

Funding for Film and Audiovisual Production: What Role for New Players?

Supporting Film and Audiovisual Production: Can the Current Legal Obligations Work for New Players?

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LINEAR SERVICES – EU RULES

Audiovisual Media Services Directive

Article 16

1. Member States shall ensure, where practicable and by appropriate means, that **broadcasters reserve for European works a majority proportion of their transmission time**, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Article 17

Member States shall ensure, where practicable and by appropriate means, that **broadcasters reserve at least 10 % of their transmission time**, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, **or alternately**, at the discretion of the Member State, **at least 10 % of their programming budget, for European works** created by **producers who are independent of broadcasters**. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria. It must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within 5 years of their production.

LINEAR SERVICES – EU CASE LAW

CJEU case law

Case C-222/07 UTECA v. Administración General del Estado (ECJ 5 March 2009)

- A measure adopted by a Member State which requires television operators to **earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and**, more specifically, to **reserve 60% of that 5% for works of which the original language is one of the official languages of that Member State** does not infringe Community law.
- Such **investment obligations should not be considered to be state aid.**
- the **obligation to reserve 60% of that 5% of operating revenue** for the production of films of which the original language is one of the official languages of Spain does **constitute a restriction on the freedom to provide services, the freedom of establishment, the free movement of capital and the freedom of movement for workers.**
 - ✓ **permitted** where it serves **overriding reasons relating to the general interest** (Spanish multilingualism), is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain this objective.

LINEAR SERVICES – NATIONAL CASE LAW

GERMANY

Rules prior to June 2010:

Filmförderungsgesetz (Film Support Act - FFG)

- Cinema operators and video companies **pay a fixed percentage** of their turnover to the *Filmförderungsanstalt* (Film Support Office – FFA).
- Television companies are **free to negotiate** the amount of their contributions to the FFA.

This **inequality of treatment** was considered **unfair by some cinema operators**.

Therefore, they decided to bring this case before the German courts.

LINEAR SERVICES – NATIONAL CASE LAW

GERMANY

Decision of the Federal Administrative Court (2009):

The FFG system is **unconstitutional**:

- Obligation of cinema operators, video companies and TV providers to make payments to the FFA is justified

BUT

- The level of contribution paid by broadcasters should **be laid down by law**

The Federal Administrative Court suspended the proceedings and **referred the matter to the Constitutional Court.**

The Administrative Appeal Court of Berlin-Brandenburg decided that the plaintiffs were not obliged to pay contributions to the FFA until a final decision was reached by the Constitutional Court.

LINEAR SERVICES – NATIONAL CASE LAW

GERMANY

Amendment to the Film Support Act (2009):

New Article 67:

- Broadcasters are legally obliged to pay a **fixed level of contributions** to the FFA.
- *Under paragraph 1 of Article 67, public service television companies are obliged to pay 2.5% of the amount they spent on the broadcast of cinematographic films (e.g., licence and administrative costs) during the previous year. Under paragraph 2, the contributions to be paid by private television companies are graded in accordance with the ratio of cinematographic films to total airtime and net turnover for the previous year. Paragraph 3 states that pay-TV providers must pay a contribution of 0.25% of their net income from subscriptions (excluding the provision of technical services) for the previous year. The rule does not apply to channels on which cinematographic films account for less than 2% of total airtime (paragraph 4). Television companies are allowed to pay up to 50% of their contributions in the form of media services. The details of these services must be set out in an agreement with the FFA (paragraph 5).*

LINEAR SERVICES – NATIONAL CASE LAW

GERMANY

Decision of the Federal Administrative Court (2011):

The new FFG system is OK:

- Previous **problem solved**
- Cinema, video and television industries **benefit financially from exploitation of German films** at national level, and these films were supported by the FFA.
- It is therefore **appropriate that they contribute to the costs of the film aid system.**

LINEAR SERVICES – NATIONAL CASE LAW

GERMANY

Decision of the Federal Constitutional Court (2014):

- The **groups that have to pay the contribution to the FFA**, i.e. cinema operators (Art. 66 FFG), programme providers and holders of video licensing rights (Art. 66a FFG) and television companies (Art. 67 FFG), **form a homogeneous group bound by a close interest in the purpose of the contribution to the FFA and held a certain responsibility to finance the film industry.**
- Their close relationship to the industry and their responsibility to finance it are based on their **common interest in the structure and success of the German film industry.**

LINEAR SERVICES – NATIONAL CASE LAW

SPAIN

Rules prior to March 2010:

Act 25/1994 (with amendments)

- ‘Television operators with editorial responsibility for television channels whose programming schedules include recently-produced cinematographic feature films, in other words, films which are less than seven years old by reference to their date of production, must **earmark each year at least 5% of the total amount of revenue** which, according to their operating account, accrued in the previous financial year **for the pre-funding of the production of European cinematographic feature films and short films and films made for television**, including the cases provided for in Article 5(1) of the Law on the development and promotion of cinematography and the audiovisual sector. **Sixty per cent** of that funding must be used **for productions whose original language is any of the official languages of Spain.**

LINEAR SERVICES – NATIONAL CASE LAW

SPAIN

Decision of the Supreme Court (2009):

Broadcasters' investment obligation is **unconstitutional**:

- In breach of the **right of economic freedom** (Article 38 Constitution).
- “unless it is on the basis of reasons that involve the general public interest, the **legislator cannot impose an obligation** to make certain economic investments.”
- there is **no reason to impose an obligation or “sacrifice” on the television sector**, thus reducing its economic freedom for the **benefit of another economic sector**.

The Supreme Court referred the matter to the Constitutional Court.

A final decision on this matter is still pending.

NON-LINEAR SERVICES – EU RULES

Audiovisual Media Services Directive

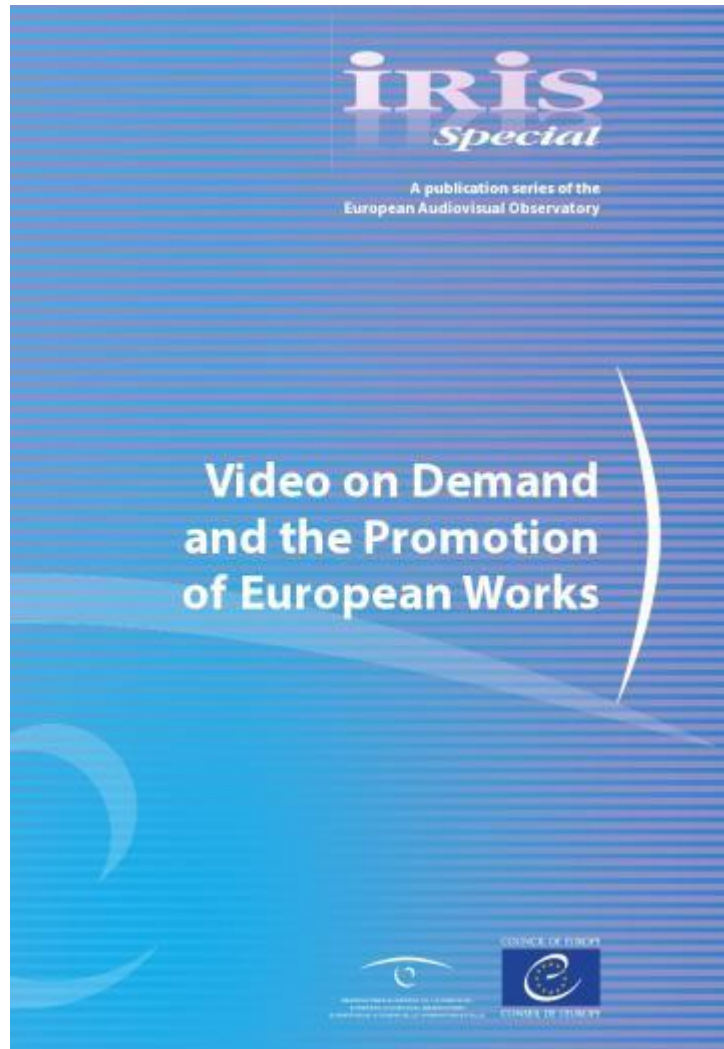
Article 13

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 the on-demand audiovisual media service.

Recital 69

On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works **might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides**. It is important to re-examine regularly the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports provided for under this Directive, Member States should also take into account, in particular, the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services, and the actual consumption of European works offered by such services.

NON-LINEAR SERVICES – OBS STUDY



Country examples:

- Italy
- France
- Belgium (FR)
- Slovakia
- The Netherlands

NON-LINEAR SERVICES – OBS STUDY

Four options

1. Quota

- ✓ *minimum share of European works in video-on-demand catalogues*

2. Prominence obligation

- ✓ *attractive presentation of European works in electronic programme guides*

3. Financial investment obligation

- ✓ *financial contributions to the production of and acquisition of rights in European works*

4. Indicators

NON-LINEAR SERVICES – OBS STUDY

National transposition

- **Italy:** quota OR financial obligation
- **France:** financial obligations AND quota AND prominence obligations
- **Belgium (FR):** financial investment AND prominence obligations
- **Slovakia:** quota
- **The Netherlands:** indicators

NON-LINEAR SERVICES – PROBLEMS?

Two issues

Delocalisation

- Inside the EU: German solution?

§ 66a (2) 2 FFG

*For providers of video on-demand services, which have neither a seat nor an establishment in Germany, the tax applies only to **offers on a website in German language** in relation to **income obtained from customers in Germany**, and **only when these transactions are not subject to any comparable financial contribution** to the promotion of cinematographic works by a film funding institution **in the country of origin**.*

- Outside the EU?

Constitutional issues

- different to TV, no licences, no scarcity!

NON-LINEAR SERVICES – PROBLEMS?

Two issues

Delocalisation

- Inside the EU: German solution?

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- Outside the EU?

Constitutional issues

- different to TV: no licences, no scarcity!

EU-COMPATIBLE?



Thank you!

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