

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

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

# EMR at a glance

- Research institute founded after TwF, covering **media law** and related fields such as **data protection, telecommunications and copyright law,**
- functions a service provider, organiser and neutral platform for information and exchange
  - Legal opinions / Studies (recently e.g. on local and regional media diversity, on AVMSD 2018-jurisdiction criteria, on Brexit and the AV sector, on Fake News) on behalf of institutions, companies, individuals
  - Research projects
  - Participation in / support of periodical publications (e.g. EDPL, UFITA, MMR aktuell, IRIS Newsletter)
  - Events (e.g. Annual European Media Law Conference with ERA, Europe Day at Munich Media Days)



# Background and Scope of the Analysis

- Reform of the Audiovisual Media Services Directive (AVMSD) by Directive (EU) 2018/1808
  - Transposition period of interest due to certain areas of discretion for Member States
  - Implementation by competent authorities and bodies will be highly relevant and challenging
    - Depending on national framework, on increased cooperation, on resources and instruments
  - “Delegation” of some relevant interpretation questions to EC by creating “Guidelines” after consultation of CC
    - Raises questions of legal nature
    - Relevant in context of study: complex new Article 13 AVMSD / Promotion of European works provision (besides linear quotas)
  
- Study therefore analyses guiding principles when establishing the mandatory Guidelines which further concretise Article 13 AVMSD



# Overview: Article 13 AVMSD

- Art. 13 originally introduced to include obligations for non-linear audiovisual media service providers concerning the promotion of European works
- Aim: in light of the increased relevance of on-demand providers amended to significantly increase the obligations for these providers
- Complex provision made up of binding elements, areas of limited discretion for the Member States, procedural elements and a legal basis for detailing the provision in further texts
- Obligations come with potential new burdens for providers including necessary investments, but also impacts supervising bodies → acknowledgment already in provision that certain exemptions necessary
- Crossborder dimension in the focus, therefore calling for a uniform approach to imposing obligations

Directive 2010/13/EU	Consolidated version of Directive 2010/13/EU with amendments by Directive (EU) 2018/1808
<p style="text-align: center;"><b>CHAPTER IV</b> <b>PROVISIONS APPLICABLE ONLY TO ON-DEMAND AUDIOVISUAL MEDIA SERVICES</b></p> <p>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</p>	<p style="text-align: center;"><b>CHAPTER IV</b> <i>deleted</i></p> <p>1. Member States shall ensure that media service providers <b>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.</b></p>

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<https://emr-sb.de/synopsis-avms/>

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# Overview: Article 13 AVMSD

- **(1)** basic rule concerning the obligation of on-demand providers
- **(2)** option of obligation to financially contribute to production and further option of expanding this obligation to “targeting” services (conditions)
- **(3)** limitation of this potential obligation
- **(4)** and **(5)** concern reporting obligations of MS and EC
- **(6)** obligatory exemption rule for certain categories of providers/services resulting in a non-application of potential rules under paras. (1) and (2); additional option of waiving obligations in other cases by MS
- **(7)** → **mandatory** Guidelines concerning paras. (1) and (6) → namely here: “definition of low audience and low turnover”

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	<p>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.</p> <p>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.</p>

# On the nature of Guidelines

- Legal quality of the guidelines not entirely clear
- Common type of “soft law” to give supplementary interpretation indications or informing about the application in practice of a specific provision
  - especially in competition law
  - self-binding force for the Commission
- But here: AVMSD-Guidelines in three different ways in Directive (EU) 2018/1808
- “Special Status” of Guidelines of Art. 13 (7)
  - Commission is bound in developing more details about the calculation and exemption criteria by the provision itself
  - Difference to Recital 5-Guidelines and Reporting-Guidelines
- Indications in the Recitals (esp. 40) on what should be considered in the guidelines
- Clearly different to previous “softer” version of guidelines concerning the European works provision



# „Low turnover“



- Ensuring competitiveness
  - giving providers with “no significant presence on the market” an advantage in order to be able to compete continuously on the market
  - not time-limited
- “low” reflects a clear notion in comparison to other value levels, but it does not give any type of measurement
- Recital 37 establishes: broadcasters should not be overburdened in comparison to providers of non-linear services



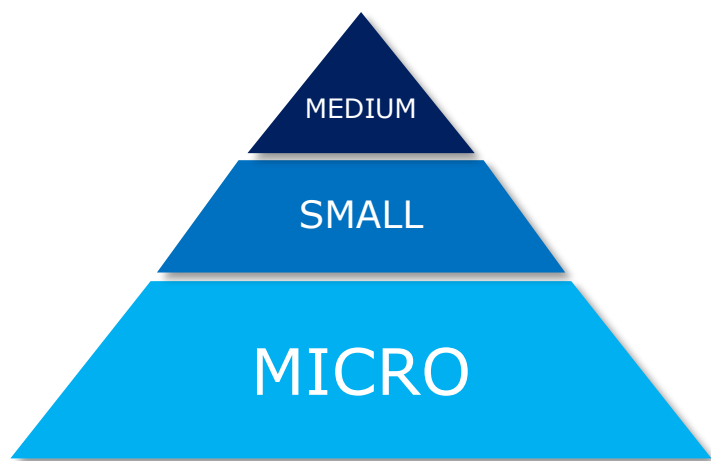
# „Low turnover“

- Exceptions for companies competing with economically stronger competitors due to a size difference are common in EU law
  - Competition law
  - but also in more recent discussions e.g. copyright / platforms (at least “start-ups” / new market entrants)
- Therefore: rely on existing approaches
  - COMM Recommendation

# Commission Recommendation on SMEs

- existing Commission Recommendation concerning the definition of small and medium-sized enterprises which defines micro, small and medium-sized enterprises
- already used as “definition” elsewhere

Company category	Staff headcount	Turnover	or	Balance sheet total
Medium-sized	< 250	≤ € 50 m		≤ € 43 m
Small	< 50	≤ € 10 m		≤ € 10 m
Micro	< 10	≤ € 2 m		≤ € 2 m



- based on staff headcount and maximum annual turnover (or balance sheet totals)
- in the interest of consistency, SME-Recommendation should be reference point also in AVMSD-context
- note: across sectors, majority of companies active in the EU Member States are not large

# „Low audience share“

- Possible argument: previous (non-binding, purely indicative) “guidelines” can be used to assume that the mention there is indeed the maximum of audience share to be reached by all exempted providers
  - However: old “guidelines” did not have to be based on the logic of the now mandatory guidelines
  - Therefore: argumentation needed before reaching a figure
- Not one single figure that is the only possible threshold for a low audience share, but any figure needs to comply with the aim of the Directive’s provision
- Proportionality requirement means that the result has to reflect in an equitable way the burdens imposed on providers with the goals of the Directive
- Calculation rules should be applied in a comparable way across the Member States to give legal certainty to providers and be able to apply to cross-border settings in a meaningful way
- Reference point should be individual channels and not be determined by the overall market position of a provider, as the idea of new services being enabled applies to any type of (incumbent or new) provider

# Possible calculation approach: share

- Not an area where there are numerous models “on the market” being discussed
- Audience share figure as such is an objective factor not subject to differing interpretation
  - Accessibility of data
- Taking a look at the AV market for linear providers: a large majority of providers taken together only reach a small share of the audience, while a small number of providers reach a vast majority of the viewing audience.
  - **80%/20% distribution**
    - → **Segment of the 20% that reach 80% audience = threshold, below which “low”/exempted**



20% of providers

80% of the audience share

# Possible calculation approach: States

- in addition: grouping three categories of States with small, medium and large populations as the market specificities should be taken into account
  - especially in small markets only fewer channels have noteworthy market shares and therefore even small providers or channels reach higher audience shares
  - e.g. small, medium, large (0-10 mio. / 10-20 mio. / > 20 mio.)
  - general audience share average of around 1.7 % as threshold in the 80/20-model would then be adapted to 2.8 / 2 / 1 % in average depending on which size of MS
  
- → statistics on MS population available
- → further enhance existing databases for shares



20% of providers

80% of the audience share

- Highly relevant question for many providers economically
- Highly relevant question also for implementation in practice (supervision; cross-border information exchange)
- Therefore: using Guidelines to ensure common approach to facilitate the application of a complex provision and support original goal of Directive of enabling cross-border dissemination of content by economically viable providers on a single market (consider: changing nature of AV market!)
- Precision, even though the Guidelines will not cover all aspects of relevance in context of Article 13
- Application in practice in cooperative manner



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