



Taxing streaming services: a real case of a Queen's Gambit
André Feiteiro / João Comenda António / Simona Segundo

The discussion about taxation over VOD platforms, including so well-known Netflix, HBO and Disney + first started when Portugal transposed the new European Audiovisual Media Services Directive (“**Directive**”) into National Law by enacting Law no. 74/2020 (“**Law 74/2020**”). These platforms became subject to an obligation of either acquiring independent European productions’ rights, originally in Portuguese, remastering or single-handedly producing locally.

Other notorious platforms, such as YouTube and Facebook, as video-sharing providers, are now subject to an ad fee of 4%, the same fee movie theaters’ advertising and commercials broadcasted on TV were already subject to.

But the hot topic is VOD platforms being levied on 1% of their relevant income in the previous year, *i.e.* those arising from audiovisual commercial communications, or subscriptions for conditional access television operators, as well as other types of income.

Law 74/2020 does not define its own concept of “relevant income” and how it will be assessed, collected or paid. There are certain situations, however, that are specifically not included in the definition.

This made it is impossible to determine the relevant income of those who (i) do not have to report it in Portugal, but in other Member States – the elements made available in those countries do not discriminate the income by geographical origin, which does not allow the part of the income obtained in Portugal to be determined; or in cases of (ii) non-disclosure of the legal documents required to enable the correct assessment of ‘relevant income’.

In this short article, we will analyze the challenges resulting from the non-determination of this concept and the effectiveness of charging streaming services this way.

First, is this charge legal?

It should be noted that levies or charges (*taxas*) are based on the provision of a public service, use of a public space or removal of a legal obstacle to the individuals, which appears not to be the case.

This makes us question if this charge is, in fact, a real tax rather than a levy, since it is based, essentially, on the ability of VOD platforms to pay, through their net worth.

The creation of taxes obeys certain legal principles that appear to not have been respected when this charge was established. One of these principles is the principle of legality that determines that taxes can only be created by law, which must determine who and what is taxed, the rate, and tax benefits for taxpayers.

Since this charge does not establish specific terms for the settlement and collection of the charge, nor does it specify what “relevant income” means, it is probably going to be challenged by VOD operators.

The Directive itself does not seem to provide a definition of the object of the assessment, simply mentioning that Member States can require media service providers under their jurisdiction to contribute financially to the production of European works, by direct investment in its content and through contributions to national funds.



The vagueness of this concept in Law 74/2020 may cause many uncertainties at the time of determining the tax that is meant to be collected. For example, if the obligation is determined and based on number of subscribers, how will that number be assessed if the operator has had subscriptions interrupted during the year? A more detailed definition of the concept of "relevant income" would help avoid uncertainty in this type of situation.

VOD operators would be penalized and subject to the payment of a charge for an income that has not been obtained by them.

France and Spain, which are planning to introduce an identical charge, intend to calculate it through the turnover of streaming companies and not on the "relevant income".

This way, if the same criterion was applied in Portugal, VOD operators would have a much more realistic estimation of how much they would pay, and they would be effectively taxed for the full value of the services actually provided and not by mere assumptions.

And is this charge a reasonable solution?

We wonder if levying streaming services is the most effective way to promote Portuguese cinema as it is. Since the cinema industry is not highly demanded in the country, maybe it is not wise to increase supply exponentially without there being any demand, instead of promoting consumption first. This considering, of course, the fact that this fee penalizes VOD platforms.

It is understandable to consider whether taxing popular streaming services will significantly reduce the operators' investment capacity, jeopardize competition within the sector in Portugal and ultimately affect the provision of these kinds of services.

Both from a Competition, Media, or Tax perspective, financially targeting streaming services providers that currently have over two million subscribers in Portugal and which could pose a unique opportunity for an organic development of the media industry within Portuguese territory, is a risky play, especially if we consider that Europe's main economies had already overloaded digital services with taxes in those jurisdictions. For all that matters, taxing streaming services in hopes of developing local cinema is an opening move for the Portuguese digital services taxation as bold as a Queen's Gambit in chess.

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