



Busting the Myths Behind Article 13 of the Audiovisual Media Services Directive Review¹

Why the proposals concerning the Country of Origin principle and financial contributions will benefit cultural diversity, the AV sector, and European audiences

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Myth 1 – Any adjustment to the Country of Origin principle now would lead to a domino effect whereby the principle will be further eroded in the future

Some stakeholders argue that the Country of Origin (COO) principle will be eroded once Art 13(2) is in place. They fear that further provisions eroding the COO could follow the new provision on financial contributions and they will face an increased burden of regulation under the Audiovisual Media Services Directive (AVMSD).

>> The Facts

According to the proposal of the European Commission, the COO remains a cornerstone of the Directive. The new wording of Article 13 provides only a limited adjustment to the COO, restricted to allowing the targeted Member State (MS) to apply financial contributions in favour of the production of European works. For the protection of minors and consumers, commercial communications, the independence of regulatory bodies, the inclusion of people with disabilities, news coverage and the majority of rules for the promotion of European works, the COO will remain untouched.

- The proposal allows MS to impose financial contributions (levies and investment obligations) on providers of on-demand services established in other MS and targeting their market. This levy or investment obligation will only apply to the turnover generated in the “targeted” country.
- This approach is not new and has already been put in place in the area of VAT for electronic services as of January 2015. VoD operators are therefore already used to adapting their invoicing practices to the different countries they are operating in.

¹ Proposal for a Directive of the European Parliament and of the Council 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 in view of changing market realities. COM(2016) 287 final

- Today, **9 countries** impose financial obligations on VoD operators as illustrated in the [EFADs FAQ](#). These financial contributions take the form of levies which feed into film funds' budgets or investment obligations in European productions.
- Investment obligations are necessary to ensure the big players contribute to the financing of European works and the fostering of European cultural diversity. Currently these big players contribute little to the production of European works and rarely buy the rights, favouring international blockbusters instead. The new digital distribution channels have not yet shown their full potential as investors in local and European audiovisual works through pre-buying rights nor will all of them necessarily be interested in playing a part in funding European film productions. Simple incentives are therefore unlikely to change their approach and encourage them to adapt their business models. The strategic challenge is to secure a stronger and more balanced economic commitment.
- The use of financial levies is also highly effective because the money generated allows film funds to support a wide range of initiatives promoting cultural diversity and giving audiences across Europe access to a wide choice of audiovisual works. These initiatives range from film education projects, to support to the production of local and European content, and efficient distribution in theatres or online. This source of funding is often a vital life line for the local audiovisual industries and leads to the flowering of local and European culture.
- There is currently no level playing field in Europe. VoD services generating revenues based in one MS or a third country but targeting the audience of another MS are not required to contribute financially to the promotion of European works in that country.
- This leads to 'forum shopping' i.e. on-demand services establishing themselves in MS with light or no financial obligations and weakens the capacity to support the creation of new European works.
- To ensure equal treatment between operators and preserve the national redistribution systems dedicated to the promotion of European works, an adjustment to the COO principle in this specific case is necessary.

Myth 2 – The proposals would lead to levies or investment obligations imposed in all 28 Member States and would increase the tax burden on on-demand audiovisual services

Some stakeholders argue that their tax burden would increase significantly once Art 13(2) is in place. They fear that they would be charged a considerable amount of their turnover in all 28 EU Member States, adding up to a sum that would make their businesses unprofitable.

>> The Facts

A scenario of 28 different financial obligations is unlikely. The proposal does not make the introduction of financial contributions mandatory and therefore it is up to the MS to decide on installing such a redistribution system or not.

Moreover, financial contributions are low and are not always in the form of a levy but also an investment obligation leading operators to invest in European content they have the rights for and can exploit to their benefit. Moreover, operators already have to adapt to different

VAT rules in the MS and the Commission’s proposal introduces several safeguards to ensure the burden is limited.

- Article 13(2) states that Member States “may require” audiovisual media services under their jurisdiction and in another MS but targeting their MS to contribute financially to the production of European works. This does not introduce a mandatory requirement on MS. MS remain free to decide whether or not to introduce a levy or investment obligation. It simply allows countries having such a system in place to ensure that it is not circumvented by operators.
- Furthermore, financial contributions and levies, which already exist throughout the EU, do not represent a financial burden. The **levies’ rates are very low**, between 1% and 2.3% of the relevant turnover.² They have a limited impact on the benefits of the operators and do not significantly affect the profitability of big players. Regarding the investment obligations in place in 7 countries, there is no loss of money. Instead, this requires the company to **invest a percentage** of the company’s turnover in rights acquisition or directly in the production of European works. This investment gives the operator the rights which they can then fully exploit to their benefit and to the benefit of audiences across Europe.
- Moreover, to avoid the scenario where operators pay several times, a **double imposition prevention mechanism** is specifically provided. Article 13.2 indeed states that *“if the Member State where the provider is established imposes 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.”* The MS of establishment will therefore need to check whether the operator has been subject to similar measures in the targeted country. If that is the case, the MS will have to adjust its obligations to take into account the contribution already made (Recital 24). For example, if operator X established in Germany is active also in Croatia, the levies to be paid in Germany will be reduced by the amount paid on the basis of the turnover in Croatia.
- National competent authorities in the EU will need to cooperate closely and exchange information. That is the reason why the EFADs are in favour of introducing an information exchange mechanism to facilitate this.

Myth 3 – The proposals would disproportionately affect SMEs and companies would be prevented from scaling up

Some market players argue that the new provision would hit small and medium sized companies especially hard. They fear that these companies would be prevented from investing in new technologies, content or business models.

>> The Facts

On the contrary, there is a carve out for SMEs in the text and there is a significant amount of flexibility for MS to ensure this is not a burden on companies scaling up.

² EFADs. 17 October 2016. “AVMS Directive FAQ – Country of Origin Principle and Financial Contributions”
<http://www.efads.eu/news/avms-directive-faq-country-of-origin-principle-and-financial-contributions.html>

- SMEs or companies with a low turnover or audience will be exempt from paying financial contributions and MS are able to take a flexible approach. The proposals in Article 13(5) allow MS to waive the requirements for providers with a low turnover or low audience or for small and micro enterprises. MS may also waive such requirements in cases where they would be impractical or unjustified by reason of the nature or theme of the on-demand audiovisual media services.
- Protecting smaller players is already common practice in many MS. For example, in Germany companies with a turnover below €500.000 are not subject to the levy. The same applies in Belgium (Wallonia-Brussels Federation) for companies with a turnover below €300.000.
- Moreover, MS can and frequently do set lower fiscal rates for smaller companies scaling up. The Commission proposals maintain MS flexibility in this regard. Nevertheless, the principle remains that companies targeting audiences in other MS should play by the same rules as those competing in that market.

Myth 4 – Financial contributions are ineffective and the targeted country approach cannot be implemented in practice

Some stakeholders argue that a provision for financial contributions in the targeted countries cannot be implemented in practice.

>> The Facts

There are clear comparative examples of fiscal obligations applied by targeted countries which have proved successful and which do not create a burden.

- Some wrongly argue that in practice it will be impossible to apply this “targeted country” approach. However, a well-functioning targeted country approach is already in place for VAT and works well. As with other fiscal obligations, this system is based on a declaration by the provider. VoD operators will simply have to declare the amount of the turnover to be subject to the levy. In France, this will be done at the same time and in the same form as the VAT declaration. Controls and checks may also be run by competent authorities to ensure that these obligations are properly implemented.
- Heavy administrative burdens are usually avoided but in general online operators face few problems adapting anyway. An obligation to adapt to national rules never seems to be a problem for online operators when it comes to adapting their marketing strategy to the specific national market such as pricing, advertising, and the content of their catalogues. Therefore, it is unlikely to be burdensome for them to adapt to a small number of financial contributions systems. Already now, there are cases of operators voluntarily paying a levy applicable in the targeted country.

Myth 5 – VoD operators will pay levies in the targeted countries without benefiting from any public support

Some stakeholders claim that they do not benefit from public support and therefore do not see why they should contribute to film funds.

>> The Facts

On-demand audiovisual operators benefit from public support on different levels.

- The money generated by financial levies and taxes is invested by national film funds into new content which on-demand audiovisual operators can distribute and even co-finance.
- Film funds provide significant support already to the online distribution of European works. As illustrated by a recent [report](#) by the EFADs, VoD services are supported by several film funds across Europe. This funding is often available for both VoD platforms under the MS jurisdiction and non-national platforms targeting their national audience.³
- Even if they are not established in all the countries where they are operating, VoD operators can already benefit from film funds' support. For example, the films they distribute may get support for subtitles or technical costs. The producers they work with also get support to produce feature films or TV series.

³ For example, according to § 115 of the German Film Law (FFG), the sale of feature length films through video-on-demand service providers - under the MS jurisdiction and non-national but operating in the MS - are fundable (up to 600.000 € conditionally repayable loans - §118 (2) FFG) as well as the distribution costs of individual films or of packages with current films according to §§ 41 to 48 FFG. This includes production costs of digital files of individual or several films combined into a package. This does not cover costs for the provision and maintenance of technical infrastructure of the video-on-demand platform.