantage.

Considering the overall aim of the Directive to encourage the use of cross-border dissemination of audiovisual media services, the proportionality requirement is not limited to granting certain eligible providers to be completely liberated from obligations, but also to apply obligations in a way that does not disadvantage providers in a disproportionate way in light of the aim to be achieved by the obligations. As reporting about European works in a television programme as well as in catalogues is an administrative burden that necessitates investment, it should be done in a way that is as minimal as possible. Because the new provision of Article 13 (2) concerns the application of possible levy-rules by Member States to non-established providers, different national approaches to the reporting or establishing of criteria for "low" would lead to an additional difficulty for such providers. For this reason, a European-wide approach should be chosen and laid out in the Guidelines according to Article 13 (7). Such a harmonised approach would guarantee providers that they are qualified in the same way in all the Member States that they are active and that the reporting or use of data about European works will be the same between the different Member States which might be imposing an obligation to providers of "incoming" services. At the same time, it would not limit Member States' discretion and competence to impose rules that contribute to cultural policy goals. The decision about what type of film support mechanism exists, what levels

of financial obligations exist as well as whether such obligations shall also be extended to services of providers that are not established in a given Member State, is reserved to the Member States. But whether a provider qualifies to be exempted as well as the way the relevant data is gathered to decide about this, can and should be harmonised. This will also make it easier to report to the Commission on the use of the provision and for the Commission to then make an evaluation of the provision.

3.2.2. Comparison with other areas with comparable exemptions

As mentioned, certain thresholds for applicability of specific EU rules and exemptions for smaller enterprises exist in several areas of EU law. Although these often vary in terms of their concrete levels or eligibility criteria, the approach is common in that the regulatory framework shall consider its impact on all participants of the markets and therefore support smaller competitors by liberating them from certain obligations or burdens in order to be able to compete efficiently with larger market players. It is noteworthy that in terms of absolute numbers (across all markets and Member States) nearly all enterprises are small and medium-sized, so the notion of "exceptional" should not be misunderstood as being applicable only to few market participants.

3.2.2.1. *The Commission Recommendation on SMEs*

As such thresholds were widespread across EU law, on proposal of the Commission for the first time in 1996 common guidelines were established to reduce inconsistencies and the number of differing definitions for these types of companies. The Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises[43] was later replaced in 2003 by a newer Commission Recommendation concerning the definition of micro, small and medium-sized enterprises[44] which is still applicable today.

The Commission Recommendation uses as main criteria to define these types of companies the staff headcount and the annual turnover (or for the latter balance sheet total). The actual thresholds for such SMEs according to Article 2 are 250 staff headcount and a maximum annual turnover of 50 million Euro (or 43 million Euro balance sheet total). Below this overall ceiling, small companies have less than 50 staff headcount and maximum 10 million Euro turnover or balance sheet total. For microenterprises the levels are 10 and 2 million Euro. Recital 4 considers the headcount to be the most relevant single criterion – meaning the "size" of the

[43] Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises, OJ L 107, 30.4.1996, p. 4-9, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996H0280.

[44] Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, Official Journal L 124, 20.05.2003, p. 36-41, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003H0361.

company in terms of employees – as the turnover levels differ quite a lot between different sectors, but are nonetheless to be considered as supplementary second criterion. The Recommendation then gives further details about what constitutes an individual enterprise as well as some further clarification on which data is to be used in what way in order to check the company against the thresholds.

3.2.2.2. *The Example of the Copyright Directive and Platform Rules*

The Recommendation is used as reference point especially in the area of competition law including state aid rules.[45] But also in other rules concerning the media sector there have been attempts to include a reference to the Recommendation in the legislative text. In the recently adopted Directive on copyright in the Digital Single Market, there was such a reference still in the version of the negotiations in September 2018[46]: there would have been an explicit exception for small-sized and microenterprises "within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC" which would have not been covered by the scope of application by not being qualified as online content sharing service provider. This express reference was later deleted in the trilogue but in the final version Article 17 (6) of the new Directive[47] includes a partial exception in the rule on the use of protected content by online content sharing service providers. This does not refer to the same criteria as the SME recommendation but instead targets new market entrants (which one could also refer to as startups here) with small turnover, i.e. providers "which have been available to the public in the Union for less than three

45 Cf. e.g. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19, https://eur-lex.europa.eu/eli/dir/2014/104/oj; Decision No 553/2014/EU of the European Parliament and of the Council of 15 May 2014 on the participation of the Union in a Research and Development Programme jointly undertaken by several Member States aimed at supporting research and development performing small and medium-sized enterprises, OJ L 169, 7.6.2014, p. 1–13, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1553873456496&uri=CELEX:32014D0553; Regulation (EU) No 1287/2013 of the European Parliament and of the Council of 11 December 2013 establishing a Programme for the Competitiveness of Enterprises and small and medium-sized enterprises (COSME) (2014 - 2020) and repealing Decision No 1639/2006/EC, OJ L 347, 20.12.2013, p. 33–49, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1553873456496&uri=CELEX:32013R1287.

46 Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – Outcome of the European Parliament's proceedings (Strasbourg 10-13 September 2018), ST 11520 2018 INIT, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:ST_11520_2018_INIT.

47 Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Outcome of the European Parliament's first reading, (Strasbourg, 25 to 28 March 2019), ST 7717 2019 INIT, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:ST_7717_2019_INIT.

years and which have an annual turnover below EUR 10 million". For the actual calculation of the annual turnover the provision then explicitly refers to Commission Recommendation 2003/361/EC. Interestingly, the provision then foresees a reverse exception that some providers, even though they meet the exemption criteria will still be obliged to prove certain additional measures. This is the case if they have more than 5 million monthly unique visitors. This formulation in one of the most recent legislative acts of the EU shows that careful consideration has been given to the proportionality requirement by setting a specific threshold but still being open for an adaptation under certain circumstances if this is required to achieve the Directive's goals. In this sense, Article 17 (5) of the Directive includes expressly a proportionality clause according to which among other elements the size of the service of a provider has to be taken into consideration when determining compliance of the provider with obligations.

In the recent proposal for a Regulation on preventing the dissemination of terrorist content online[48] the Commission refrained from including an exemption provision for small companies. However, this decision is presented with its reasoning in the Explanatory Memorandum and explained by the fact that especially abuse also on smaller platforms should be prevented. Therefore – and considering that this is only the original proposal and not yet a final legislative text – the balancing test in this case resulted for the Commission in not including an exception because of the overarching goal of the proposed Regulation. But even in this proposal there is a suggestion made that SMEs should receive special support in developing and applying adequate technical instruments to achieve the obligations that would be introduced by the Regulation.

3.2.3. Context with other criteria to be laid down in guidelines

Briefly, the other elements of Directive (EU) 2018/1808 that shall be further detailed in guidelines should be mentioned here.

3.2.3.1. *The Calculation of Share of Works in Catalogues*

As presented above, the only other element that is fixed as a part of the mandatory Guidelines, concerns the "calculation of the share of European works" in catalogues of on-demand service providers. In this case, other than with the word "low" there seems to be a clear definition of the share by having a mathematical figure. But the share of 30% itself does not lead to a harmonised application of rules across the Member States if the calculation basis is completely different. It could actually lead

48 Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online - A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM (2018) 640 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0640:FIN.

to entirely different amounts even though the number according to the "national" calculation might be the same. With the calculation of the quota for television programmes, the "majority" requirement is in principle clear as the schedule of a programme is measurable in hours. For catalogues this is not the case. In order to reach the goal of the Directive as far as the expected contribution of on-demand service providers to the promotion of European works is concerned, the legislative bodies request from the Commission to find a common approach. This has a twofold effect. The promotion of European works is not mainly a cultural policy goal of each Member State, but is framed as a common goal which therefore necessitates a regulation at EU level and not only an option for regulation at Member State level. With the Guidelines on calculation it shall be avoided that individual Member States do not take the same approach in applying the rules to providers under their jurisdiction and thereby would limit the contribution to the common goal. On the other hand, harmonising the calculation approach is again an outcome of the balancing according to which it is necessary not to overburden the providers. If the calculation is completely different by Member State, providers active across borders or in several Member States would need to adapt catalogues for each of these in order to comply with the calculation basis. Even though in practice providers anyway – maybe for other reasons than regulatory compliance – opt to offer different catalogues in different Member States, the goal of the Directive to make most efficient use of the single market for such services requires the possibility of using a harmonised approach.

3.2.3.2. *The Question of the Nature or Theme of Services*

The same reasoning would apply for the clarification of the notion of "nature" or "theme" of an audiovisual media service, which can qualify them for being exempted from obligations according to Article 13 (6) sentence 2. However, as this exemption is only a possibility that Member States can decide to use, there is not the same necessity to define its scope on an EU level. This does not mean that it would not better serve the purpose of creating a framework for effective competition also of such special types of services if there was a harmonised approach. In other words, even without an obligation to lay down a common approach to the types of services that can qualify as potentially profiting from the exemption as well as the circumstances which make them different (if it would be "impracticable or unjustified" for them), there is still the need to impose obligations in a proportionate manner and respect differences between different providers or services. This could suggest that a written form of basic agreement on how the discretion of the Member States should be used by the competent regulatory bodies would be better than having a completely diverging approach.[49] This would be a similar approach that

[49] The problem of differing approaches is also pointed out in ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, p. 83, in which "exchanging experiences and best practices amongst NRAs" is suggested to resolve this.

was chosen when the Commission and Contact Committee agreed on guidelines under the previous versions of the Directive to harmonise the reporting about the compliance with the European works provision.[50] Those were also not mandatory in their creation and not directly binding, but had the effect of unifying the approaches to a certain extent.

3.2.3.3. *Guidelines on "essential functionality" concerning VSPs*

Another mention of Guidelines in the new Directive concerns the scope of application as far as video-sharing platform services are concerned. In the definition of Article 1 (1) (aa) the criterion of "essential functionality" is introduced, which can lead to a service being a VSP besides the case when the service contains the elements mentioned as "principal purpose". Recital 5 links an explanation for this criterion with the potential applicability to "social media services" if these have as an "essential functionality" the provision of programmes and user-generated videos. The criterion is nevertheless not limited to this example as the wording of the definition itself shows. What is interesting is that Recital 5 gives reasons why the Commission (again, after consulting the Contact Committee) "should, where necessary, issue guidelines … on the practical application of the … criterion" even though these are not foreseen in the provision itself as is the case for Article 13 (7).

The guidelines are supposed to "ensure clarity, effectiveness and consistency of implementation" which is exactly the above-described reason for attempting at a maximum possible common approach in applying exemption rules for European works. Ensuring certainty for providers across the different jurisdictions can be reached by being clear in the way of implementation and having consistency between the different regulatory bodies. Effectiveness on the other hand is, again as above, aimed at reaching the goals of the Directive. Therefore, the guidelines shall extend to all necessary aspects or – this is another possible way – be supplemented by additional guidelines if the need occurs. Recital 5 further reflects the principle of proportionality by explicitly requiring that the definition of essential functionality in the guidelines shall duly balance between the legitimate aims (i.e. why the services concerned should be obliged to take certain measures for "general public interest objectives") and the possible infringement such measures could entail, not only on the side of the providers but for freedom of expression as another general interest. Because these guidelines are not mandatory in their creation, the Recital explains more clearly their conditions than in the case of the Guidelines that have to be issued according to Article 13 (7). These arguments reinforce the conclusions of above as to why the Guidelines are needed and which purpose they are supposed to serve.

[50] See above 3.1.

3.2.3.4. *The Media Literacy Reporting Guidelines*

The final mention of guidelines to be issued by the Commission after consulting the Contact Committee is in the new Article 33a (3) on media literacy. But in this case the guidelines do not concern a substantive matter. Instead they relate to the formal aspect of how Member States shall report about the measures implemented for developing relevant skills and promoting media literacy. The goal here is comparable to the guidelines under the old Directive that initially were targeted at ensuring that there would be a comparability of data available on the quota provision by defining who would have to report what. This is clearly more limited than having guidelines issued that define more closely an obligation that stems from the Directive or an exemption from such an obligation.

3.2.4. Interim conclusions

The Guidelines that need to be issued in order to set the framework on how to calculate shares of European works in catalogues as well as for the exemption of certain providers from the obligations, have to contribute to the aim of the Directive while fulfilling the function of detailing the provision of Article 13 and respecting the principle of proportionality. The goal of the Directive to create a single market and set a framework which allows a competitive participation in that market for providers that want to offer their services across borders is best achieved if those obligations that have a transnational dimension are applied in the same or a most common approach. This does not mean that the function of a Directive – i.e. setting the framework within which Member States retain a discretion on how to implement rules that achieve the goals of that framework – is undermined. Much to the contrary, concerning the new provision on supporting European works, the Member States have as a starting point the competency to decide on how to structure film support systems and which obligations to apply to which types of providers. Although the quota and share aspects are binding as a minimum, it is up to the Member States e.g. to decide whether at all to apply national rules on contributions to film funding schemes also to providers of services that are incoming from other jurisdictions. The cultural policy competence of Member States is therefore not disregarded when administrative procedures as well as details on certain substantive provisions such as the exemption rule are shaped in a harmonized way by common Guidelines.

In developing the Guidelines that are mandatory according to Article 13 (7) of the Directive the considerations above need to be taken into account. For the question of what constitutes "low turnover" or "low audience" in order to be a provider that is exempted from obligations it is obvious that there is not one single specific number for each of those two categories that is the only possible solution that respects the principle of proportionality and the aim of the Directive and the provision itself. But when reaching at a fixed level or an approximate number the drafters of the Guidelines have to develop these in light of the principles. And this

will necessitate a careful consideration of whether the obligations imposed and underlined by the Guidelines (i.e. by defining which providers only are exempted) are not overburdening especially providers of linear services that – as the Directive acknowledges – already overall contribute significantly to the promotion of European works.

The considerations presented in this section also apply for the other types of guidelines that the Directive either suggests (in the Recitals) to issue or that concern the other element of the mandatory Guidelines, namely the question of calculating the share of works in catalogues of on-demand providers.

This section showed that for the case of exempting "small" providers from obligations or specific rules, there is a reference point in EU law with the Recommendation of the Commission on SMEs. Although this is mainly used in the context of competition law, for consistency reasons it is recommendable to refer to those standards also for the definition of providers that have a "low turnover". Should the drafters of the Guidelines reach the conclusion that the market for audiovisual media services is different from other markets and there are specificities (e.g. in the volume of staff headcount in case of a micro, small or medium-sized enterprise) then those numbers could be adapted, but the same principal approach should be chosen. The benchmark as established has an authority that makes a new definition for a new sector-specific regulation (i.e. here for the audiovisual media services sector) unnecessary.

Concerning the alternative of "low audience" that justifies an exemption it is evident that there is no fixed given number that is the only possible reflection of the principle of proportionality. There are different results possible when a threshold is established, but the guiding principles mentioned above must lead to a result with which the limits set by the Guidelines balance in an equitable way the burdens imposed on providers with the goals that the Directive wants to achieve. Therefore, a comparability between those types of providers that are regarded as being justified for exemption and vice-versa those types of providers for whom additional obligations to support European works are regarded as being reasonable, should be achieved across Member States. Small providers, expressed in this alternative as those with low audience in a specific Member State which often but not necessarily correlates to size of provider, should be exempted *because* the burden is too high, while for larger players it is also a burden but one that can be shouldered more easily in light of the relevance they have with a service on a given market. Because there is no one figure that one can reach as a result in an abstract manner, it is necessary to scrutinise models to see whether they are in line with these described conditions. For one such model that has been proposed, the scrutiny check will be done in the following section.

Since not only the size or audience share on a market are typical indicators for small or even niche providers, but also the type of service they offer, it would have been

an important step forward if the finding of a common approach would have extended also to the question of which providers can be exempted due to the nature or the theme of the service. Clearly, the audiovisual media services have diversified and in light of the competition by different types of VOD providers special interest channels have continued to play an increasing role in the offering of a broad range of content by providers. Individual channels therefore often have a very low audience, but irrespective of that in some cases would have by definition difficulties to reach support goals in respect of European works if e.g. the channel has a thematic scope that focusses on another cultural area such as Indian movies. Even though the mandatory Guidelines to be issued do not have to extend to this question, there is a possibility for the creation of non-binding additional guidelines (or adding that topic to the newly established Guidelines) with the goal of reaching a common approach in implementation that should be used by the Commission and the Contact Committee.

The Guidelines do not only serve the function of harmonising the approach in a substantive manner as far as the scope of the Directive is concerned. Moreover, the implementation aspect includes a harmonisation from a procedural perspective because the reporting obligations and the internal compliance management by providers are more calculable if they are unified across borders if the providers are active in several Member States. Therefore, the accessibility of comparable data when establishing what is a "low audience" will be an important element in order to respect the principle of proportionality when doing the balance. This question of reliable data should therefore be included in the Guidelines as will also be shown in the following section for a specific example.

4. The calculation approach based on audience share distribution

In the previous section the general framework for establishing the Guidelines according to Article 13 (7) in order to detail the elements of Article 13 (6) was analysed. As interim conclusion for the element "low turnover" leading to exemption of obligations concerning European works, the suggestion to use the Commission Recommendation on SMEs either as direct reference or orientation was presented. This leaves the element of "low audience" to be further discussed in this section. A concrete number as a result of the balancing test is not the outcome as described above. Therefore, any model that proposes to find the appropriate threshold beneath which imposing obligations of the kind mentioned in Article 13 would be unjustified, needs to be checked for compatibility with the general framework and especially a correct application of the principle of proportionality.

4.1. Overview of the methodology suggested

4.1.1. The model "in a nutshell"

The model analysed in the following section was proposed by the Association of Commercial Television in Europe ("ACT")[51] in the consultation process initiated by the Commission[52] and remains as far as is apparent to date the only concrete model suggested in the discussion. It is based on the identification of a data source that allows a common approach and reflects the market reality across the EU Member States in a constantly updated manner. With that data, the model further proposes to derive certain patterns from the figures available in order to identify "typical" small providers, i.e. providers with a low audience share. Indeed, as will be shown, the model concludes from the figures available that the distribution between services that have a large market share and those that have only small audiences reflects a mathematical distribution that is different from a normal distribution – a Gaussian curve – where a majority of channels would have an equal share. To the contrary, the observation is that a large part of the market is covered by a few channels, while a very large amount of services only reaches an added audience share of smaller significance. In an additional step, the model suggests to apply the general conclusion to markets of specific sizes. This is done in order to adapt the final number of average audience share by service which justifies – in a given market – to be exempted from the obligations. With this approach, a concrete number for a given set of comparable Member States is found.

51 www.ACTE.be

52 For further details see ACT, Position Paper, https://acte.be/library/61/54/AVMS-Implementation-ACT-suggested-Approach.

In the following parts, the different steps of the model are explained further and a more detailed view is taken.

4.1.2. The data source

The first question on how to find a solution for a threshold below which one can consider a service of only having low audience is the observation of the markets in real terms because there is no single abstract figure that can be applied. Therefore, it is essential to use data which reflects as widely as possible the markets of the EU Member States and does so based on comparable data because the common approach to be found necessitates the conclusions to be drawn from datasets that concern the same factor across all concerned territories or markets. Since the data is not only required to first make a calculation based on the status quo in order to get a clearer picture of the structure of the audiovisual media services market in the Member States, but also in order to be able later to apply the found model to every single service in the Member States, it is important that it is a data source that is frequently updated. Because of the lack of an "official" EU database at the European Commission that contains the required market information, the proposed model used an existing database that was available to use for research purposes and concerns the relevant market figures.

Since the exemption question relates to providers of audiovisual media services the data needs to cover the audience shares of individual services in a given market. Such data is available, long established and a commonly accepted standard at least for linear services by measuring the viewers of a channel against the overall viewers and thereby reaching a percentage share of the total viewing audience. These figures are, for example, a determining factor for pricing of commercial communication and are aggregated and licensed by different established audience measurement operators. These allow for comparable audience definitions and data analysis across nearly all Member States and the large number of existing channels in these Member States. Although not all channels are listed, one reason being that providers of services with miniscule audience shares are not included, the amount of channels makes the database representative for the markets in the EU-28.[53]

4.1.3. The observation concerning audience shares

The distribution shows that the vast majority of channels have only small audience shares and only few take a large portion of the total viewing audience. In actual

[53] The data used for developing the model and at that given time only two Member States (Luxembourg and Malta) were not included, but an overall number of channels of nearly 1300 were listed with the audience shares, which is significant in comparison to the roughly 4000 available channels as many of the missing channels are presumably so small market players that they would anyway fall under an exemption criteria because of their audience share.

fact if one looks at the global (i.e. across all EU Member State markets included in the database) situation in percentiles of 0.1 % audience shares, more than half the channels have shares of 0.4 % or less. Similarly, if one further increases the shares gradually, the number of channels in that bracket increase rapidly, only leaving few channels in most markets taking a large part of the audience share.[54] This distribution is very different for a normal distribution curve in which few are at low and high levels and the majority is somewhere in the middle.

The results for the audiovisual media services markets reflect instead the situation that is described in economics with the *Pareto principle*. According to that model (expressed in a simplified manner), typically 80 % of an effect are caused by 20 % of a factor or viewed vice-versa 20 % make up for 80 % of something. This model is used in many economic contexts. Applied to an audience share model, this would mean that 20 % of channels would take 80 % of audience share or, differently formulated, that it is of interest to identify how much audience share a service reaches (as a minimum) if it is one of the channels in the bracket of the 20 % most watched channels. If one looks at the available data one will indeed discover that the distribution reflects very precisely an 80/20-distribution, i.e. that most channels even added together do not reach an overall audience share of more than 20%, while the strongest market players are few (20 %) and reach more than 80 % of audience share.

This Pareto-approximation is not perfectly reflected in each of the markets, but taken together across all EU Member states – which is the purpose of the first step to identify a typical threshold of what is small – it is significant how close the actual results are to this distribution. Therefore, it is justified to take a look at what the actual minimum audience share is that is reached by the "big" players, i.e. the top 20 % of most viewed channels. Even though for some of these channels the audience share is very high, the interesting figure is the portion of audience share that each of these reaches at least. On average across all markets in the database set this threshold is 1.7 % which in turn allows the conclusion that generally speaking a typical European channel reaching less than that audience share can be regarded as one of the very many that is small compared to the "top 20 %" and reaches only a low audience share.

4.1.4. The consideration of market sizes

However, before concluding that this 1.7 % threshold is the final and only figure that is representative for the audiovisual media services markets, the model checks the situation according to different market sizes. This is done with the aim to see whether there are comparable Member States, respectively markets in Member States, which, put into comparison with other groups of Member States, have

[54] For the data of 2017 more than 70 % of channels do not reach an audience share of more than 1 %.

different characteristics that justify a specific calculation. As the audience share is in percentage of an overall viewing audience, which is in absolute numbers dependent on population numbers, the distinguishing criterion should be Member States with different sizes of population. This distinction could be made in small steps and there is again no abstract number that can be used as only reference point. But the differences between groups of Member States already show if one simply divides them into small, medium and large-sized Member States.[55] The number of available channels typically correlates directly to market size because of the amount of potential viewers. Therefore, for the three categories of Member States, the minimum audience share of any one of the 20 % channels with highest audience share decreases from smaller to larger markets. The model calculation shows in rounded figures that for small markets (0-10 million population), the minimum audience share of any one of the 20 % top channels is 2.8 %, for medium (10-20 million) 2 % and for large (more than 20 million) Member States' markets roughly 1 %. Overall, as demonstrated above, the average across the EU was minimum 1.7 %, each of the three groups shows a variation of this average. If one applies the model to different population size markets one would therefore have three different thresholds for audience shares below which a channel should be regarded as having a "low audience".

In the following section this calculation model will be analysed for compliance with the framework set in the previous section that any calculation has to respect.

4.2. Evaluation of the calculation system in light of interpretation results

In this section the study will evaluate the model for calculation of the "low audience" threshold that shall exempt providers from obligations under the European works provision of Article 13. As explained above, the methodology proposed to compute a figure which can be used as such a threshold. The possible adaptation by concerned market needs to match the proportionality criteria and contribute to the achievement of the Directive and provision's goals in a balanced manner.

As will be seen, the calculation methodology fulfils the necessary criteria because it allows a comparability across borders and at the same time takes specificities of markets into consideration. Although there is not only one solution that works under the given premises, the result for the proposed model is positive.

4.2.1. The sufficiency of the database used

Firstly, the suggested model allows the establishment of European-wide threshold system giving comparability across borders which is one of the aims of having a

[55] The model assumes that these three categories are population up to 10 million, from 10-20 million or above 20 million with 15, 7 and 6 actual Member States respectively in the year chosen (2017).

common approach to the exemption provision. Providers that are foreseen to contribute in another Member State than its jurisdiction state because of and in relation to the offering of a service across borders, shall be exempted if they fulfil the criteria in the same way across the EU. The model contributes to giving providers legal certainty and regulators clarity in application of the relevant provision depending on how it was implemented in national law.

Secondly, the model suggests to rely on data that is established in a comparable way by a trusted provider. Audience databases are long established and encompasses nearly all EU Member States. The data inserted is based on a "currency" that is widely acknowledged and used as measuring market success for audiovisual media services, not least as it is the commercial communication currency for linear providers. The audience share of television programmes is indeed a factor that is used also in national context when regulatory measures are applied only to large operators or vice-versa small providers are considered for exemption.

The data, whether compiled or licensed, can presumably be updated in future and serve as reference point for the application of some of the AVMSD-provisions, it may be possible to further expand the breadth of the data collection. However, as has been shown above, already a noteworthy share of all channels in the EU are included and this data is sufficient for allowing a comparative deduction of what can be regarded a provider of a "small" service, because of the low audience share it reaches.

Beyond the use of the database to determine the threshold in the first instance, the coverage also allows its use for the regular checking of which service is exempted for which period of time. It is not the only database that could be used and its usability does not mean it is perfect – as mentioned one of the current minor flaws is that only 26 EU Member States are covered and therefore not all channels are reflected in the database – but it can be used as one possible source or model for a comparative view of the audience shares in Europe.

4.2.2. The objectivity of the audience share distribution ratio

Thirdly, the conclusions drawn from an analysis of the more than one thousand channels in the database by analysing a given year, are a neutral result as it is based on establishing what the distribution is between channels with a high and low audience share. It is not a rough estimation, but instead a distribution of audience shares between small and larger channels observed in a very detailed manner, i.e. in 0.1 %-audience share increments. This approach resulted in two clear trends: the vast majority of providers reach only very small audience shares and the largest audience shares are taken by only few channels. The market structure is common to all EU Member States that are included in the database.

Having done this analysis, the model allows the conclusion that roughly there is an 80/20-distribution, a distribution commonly referred to as the *Pareto rule*. Checking every Member State against this result to see how few channel providers cover the 80%-share of the audience, confirms that roughly 80% of the channels reach audience shares below what the top 20% achieve. This may seem remarkable on first view, but in actual fact is not surprising considering that there is a diverse and broad offer of linear channels across the EU and that usually there are a few dominant market players while the others contribute to diversity without necessarily having the same economic standing due to the smaller share that they reach. This is exactly the reason why the Directive's provisions on European works implicitly – and since the latest revision by Directive (EU) 2018/1808 explicitly – improves the competitive position of these smaller channel providers by liberating them from certain support obligations.

As the calculation allows the identification of a specific number (a certain percentage of audience share) to be characteristic to those "large" providers, it at the same time gives the threshold for identifying those providers that are below and therefore small, because they only reach a low audience.

4.2.3. The consideration of different markets

Fourthly, however, the model goes one step further to refine the result in view of the very diverse population numbers in the Member States. This further adaptation applies the rationale of Recital 40 sentence 3. The latter explicitly states that the different market sizes should be taken into account for the identification of low turnovers. This same approach should be chosen also for the calculation of "average" viewing audience shares, because as has been shown the average minimum audience share of large providers is different if one takes a look at Member States with different population numbers. Taking the population size as relevant factor, because this determines the total possible number of viewers and therefore typically impacts the economic chances for providers, the model suggests to group the EU Member States by small, medium and large population numbers. Although the exact numbers for grouping the States could be different than the ones chosen and it would be possible to add further divisions, too, the result for putting together States with up to 10 Million population, up to 20 million and above 20 million gives comparable results in terms of the numbers of channels offered. The data establishing the population size is taken from Eurostat in the model and is therefore again relying on an objective data source.

Applying the above explained test to these 3 categories of Member States/market sizes the threshold figure changes to 2.8, 2 and 1% respectively which can be explained by the larger number of channels operating in the larger markets and the enhanced competition for viewers. Applying this model to the three categories allows the establishment of thresholds specific to market sizes that enhance the competition position of those channels in the territory in which they operate and

that do not fall within the category of the 20% strongest channels in terms of the audience share that they reach. Additional support obligations are then not imposed on these channels which – although large in numbers, not so meaningful in market share – can profit from a less burdensome business environment.

4.2.4. The application to the appropriate reference group

This balancing, however, only works if the model is applied in the way suggested. It is not the overall market position of a provider that should determine the audience share, because this – other than economic market data – is channel-based. Therefore, even if a provider offers several channels on one market, it should not be the cumulative audience shares that lead to the decision of being below or above the threshold, but the result for each of the channels. If not, the obligation of supporting European works because of the commercial success of a channel (as a result of its higher audience share) would be transformed into an obligation based on economic potential of a provider. Such an approach would then in turn disadvantage multi-channel providers if and when they would invest in e.g. new formats to be tested on the market, because these – in direct contrast to similar efforts by providers of only one channel – would immediately be confronted with the additional burden of support obligation and in a far less scalable way. This could decrease incentives to expand and broaden the offer and instead focus on channels which anyway are, as a result of their own audience share, subject to the support obligation. A "compensation" across channels of a provider or a company with group structure would contradict the aim of the Directive and more importantly the exemption rule in the provision concerning European works instead of incentivising the creation of special interest offers.

4.2.5. The overall result in light of possible developments concerning the data

In an ideal setting, the database used for making an annual analysis of markets with the goal of identifying those channels of audiovisual media service providers that are exempted from the support obligation of Article 13, would be complete and possibly further refined in terms of not only the Member States covered, but also the number of channels. But this improvement can happen along the way of applying a common database, because it still allows more comparability and common approach than if Member States could decide for themselves which databases they use to establish the denominator for the exemption provision. And comparability, as has been shown, is crucial in achieving the goal of giving providers legal certainty when operating their channels across borders which is the condition triggering the Article 13 (6)-exemption.

This possibility of an improved common database as well as a different view in terms of division of market sizes do not change the conclusion that the model suggested by ACT and described in the previous section achieves the correct balance between not overburdening providers while allowing the cultural policy goals to be

reached. It is also precise in terms of the threshold which makes the applicability of the provision, at least for this element, clear and more easily to handle, which is important considering that the administrative procedures to use the possibilities of Article 13 (2) will be very complex.

5. Conclusions

This study has shown that the challenge of the newly shaped provision of Article 13 AVMSD will be on how to apply it in practice. The European works support obligation is mandatory to be transposed for Member States concerning on-demand service providers, but leaves discretion whether and how further obligations are imposed and potentially then extended to incoming offers. Both for providers and monitoring authorities this new provision, again depending on how it is transposed, will not be easy to apply and will necessitate some administrative procedures to be clarified. In order to facilitate the additional burdens that could result for providers, the provision mandates the issuing of guidelines that will allow a harmonised approach in applying the new rules.

The aim of this first step for a harmonised approach guaranteed by Guidelines which are then applied across Member States should be to define as extensively as possible a common approach because the introduction of the possibility to apply obligations also to content of providers from outside a Member State's jurisdiction impacts from the outset the cross-border service provision. If the legislating bodies decided to introduce this possibility, the insistence on harmonising Guidelines came with it to ensure that providers of cross-border disseminated content as the prototype of the original goal of the Directive should not be unduly infringed in their activity. The EU-wide content dissemination of audiovisual media services of a provider respecting the legal framework of the Member State of its origin is the characteristic of the AVMSD and an important element ensuring the single market for such services.

The cultural policy competence of the Member States is not affected by such a harmonisation towards a common approach in implementing the rule by the Guidelines, because the States retain the right to decide whether and how to set up a system of financial obligations for supporting European works and ultimately whether to extend obligations to providers not under their jurisdiction. Unifying the approach by defining what types of services should be exempted from any such obligation because of their smaller significance in the markets, does not hamper the sovereignty of Member States in the creation and design of funding models.

The creation of the Guidelines which are the basis for this study, will have more significance than previous forms of guidelines. Already under the Television without Frontiers Directive there were non-binding guidelines established which gave indications on the application of certain provisions (including the European works-quota provision) of the Directive by the Commission. The Guidelines of Article 13 (7) of the new AVMSD are mandatory which gives them more authority. However, it needs to be underlined that they will still not be legally binding per se, but could be challenged ultimately in the context of a legal dispute. It is to be hoped, therefore, that the once established Guidelines will be precise enough to fulfil their

goal of achieving the right balance between imposition of culturally motivated obligations on providers by Member States and the assurance of a competitive position of providers in the changed audiovisual content dissemination market.

The Guidelines, albeit mandatory to be created, have only a limited scope. Although the provision of Article 13 (6) indicates that not only low turnover or low audience should be criteria to exempt providers from additional obligations to support European works, but also if the nature or theme of the service would make such obligations impracticable or unjustified. These criteria, too, are vague and would have deserved a further definition and common approach across the Member States, but the Guidelines are not mandatory for this element. In order to achieve legal certainty for providers it would be recommendable to extend the Guidelines, even though they would have less authority for this aspect, also to the question of special types of services that suggest an exemption. The Member States are given discretion on this question by Article 13 (6), but this does not mean that there could not be a suggestion for a common basic definition. The Commission could then in the first reporting period observe whether or not Member States follow such a common definition or whether there is strong divergence, which – in case it has a negative impact on providers offering their "special" services across borders – in the latter case may necessitate further action in future.

Another reason for arriving at a common application of the criteria stems from the fact that the application of a cross-border levy system will be an administrative burden on providers and authorities anyway. As the systems are different and the "revenues earned in the targeted Member State" (Article 13 (3)) are not easily established, any expansion of levy systems to non-resident providers will result in having to establish reporting procedures. The less harmonisation that is achieved the higher the burden will be for the establishment of these reporting procedures and the internal management at least for those providers that offer services across borders. This concerns questions such as which elements need to be reported and to whom, e.g. the programme schedules, the data on what has already been invested in the country of origin, the comparability of investment data, how to deal with channels that rotate around the threshold being above and below from time to time etc. It is also not clear, how such data can and will be exchanged between national regulatory authorities or those bodies in charge of applying possible rules in the Member States. The role of ERGA in providing the forum for such an exchange is not clear and whether it is possible to implement data exchange in a manner that is not too costly and allows a timely reaction by the concerned providers, needs to be seen. The accompanying Recital 36 underlines that providers subject to obligations at the same time need to be able to apply for funding in a non-discriminatory way. This again necessitates the introduction of new administrative procedures. For all of these reasons a unified approach to at least the question of which providers are to be exempted, is advisable in order to avoid the new provision resulting in too much of a burden for providers.

This study focussed on identifying the guiding principles in establishing the Guidelines taking into consideration the aim of the Directive and the goal of the provision itself. In doing so, it applied the results to a concrete calculation model presented by ACT with which the exemption criteria of low audience could be determined. In addition, it took a look at how existing definitions could and should be used for the decision about low turnover. The calculation model was evaluated as being one possible approach because it respects the guiding principles. It is also a recommendable model because it has the advantage that it works with existing and, more importantly, comparable data. It further gives a clear result and for the question of applying to a given channel also simple in the sense of offering a concrete threshold below which providers should be exempted. The methodology demonstrating distribution of share is objective as was shown in the study and at the same time takes into account differently sized markets by grouping Member States in three categories of small, medium and large markets.

In a final concluding observation, the background against which the AVMS Directive was renewed by Directive (EU) 2018/1808 should be highlighted. It is another reason for being precise in the Guidelines in order to benefit the providers concerned, but in addition carefully consider why the exemption rule was introduced in the first place. The market in which audiovisual media service providers operate has changed significantly in the past decade, but especially in the last few years. Irrespective of the additional pressure created by new dissemination forms through VSPs, the strong dominance of few (originally non-European) companies offering (different categories of) video-on-demand services has put linear providers in a difficult position. Without having to go into the details of key economic factors, the fast increase in growth of video-on-demand services demonstrates that linear providers are further losing market shares.[56]

In light of this market trend, Article 13 was reshaped to impose stronger obligations on non-linear providers. Moving from a very general support obligation, there is now a share obligation for catalogues, although the level of European works is lower than in programmes of linear providers. The exemption obligation as well as the explanation in Recital 37 show that the legislating bodies wanted to ensure that linear providers that have until now guaranteed the wide availability of European works in audiovisual media services, will be strengthened in the competition with other providers. Therefore, not all linear providers can be burdened with additional support obligations and the special role of linear providers shall be taken into account. The situation is especially complex, as many linear providers are now also important players on the on-demand market, at least in terms of the services offered. The vast market share for non-linear services is taken by providers offering only on-demand, so for providers offering both, these will be charged both by the quota obligations in their linear channels (by Articles 16 and 17) as well as by

[56] Cf. overview in European Audiovisual Observatory, Yearbook 2018/19, Key Trends, p. 44 et seq., 50-51.

obligations under Article 13 (1) and potentially – depending on Member State transposition – by additional obligations for cross-border services of both kinds. In light of this market situation and the increasing economic pressure by VSPs that are not included in any regulation concerning European works, any form of implementation of the European works supporting provisions should not lead to a result in which the long tail of broadcasters contributing to Europe's audiovisual policy goals are structurally disadvantaged.

Bibliography

Association	AVMS Implementation – ACT suggested approach (Essential Functionality – Audience/Turnover, Brussels, December 2018, available at https://acte.be/library/61/54/AVMS-Implementation-ACT-suggested-Approach.
Craig, Paul	EU Administrative Law, 3rd ed., Oxford 2018.
European Audiovisual Observatory	Mapping of national rules for the promotion of European works in Europe, 2019, available at https://rm.coe.int/european-works-mapping/16809333a5.
European Audiovisual Observatory	Yearbook 2018/19, Key Trends, Television, Cinemas, Video- and On-Demand Audiovisual Services – the Pan-European Picture, Strasbourg 2019, available at https://rm.coe.int/yearbook-keytrends-2018-2019-en/1680938f8e.
European Commission	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010 Promotion of European works in EU scheduled and on-demand audio-visual media services, COM/2012/0522 final, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52012DC0522.
European Commission	Promotion of European works in practice, 2014, available at https://ec.europa.eu/digital-single-market/en/news/promotion-european-works-practice.
European Regulators Group for Audiovisual Media Services (ERGA)	ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, available at http://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf.
Institut für Europäisches Medienrecht (EMR) e.V.	AVMSD synopsis 2018, available at https://emr-sb.de/synopsis-avms/.

Kogler, Michael R.	Hauptzweck und wesentliche Funktionalität der Bereitstellung audiovisueller Inhalte, in: Kommunikation & Recht (K&R) 9/2018, p. 537-544.
Nikoltchev, Susanne (ed.)	Video on Demand and the Promotion of European Works, IRIS Special, European Audiovisual Observatory, Strasbourg 2013.
Weinand, Jenny	The revised Audiovisual Media Service Directive 2018 – Has the EU learnt the right lessons from the past?, in: UFITA 1/2018, p. 260-293.