

# European works quotas for on-demand media service providers

**February 9 2011**

**By Ernesto Apa and Federica De Santis**

## Introduction

Under Italian law, audiovisual media service providers (both broadcasters and on-demand media service providers) are required to promote the production and distribution of European works<sup>(1)</sup> under a quota system. The system reflects the general aims of the EU Audiovisual Media Services Directive (2010/13/EC).<sup>(2)</sup>

The quota system for broadcasters is regulated by Resolution 66/09/CONS of February 13 2009, as amended,<sup>(3)</sup> which was issued pursuant to Article 44 of the Audiovisual Media Services Code (Legislative Decree 177/2005). Broadcasters are required to include a certain percentage of European works<sup>(4)</sup> in their programming schedules and to maintain certain levels of investment<sup>(5)</sup> in audiovisual works by independent producers.<sup>(6)</sup>

On April 6 2011 AGCOM, the communications regulator, issued a regulation to promote the production and distribution of European works by on-demand audiovisual media services. This is Attachment A to Resolution 188/11/CONS, which in turn supplements Resolution 66/09/CONS. The regulation came into force on May 5 2011 and was adopted pursuant to Article 44(7) of the code, which requires AGCOM to regulate the promotion of European works by on-demand audiovisual media services, with particular regard to:

- the financial contribution by such services to the production and rights acquisition of European works; or
- the proportion or prominence of European works in the catalogue of programmes offered by the on-demand service.

The regulation is the result of discussions by a panel of interested parties to develop proposals for the promotion of European works by on-demand audiovisual media services.

### **Measures for on-demand audiovisual media services**

The regulation introduces specific measures to promote access to, and the production of, European works by on-demand media service providers.

According to Article 2(1)(m) of the code, the term 'on-demand audiovisual media services' (ie, non-linear audiovisual media services) refers to audiovisual media services provided by a media service provider<sup>(7)</sup> for the viewing of programmes at a time determined by the user and at his or her individual request, on the basis of a catalogue of programmes selected by the provider.

The regulation does not apply to services that are excluded from the definition of 'audiovisual media services' under the Video on Demand Regulation (Attachment A to Resolution 607/10/CONS of November 25 2010). The exclusion applies to:

- services that are not primarily for profit-making purposes, are not in competition with mainstream television broadcasting and whose annual revenue (from advertising, teleshopping, sponsorship, agreements with other entities, state contributions and pay-television programmes) does not exceed €100,000;
- private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing or exchange within communities of shared interests (ie, user-generated content (UGC)), unless the operator which aggregates the UGC assumes editorial responsibility (however this may be exercised), and uses the material for commercial exploitation;
- any form of private correspondence, including emails;
- services whose principal purpose is not the provision of programmes; and
- services in which the audiovisual content does not constitute a principal purpose - this includes websites that incorporate audiovisual elements (eg, animated graphics or brief advertisements) in a purely incidental way, as well as online games and search engines.<sup>(8)</sup>

Article 1(1) of the regulation defines a 'catalogue' as "[a] number of programmes, arranged by the non-linear audiovisual media service provider according to predetermined criteria, which can be viewed at a time chosen by the user".

Article 1(3) of the regulation requires on-demand audiovisual media service providers to:

- ensure that their catalogue contains at least 20% European works, calculated in terms of the total number of hours of programming made available each year in the same catalogue; or
- allocate an annual financial contribution to the production of, or purchase of rights to, European works for their catalogues, representing at least 5% of the revenue specifically attributable to the public provision of on-demand audiovisual content within the same catalogues in the preceding year.

Media service providers may implement such requirements gradually, taking into account market conditions and offers of rights. However, they must comply within four years of the regulation entering into force. During the transition period, either the content quota under the first requirement must be at least 5% a year or the investment quota under the second requirement must be at least 2% a year.

At the end of the transition period, media service providers that fail to meet the percentage financial contribution requirement under the second requirement by less than 1% must comply during the subsequent year.

For media service providers that own or control more than one catalogue, compliance with the two requirements is determined on the basis of all catalogues provided. The percentage under the first requirement must be calculated as the percentage of hours for European works compared to the total hours of programming made available in the catalogues.

Media service providers may apply to AGCOM for derogation from the content and investment quotas. AGCOM may grant such derogation if:

- the media service provider has not made a profit in the past two years;
- the media service provider's market share by revenue is below 1%; or
- the catalogue is:
  - a thematic catalogue - that is, at least 70% of the total programming time available relates to a specific theme for a defined audience (for the purpose of Article 1(2) of the regulation); or
  - a generalist catalogue that exceeds the 1% quota, but for which no products that are consistent with the editorial line of the catalogue are available on the market.

## **Comment**

Content quotas are intended to make the European film and television industry more competitive. However, they also limit the editorial autonomy of the media service provider, and too strict a regulation could adversely affect the market.

As Italy's system in this area has been adopted through co-regulatory procedures, the resulting framework is a well-balanced compromise between promotion of the distribution of European works and the freedom of operators to compile catalogues of content.

## Endnotes

(1) As defined under Article 2(1)(cc) of the Audiovisual Media Services Code.

(2) See Articles 13, 16 and 17 of the directive.

(3) Resolution 66/09/CONS was amended by Resolution 291/09/CONS of May 20 2009 and Resolution 397/10/CONS of July 22 2010.

(4) Pursuant to Article 3(1) of Resolution 66/09/CONS, broadcasters must reserve over 50% of their transmission time for European works. The regulation also sets sub-quota requirements.

(5) Pursuant to Article 4(1) of Resolution 66/09/CONS, broadcasters must allocate 10% of their annual net revenue to European works by independent producers.

(6) Under Article 2(1)(p) of the code, 'independent producers' are European producers of audiovisual content that are neither controlled by nor affiliated to broadcasters, and have not sold 90% or more of the content that they produce to a single broadcaster over a three-year period.

(7) Article 2(1)(b) defines the term 'media service provider' as a natural or legal person with editorial responsibility for choosing the audiovisual content and determining the manner in which it is organised.

(8) Article 2 of the Video on Demand Regulation; Article 1(3) of Attachment A to Resolution 188/11/CONS.

PORTOLANO COLELLA CAVALLO PORTOLANO  
NO COLELLA  
CAVALLO PORTOLANO  
PORTOLANO COLELLA CA  
COLELLA CAVALLO PORTOLANO COLELLA CAVALLO PORTOLANO  
TOLANO COLELLA CAVALLO P