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The "Netflix Tax": An Analysis of Investment Obligations for On-Demand Audiovisual Services in the European Union

CATALINA IORDACHE
TIM RAATS
KAREN DONDERS
Vrije Universiteit Brussel, Belgium

Throughout time, the European Union's media policy has attempted to strengthen the internal market for audiovisual services through economic and cultural measures. To anticipate or react to the dominance of foreign platforms, the revised Audiovisual Media Services Directive (AVMSD) extends its quota regime and obligation to invest in European works to on-demand audiovisual players, also when targeting a foreign market. Through document analysis, this study examines the financial investment obligations on these platforms in 10 European Union states. We found that several countries already target on-demand audiovisual platforms, and some regulations also capture foreign players. However, new policy measures are characterized by significant differences, resulting in fragmentation rather than harmonization. Moreover, the contribution requirements themselves are thus far limited and may offer only partial support to the intra-European circulation of content.

Keywords: media policy, quota, investment obligation, video-on-demand, European Union

The remarkable changes brought on by digitalization over the recent decades have challenged audiovisual policies to adapt. The global market for video-on-demand (VOD) services has substantially grown (Doyle, 2018; Johnson, 2019), while platforms distributing content over the Internet, so-called over-the-top (OTT), have become particularly popular, rapidly winning shares over traditional television (Lotz, 2019). Recent literature highlights the changes determined by new content delivery platforms and the ways in which media policy is trying to keep up with them (see Evens & Donders, 2018; Jenner, 2018; Lobato, 2019).

Media scholarship has pointed out that, although the changes determined by these platforms are instrumental, it is also important to look at all the elements of continuation (see Lotz, 2019; Smits & Nikdel, 2019). This is particularly relevant within the context of power imbalances, as the European VOD market

Catalina Iordache: Catalina.Iordache@vub.be
Tim Raats: Tim.Raats@vub.be
Karen Donders: Karen.Donders@vub.be
Date submitted: 2020-08-18

continues to be dominated by U.S. platforms (Council of Europe, 2020). To this end, discussions on VOD platforms seem to follow the same trajectory as satellite television, "closely resembl[ing] the history of transnational satellite channels expanding into Europe, Latin America, and Asia in the 1990s" (Lobato, 2019, p. 133). Moreover, it was pointed out that it was the distribution, rather than the production of content, that concentrated power and commercial profits in the cultural industries (Garnham, 1987; Hesmondhalgh, 2013). Thus, the U.S. dominance of OTT markets reinforces the threat of power imbalance in favor of global and transnational content distribution platforms.

Although still a diverse collection of national markets, Europe has forged a stronger political and economic entity through the creation of the European Union (EU). From under this unified umbrella, European policy makers have historically attempted to tackle U.S. audiovisual hegemony through a series of common measures, aimed both at cultural protection and diversity, but also at economic development and sustainability (Michalis, 2007; Raats, Schooneknaep, & Pauwels, 2018). To anticipate or react to the growing power of foreign platforms, the revised Audiovisual Media Services Directive (AVMSD) extends its quota regime and obligation to invest in European works to on-demand audiovisual players, also when targeting a foreign market. This study examines the measures that different EU member states are taking toward adapting their national media regulation to capture on-demand players, including international ones. The research is based on a close reading of national media regulation documents, where two key parameters are analyzed within the broader developments in EU audiovisual policy: investment obligations and content quota imposed on on-demand platforms.

The following section will trace three key moments in the evolution of EU audiovisual policy, up to the development of current measures targeting foreign on-demand platforms. The subsequent sections will present the methodology, followed by the study's main findings and analysis. The discussion will reflect on the new regulations within the historical context of EU media policy.

EU Audiovisual Policy: Work in Progress

Literature on media policy analysis (Freedman, 2008; Puppis & Van den Bulck, 2019) frames the current study, not only by giving it a clear aim of investigation but also by guiding the choices made in concepts and terminology. The field of media and communication policy research is complex and covers a wider range of measures in telecommunications, information, and communication technology, such as platforms, convergence, and culture (see Price, Puppis, & Verhulst, 2013). Of the many tools available for reaching policy goals, the focus of this study will be placed on media regulation, specifically on national audiovisual legislation.

Three key phases in the development of EU audiovisual regulation have been identified as relevant to this study. A first stage consisted of the European Economic Community's shy attempts to create an internal market and forge a European identity. A second phase observed a series of cultural-specific policies that took shape within the context of EU liberalization and adjustment to new media technologies. In the third phase—the current "Netflix era"—policy makers continue their search for the right tools to protect and promote the EU market.

From Audiovisual Monopolies to Television Without Frontiers: First Steps Toward Harmonization

Initiated as a regional organization with economic attributes, the European Economic Community did not formulate policies on media or culture until the late 1980s. These measures aimed to support European integration and help forge a European identity, resulting, among other things, in the setup of a pan-European television channel (Pauwels & Loisen, 2016). More concretely, the measures translated into economic actions and aimed to support the cultural industries, which were considered to be under the threat of U.S. and Japan global media powers (Theiler, 1999). However, member states opposed the adoption of cultural policies at the EU level because they feared these would interfere too much with national competences (Pauwels & Loisen, 2016). Therefore, the EU shifted its focus from audiovisual production to enhanced circulation and distribution, and from a cultural discourse to a more economy-centered one.

Adopted in 1989 and amended in 1997, the Television Without Frontiers Directive[1] aimed to liberalize the broadcasting market across EU borders. The directive's approach reflected the EU's willingness to support big media companies active across European markets, to make them internationally competitive (Nowak, 2014). The directive introduced a commitment to reserve a minimum of 50% of television programming to European works (Article 4), as well as for broadcasters to devote 10% of their television scheme or allocate 10% of their production budget to independent productions (Article 5). The directive also introduced the "country of origin" principle (Article 2) to improve the conditions for the establishment and functioning of the internal market for media services across borders. However, scholars claim that policy initiatives at the time have instead "provided Hollywood with a larger market and a host of new clients desperate to fill hours with cheap television material" (Chalaby, 2006, p. 48), thus contributing to the power imbalance already signaled in the transnational media flows discussions of previous decades (see Hamelink, 1983; Sinclair, Jacka, & Cunningham, 2002). Moreover, the proposed measures only required broadcasters to stick to the quota "where practicable," which was considered ineffective (Levy, 2003).

To counter U.S. dominance and help boost the European audiovisual market following the liberalization of television, the European Commission launched the MEDIA program in 1990 (Henning & Alpar, 2005), alongside the Eurimages program, which had been launched the year before by the Council of Europe. Both programs aimed to stimulate coproduction and distribution of audiovisual works in Europe (De Vinck, 2009). At the same time, the European Commission played a significant role in trade negotiations defending the "cultural exception" during the Uruguay Round of the World Trade Organization from 1986 onward, where the United States heavily lobbied for a full liberalization of audiovisual markets (Pauwels & Loisen, 2003, pp. 294–299).

Although infrastructure, support for distribution and promotion, trade, and access to media were seen as economic factors and thus subject to EU intervention, measures that were associated with culture were primarily handled through national policies (Barnett, 2001). European support for the audiovisual industries was, and remains to this day, a combination of the cornerstone directive, the MEDIA program (now Creative Europe), and several measures that member states can decide on themselves. The latter are backed by the EU's State Aid policies that allow significant leeway for member states to support their audiovisual industries directly

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[1] Directive 97/36/EC amending Directive 89/552/EEC on Television Broadcasting Activities.

through subsidies, or indirectly through tax incentives (De Vinck, 2014). Audiovisual support policies, in particular, developed within various domestic settings across Europe, creating significant differences between countries. This reinforced imbalances between small and large markets, as the latter developed more coherent "policy toolkits" to support their domestic industries (Raats et al., 2018, p. 199). Most of the measures developed in member states favored subsidies for content production over its circulation. As a result, the number of European films produced yearly dwarfed U.S. output, yet at the same time remained limited in budget and revenue potential (Kanzler & Talavera, 2018).

From Television Without Frontiers to the Audiovisual Media Services Directive: Toward More Cultural Diversity?

In the 1990s, EU policy was reformulated to include cultural-specific measures, through the Maastricht (1993) and Amsterdam (1997) treaties. The cultural and media sectors were also now represented through a community-wide approach but were still within national limits, safeguarded through the principle of subsidiarity (Pauwels & Burgelman, 2003). Essentially, EU institutions were required to take values such as cultural diversity into account. They also had to respect the fundamental contribution of public broadcasters to the "democratic, social and cultural needs of each society" (p. 109), according to the Treaty of Amsterdam (1997). Though significant, the vague wording had a limited impact on actual policy making (Donders, Loisen, & Pauwels, 2014).

In 2007, the AVMSD,[2] an amended version of Television Without Frontiers, became the main regulatory framework for EU audiovisual and media policy. The act's main goal was to extend the liberalization approach of Television Without Frontiers to nonlinear media services providers. The directive was seen as a prime example of convergence: a horizontal, comprehensive regulatory framework, seeking to level the playing field among the different kinds of broadcasters. This was unbalanced as broadcasters were subject to stringent regulations, while new media companies needed only to follow the "light-handed approach of the e-commerce directive" (Kalimo & Pauwels, 2009, p. 18).

The AVMSD recognized UNESCO's Cultural Diversity Convention, which the EU had ratified the year before. The directive also included measures that encouraged pluralistic cultural expressions and cultural diversity (Irion & Valcke, 2015). According to Article 13, member states had to support the production of European works, while Article 2 allowed limiting content from outside the EU. The directive also extended the "country of origin" principle to nonlinear audiovisual services. Content quota and subsidies for European film productions were thus meant to protect European culture and the industry from global influences, while encouraging pan-European distribution and production (Nowak, 2014).

These measures have supported the production of domestic content in EU member states, while harmonizing the circulation and reception of audiovisual content in European markets. However, neither Television Without Frontiers nor the AVMSD has resulted in a significant uptake of cross-border circulation of European works, either within or outside of the EU market (De Vinck & Pauwels, 2015).

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[2] Directive 2007/65/EC amending Directive 89/552/EEC on Television Broadcasting Activities.

From Regulating European Players to International Platforms: The New AVMSD

The historical apprehension over U.S. economic and cultural domination seems to have resurfaced with the growing expansion and popularity of new content delivery platforms in Europe. Industry reports show significant growth for the European subscription video-on-demand (SVOD) market, and the growth is primarily ascribed to the rapid expansion of U.S. players Netflix and Amazon Prime Video (Council of Europe, 2020).

Yet again, European policy makers are looking for a combination of measures meant to stimulate investment, as well as encourage circulation. As part of its Digital Single Market strategy, the European Commission aimed to adapt the AVMSD to the digital age and enhance the promotion of European works. The revisions were formally adopted by the European Parliament in December 2018. Among the revised measures, several points are particularly relevant to this study.

Article 13(1) of the revised AVMSD stipulates that member states must ensure that providers of on-demand audiovisual media services under their jurisdiction secure a minimum 30% share of European works in their catalogs, as well as prominence of these works. Article 13(2) stipulates that member states may require providers of on-demand audiovisual media services under their jurisdiction to contribute financially to the production of European works. This can happen through direct investments in content, such as acquisition of rights or (co)productions, or contributions to national funds. Member states may also demand this type of financial contribution from providers of on-demand audiovisual media services who target audiences in their territories but are established in other EU member states. In that case, the calculation of the investment must be based on the revenues earned in the targeted member state, while taking into account the financial contributions imposed on the provider in other member states. It is important to note that this is a voluntary measure, as member states are allowed, but not obliged to introduce such an investment obligation. The new directive also foresees a derogation of the “country of origin” principle, as it is also applicable to service providers based in another member state but targeting audiences in the state that wishes to submit them to investment obligations.

Methodology

As the audiovisual practices of EU member states are highly fragmented and diverse, qualitative document analysis was identified as a suitable research method because of its systematic and structured approach to media policy research. Of the various types of documents (Karppinen & Moe, 2019), this study analyzes data from national media and audiovisual legislation, including legal documents, media decrees, and executive decisions. The analysis focuses on the (1) investment obligations and (2) content quota established for on-demand platforms in member states. Data collection and analysis were conducted through desk research according to the method’s step-by-step approach (Altheide & Schneider, 2013), involving first the superficial examination of documents, followed by their thorough examination and interpretation (Bowen, 2009).

First, the research team identified the relevant regulatory documents containing audiovisual media services provisions in all EU27 member states.[3] This was done through the consultation of various reports, including those published by national media regulation agencies and film funds, and the IRIS Plus series of the Council of Europe and European Audiovisual Observatory. Second, the national regulatory documents identified as relevant to our study were obtained and translated through online tools, as well as communication with national experts and media regulation agencies. The third step was a close reading of each document to find whether they contained provisions for the promotion of European works on on-demand service providers at the time of data collection, which was August 2019. Three themes (see Fereday & Muir-Cochrane, 2006) emerged: (1) quotas for carrying audiovisual works in their catalogs; (2) direct contributions to (co)production or acquisition of rights; and (3) investment obligations in the form of a levy to be paid to an audiovisual fund. These themes were developed into four categories, to differentiate the countries that also captured foreign services (see Table A1: https://www.dropbox.com/sh/eksf96hvic22u9d/AAAmsEs1Ue5EeBAfBbfaxC7Ma?dl=0).

The interpretation of data (Bowen, 2009) contains a more in-depth look into the investment obligations put in place for on-demand audiovisual services providers, domestic and foreign. Thus, the study focuses on 11 regional media markets, from 10 member states: the French Community of Belgium (Wallonia), the Flemish Community of Belgium (Flanders), Croatia, the Czech Republic, Denmark, France, Germany, Italy, Portugal, Slovenia, and Spain. The close reading of the investment obligations was conducted based on the following labels: the provisions applicable for on-demand media services providers; the scope of application; the tariffs and amounts required; the calculation method; the beneficiaries of the contribution; exemptions or reductions; and the applicable procedures in place for collecting the required contributions.

The information was cross-checked with experts from independent media regulators and audiovisual funding agencies in the studied countries. Given the sensitive and ongoing nature of the topic—as some countries are still in the process of adapting their legislation—this was done on an anonymous basis. Local experts helped us interpret the texts within their "communicative context" (Mayring, 2014, p. 39), as it is essential that texts be understood considering their creation and purpose and that their analysis make inference beyond the text (Puppis, 2019).

Media Regulation for On-Demand Services in Member States: Something Old, Something New

The qualitative document analysis of regulations points to three ways in which member states choose to promote European works on on-demand audiovisual media services: (1) quotas for carrying audiovisual works in their catalogs; (2) direct contributions to (co)production or acquisition of rights; and (3) investment obligations in the form of a levy or a tax to be paid to an audiovisual fund. Although some countries are also in the process of imposing more general digital taxes, these will not be discussed here, as the funds do not necessarily support audiovisual content production or circulation.

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[3] All regulatory acts consulted for this study are listed in Table A3.
(See https://www.dropbox.com/sh/eksf96hvic22u9d/AAAmsEs1Ue5EeBAfBbfaxC7Ma?dl=0)

Our study found that 10 EU member states currently foresee the implementation of investment obligations for on-demand audiovisual services: Belgium (French and Flemish Communities), Croatia, the Czech Republic, Denmark, France, Germany, Italy, Portugal, Slovenia, and Spain. As this study is based on an extensive study that discusses in detail the regulations in each region (see Donders et al., 2018), we will focus here only on three key lessons learned within the historical context of EU media policy: the novelty brought by the revised AVMSD, the continued fragmentation between measures of the EU and member states, and the reinforced focus on production over circulation, and domestic over nonnational European works.

What Is New:
The Derogation of Country of Origin as a Means to Capture Netflix

Following the derogation to the "country of origin" principle, the revised directive allows the implementation of new regulation on a voluntary basis. Thus, the obligations do not follow directly from the AVMSD but are, in fact, initiated at a national level. From the 10 countries that foresee investment obligations for on-demand audiovisual services, only half specify obligations for nondomestic providers of on-demand audiovisual media services: France, Germany, Italy, Flanders, and, possibly from 2020 onward, Denmark.

Germany already imposed a parafiscal levy in 2014 that was to be paid by on-demand audiovisual services providers to the national film fund. This measure included providers established outside Germany who distributed films via the Internet, in the German language, to customers in Germany. Companies were exempt from paying the levy if they already covered a similar financial contribution to a film fund in another member state. The measures also applied to, among others, Netflix, who filed a lawsuit against Germany arguing that the Film Promotion Act, which forms the legal basis for the German investment obligation, was based on a misinterpretation of the AVMSD and violated the freedom to provide services, the freedom of establishment, and EU State Aid rules. Netflix lost the lawsuit in May 2018 and, based on the decision of the European Court of Justice, service providers captured by the legislation had to retroactively pay the levy on the revenues generated in Germany since 2014 (General Court, Eighth Chamber, 2018, p. 58).

French legislation for on-demand audiovisual media was extended in September 2017 to ensure that foreign companies that sell and rent physical and online audiovisual content in France must also cover a Video and VOD Tax. In Italy, the media law foresees that on-demand audiovisual media services providers subject to Italian jurisdiction invest in recent independent European audiovisual works. The law stipulates that from January 1, 2019, these obligations also apply to providers of on-demand audiovisual media services that target consumers in Italy, even if established in another member state. The Flemish Community of Belgium proposed a new regulation in 2018 that was added to capture nonlinear broadcasters, including foreign players based in other member states who target the Flemish audience. In the fall of 2018, Denmark published a media agreement that would require all streaming service providers on the Danish market, including foreign services, to invest in new Danish-language content. As the new regulation has so far only been included in the Media Agreement for 2019–2023, more clarifications are necessary about the details of application and the starting date of implementation.

The new national regulations attest to an increasing awareness and a commitment to limit or even benefit from the growing presence and dominant position of some of these U.S. platforms in Europe. To this end, the old discussion on the imbalance of transnational flows, ignited by the spread of satellite television (Williams, 1990), is only being awakened by contemporary debates on VOD. However, tackling this on a national level may be problematic, not least because the binary national-transnational model has been criticized in media studies (Jenner, 2018) for ignoring various forms of "domestication," with regard to the content itself, or ancillary elements such as advertising, translation, or programming strategies.

What Persists: Common Objectives, Yet Fragmented Regulation

A second main finding of our study is the continued disconnect between the harmonization effort made at the EU level through the revision of the AVMSD, and the growing fragmentation at the level of member state regulation. This is particularly the case for the investment obligations foreseen.

The investment obligations in the 10 member states differ greatly in the national regulations. With regard to form, four different methods apply: (1) a levy, (2) direct investments, (3) the choice between a levy and a direct investment, or (4) a joint obligation in the form of a levy and a direct investment. These are calculated primarily on the basis of a percentage of monetary flow received by the on-demand media services provider, ranging from 0.5% to 26% (for more details, see Donders et al., 2018). Calculation methods, however, differ significantly, both in percentages and in the calculation basis that determines the contribution. Different types of money flow represent the basis for the calculation: price paid by user, turnover, revenues, or lump sum per year/user. This diversity is important because each instrument may have a different impact on the audiovisual market in the country/region, and particularly on the production and distribution of content. To this end, a levy or a tax may go into national revenue or simply contribute to the administrative costs of an audiovisual fund or cultural agency, which can add little or no support to the creation or acquisition of audiovisual content. Comparably, a direct investment may support the creation of new content but also the acquisition of existing content.

The Payment of a Levy

Germany foresees a parafiscal levy to be paid by on-demand audiovisual services providers to the national film fund. The amount varies on the company's net annual turnover, with some companies being exempt from paying the levy if their net annual turnover is below a certain threshold (see Table 1).

Table 1. Member States That Impose an Obligation in the Form of a Levy.

	Investment	%	Monetary Basis
Germany	Levy paid to film fund Filmförderungsanstalt	1.8	Turnover from sales of cinema films in Germany if turnover ≤ €20M
		2.5	if turnover > €20M
		N/A	if turnover < €500K

Direct Investments

Five countries—Italy, Portugal, Slovenia, Spain, and Denmark—stipulate that suppliers of on-demand audiovisual media services must invest directly in European productions, which means they have to acquire certain rights. But what is considered a direct investment, the amount foreseen, and the calculation methods all differ (see Table 2).

Table 2. Member States That Impose an Obligation in The Form of a Direct Investment.

	Investment	%	Monetary Basis
Italy	Acquisition of recent audiovisual works, of which 50% of Italian cultural expression	20	Annual net revenue in Italy
Portugal	Cofinancing, (co)production, minimum guarantees, rights acquisition of national cinematographic works	1	Annual revenues from on-demand audiovisual services activities
Slovenia	10% quota for European film in catalogs OR direct investment in (co)production/rights acquisition of European works	1	Annual revenues from on-demand audiovisual services activities
Spain	(Co)production/rights acquisition of European works; % to certain formats and Spanish-language works	5 6	Annual reported income of . . . commercial companies public service providers
Denmark	Direct investments in new Danish-language content	2 N/A	Annual revenues in Denmark if revenues < DKK 375,000

In all five countries, the direct investment is calculated on the provider’s net revenues or reported income in the previous calendar or financial year. However, the percentages required vary from 1% in Portugal and Slovenia, to 20% in Italy. The investments can be made through direct financing, (co)production, or rights acquisition of European works, specifically films in the case of Portugal, where amounts that remain unspent at the end of the calendar year are given by operators to the Portuguese Institute of Cinema and Audiovisual Media. Slovenian legislation allows providers of on-demand audiovisual media services to choose between reaching a quota for European works in their catalogs or making a direct financial investment. In Denmark, the investments must support the production of new Danish-language content. In Spain, the public service broadcaster is expected to invest slightly more than direct commercial services, and there is also a requirement for Spanish-language content (see also Arriaza Ibarra, 2013).

The Choice: A Levy or a Direct Investment

Both communities of Belgium allow a choice between the payment of a levy and a direct investment. In these cases, percentages only vary between 1.4% and 2%; however, the calculation bases and methods are rather diverse (see Table 3). In both communities, the investments can be done through (co)production, prepurchase of rights, or in the form of a payment to a film fund. Wallonia foresees that both publishers of television services (*éditeurs*) and distributors contribute to the production of audiovisual works. The investment required from publishers is calculated based on the turnover from the previous financial year and is adjusted annually based on the evolution of the consumer price index. Distributor services have a choice between a contribution based on user subscriptions and a percentage of the annual turnover.

Table 3. Member States That Foresee a Choice Between Direct Investment and the Payment of a Levy.

	Investment	%	Monetary Basis
Belgium (FR)	(Co)production/prepurchase of audiovisual media works		Publishers: Turnover from advertising, sponsorship, and distributors/third parties (+index)
	Or levy paid to Centre for Cinema and Audiovisual	N/A	if turnover >€300K
		1.4	if turnover €300K-€5M
		1.6	if turnover €5-10M
		1.8	if turnover €10-15M
		2	if turnover €15-20M
		2.2	if turnover >€20M
			Distributors: €2 per user from previous year Or . . .
		2.5	annual turnover generated from users
Belgium (NL)	(Co)production of (Flemish) audiovisual works		€3M (+index) per year Or €1.3 per user in previous year
		2	Revenues from previous year in "Dutch language area"
	Or financial contribution to Flemish Audiovisual Fund	N/A	Turnover <€500K On-demand services captured by investment obligation for distributors

Flanders has two main regulations that capture investment obligations for VOD platforms: the Incentive Scheme added in 2014, which captures on-demand audiovisual providers as "service distributors"; and the 2019 regulation that captures on-demand audiovisual players as "nonlinear broadcasters." The former requires investments to be made in fixed amounts, either a lump sum or price paid per user. The latter stipulates that nonlinear broadcasters must contribute a percentage of revenues from the previous year.

Joint Obligation: A Direct Investment and a Levy

France, Croatia, and the Czech Republic have joint obligations for on-demand audiovisual media services providers. These must, therefore, make a direct investment as well as contribute to an audiovisual fund. The contributions are, however, significantly different in size, from investment of 1% of revenues in the Czech Republic, to a maximum of 26% of net annual turnover in France (see Table 4).

Table 4. Member States That Impose a Joint Obligation in the Form of a Direct Investment and the Payment of a Levy.

	Investment	%	Monetary Basis
France	Exploitation rights, investment in producer's shares or adaptation for deaf/hearing impaired for European cinematographic and audiovisual works	26 (22 French works)	SVOD: Net annual turnover if >€10M and ≥10 cinematographic works made available: <22 months after theatrical release in France
	Quota for works of French cultural expression.	21 (17 French works)	≥ 22 months and < 36 months after theatrical release in France
		15 (12 French works)	>36 months after their theatrical release in France
		15 (12 French works)	TVOD: Net annual turnover if >€10M
	Production of European films	3.2 (2.5 French works)	Catch-up (if not paid by broadcaster)
	Tax paid and distributed to National Center for Cinema	2	Net annual turnover from exploitation of cinematographic/audiovisual works video recordings
		10	pornographic or violent content
Croatia	20% quota European films Or production/rights acquisition of European works Levy paid to Croatian Audiovisual Centre	2	Annual gross income from on-demand audiovisual services
Czech Republic	10% quota European films Or investment in production/rights acquisition of European works	1	Total revenues generated by service in reporting period
	Fee paid to The Czech Film Fund	0.5	Price paid by the end user as the product of the audiovisual charge base and the charge rate

France has a fairly complicated system in place for the calculation of direct investment obligations, whereby the financial contribution varies depending on (1) the type of service, (2) the size of the VOD offer, or (3) the release window(s). French legislation for on-demand audiovisual media stipulates that subscription VOD and transaction VOD (TVOD) providers must contribute a certain percentage of their net annual turnover to European audiovisual and cinematographic productions. In addition to that, the Video and VOD Tax stipulates a levy for services that sell and rent physical and online audiovisual content in France, calculated based on the net annual turnover from the exploitation of cinematographic audiovisual works. The system in France is an extension of the participatory financing system in which different levies make up the budget of the National Centre for Cinema.

In the case of Croatia, on-demand service providers may choose between a quota for European works and a direct investment in production or rights acquisition. In addition to this obligation, they have to pay a financial contribution based on their annual gross income to the Croatian Audiovisual Centre. In the Czech Republic, on-demand services can choose between a content quota and a direct investment in the acquisition of rights. This requirement is complemented by legislation according to which the services must also pay a levy based on the price paid by the end user. The law foresees that the levy be paid to the Czech Film Fund.

The findings show that, although only a limited number of countries have so far imposed, or are in the process of imposing, regulation to promote European works in member states on VOD platforms, the existing measures are already very diverse, pointing toward growing fragmentation. Although some initiatives make use of the wording of the AVMSD in terms of definitions, the financial contributions differ greatly depending on the level and the calculation method established by each state. Often, this is the result of formulating new legislation or adapting regulations that were already in place but did not cover particular services, such as the 2019 regulation to capture on-demand audiovisual players as "nonlinear broadcasters" in Flanders, or that were added to existing support frameworks, such as the French circular financing system, in which the National Centre for Cinema funding derives from different forms of levies: advertisement, rental, retail, and so on. Audiovisual regulation often sets out from a specific market context, which determines the necessity to impose new laws in support of new players, without damaging incumbent domestic services.

What Is Reinforced: Production Over Circulation, Domestic Over Nonnational European

Following the historical development of media regulation within the EU, a third relevant finding is the continued tension between the economic and the cultural nature of the measures. As in the case of previous media regulation, this can also be seen in the reinforced focus on production, either directly, through the above-mentioned subsidies, or indirectly, through the promotion of domestic productions to reach the quota for European works.

The revised directive, which all member states must gradually integrate into their national media policies, requires that 30% of the catalogs of audiovisual on-demand service providers consists of European works, and specifies that European content needs to be prominently featured. Twelve countries in EU27 foresee a specific quota for European works in VOD catalogs (see Table A2, available at https://www.dropbox.com/sh/eksf96hvic22u9d/AAAmsEs1Ue5EeBAfBbfaxC7Ma?dl=0). Quota levels still differ among member states, as does their enforcement, which can be fixed or gradual (e.g., France and Malta).

Member states have historically focused on reinforcing domestic volumes rather than promoting nonnational European works. Criticism of the measures imposed already started with the Television Without Frontiers directive, as even when member states fulfilled the content quota, there was still a considerable reduction in the programming of European films in cinemas and on television (Collins, 2002; De Bens, Kelly, & Bakke, 1992). Liberalization of media markets boosted domestic production, yet the share of nonnational European productions in cinemas, on television, or VOD, remained very low (see e.g., European Commission, 2012). Some member states specifically give enhanced support to national cultural expression. This is done both through quota and investments in works produced in the country (e.g., Belgium and Hungary), or works of national cultural expression (e.g., France, Italy, Spain, and Denmark).

The fragmentation, determined by borders, market size, export capacity, cultural specificities, and language, still causes significant hurdles to the circulation of European works (Bondebjerg et al., 2017). Scholars have already pointed out that the expansion of online platforms will not introduce new transnational content flows but will, in fact, extend the existing viewing patterns into online consumption, by an already defined national audience (Lobato, 2019). It can be expected that the required quota of European works will mainly benefit larger markets showing considerable domestic audiences and a “language of advantage” that has global potential (Collins, 1989). At the same time, we must acknowledge that it took a U.S. player to develop a service that increased the pan-European circulation of audiovisual content and gave European audiences increased access to nonnational EU content, in an accessible and user-friendly manner.

Finally, the contributions themselves are quite limited, giving some of the national regulations more of a symbolic character, rather than the chance to make a real impact on the production and intra-European circulation of EU audiovisual content. According to recent studies (Econopolis & SMIT, 2018), the financial investment made by Netflix in the past years, particularly in the acquisition of television drama, is already larger than the investment required by the new provisions in those markets. This is also because of the increasing collaboration between Netflix and European producers and broadcasters. Growing investments in European “Netflix Original” productions have proven instrumental for the platform, in its strategy to enter and rapidly expand into various European markets. However, quota and investment obligations might boost opportunities for European producers to collaborate with emerging OTT players such as Amazon Prime Video and Disney, whose contributions to European works have so far been limited.

Discussion

Media policy is just as much about politics, trade, and technology as it is about culture (Raboy, 2004). The tensions between the economic and the cultural dimensions of EU media policy were there from the very beginning (Erickson & Dewey, 2011). Van Cuilenburg and McQuail (2003) go as far as claiming that the balance among the key objectives of media policy—political, sociocultural, and economic—failed as it was taken over by economic values. Over time, regulatory requirements such as content quota and national and European support programs were put in place to boost the production of European works. Similarly, measures such as rights acquisition and investments in European content were also aimed at strengthening distribution. But the new and complex institutional environment generates a need for “new tools, frameworks and models through which to understand media regulation, and the relationship between national and international forces” (Flew, 2016, p. 76). In practice, the dichotomy culture-economy can also oversimplify the discussion, as measures such as quota and investment obligations were always aimed at both cultural and economic development (McGonagle, 2016). To make the measures fully focused on the cultural domain, the diversity of European countries needs to be carefully considered, and this may go against the interests of larger markets, such as France and Germany, that have been at the forefront of protecting European markets from foreign dominance.

Elements of power imbalance (Cunningham & Silver, 2013), ownership concentration (Hesmondhalgh, 2013), and the established tensions between the national and the global (Flew, Iosifidis, & Steemers, 2016) are reasserted through the new regulations. The EU's neoliberal agenda in media policy has pushed the discussion on transnational content flows even farther from the realm of nation-states toward that of global corporations. Thus, already characterized by modest regulatory governance and commercialism, both broadcasting and the Internet have become radically commercialized sectors (Humphreys & Simpson, 2018). In this context, strengthening the EU audiovisual industry will require a more systemic shift than the measures discussed in this study. Notwithstanding the attempt to unify media policy under the EU umbrella, national governments remain key players in shaping the audiovisual market. Global media corporations are still captured by the legal and policy frameworks set at national level (Flew et al., 2016), which, as we have seen, are highly fragmented or nonexistent in many member states.

The reinforcement of domestic content over nonnational European works is also not new. Media scholars have previously pointed out the effect of satellite television in building and strengthening national and regional markets, both through economic measures of commercialization and competition (Sinclair et al., 2002) and elements of cultural nature (Straubhaar, 2007), including discussions on language, class, and the formation of diasporic audiences. However, literature on new media and platforms points to the problematic nature of discussing the topic on the same binary between indigenous media and U.S.-led media imperialism (Jenner, 2018), because of the fluid nature of transnational television and the diversified content made to appeal to both local and global audiences.

Another key element of discussion is the imbalance between the production and distribution of content. Although it has been claimed that "it is cultural distribution, not cultural production, that is the locus of power and profit" (Garnham, 1987, p. 31), new measures seem to reinforce content production but lag behind in support for content circulation. This is particularly worrying since global platforms such as Netflix, Amazon Prime Video, and Apple are, by definition, content delivery platforms on their way to becoming the "new King Kongs" of the media industry (Cunningham & Silver, 2013).

Over time, differences in market size and volume of public support have also maintained, rather than decreased, imbalances among member states. Stronger media markets introduced more direct and indirect support, in the form of levies, backing of promotion and distribution, professional training, and so on. France has historically invested in quota for exhibition, direct support, tax credits, and a levy on cinema and cable distribution (Kerrigan & Özbilgin, 2004), and has developed the most extensive toolkit for enhanced distribution in the EU (Jäckel, 2007). Along the same lines, it was France and Germany that extended the regulation to foreign players even before the revisions in the AVMSD, seemingly one step ahead of EU policy. Furthermore, it is still expected that existing content quota will be filled with the most popular content as Netflix and other big platforms try to secure deals for larger territories. Most likely, this will reinforce the position of large European production markets, such as France, United Kingdom, Germany, Spain, and Italy. Smaller EU markets lack the combination of direct and indirect support measures and focus primarily on developing and safeguarding production volumes in their local markets (Wauters & Raats, 2018).

In the current situation of the EU VOD market, which is already dominated by U.S. companies, we have to ask: Is this history repeating? Media policy's efforts to keep up with developments in technology are noticeable, but harmonization through legislative measures remains limited. EU policy has, nevertheless, raised awareness among domestic policy makers and industries about the consequences of transnational media platforms entering European markets (Evens & Donders, 2018). It is worth mentioning that Netflix's announcements on its largest upcoming EU investments did take off during discussions leading up to the quota. Similar to the quota and investment obligations imposed on "traditional media," these may also not yield the desired outcomes to strengthen the European market and overcome fragmentation. And, just as before, although these measures are primarily economic in nature, European media markets continue to face difficulties in competing with U.S. media giants such as Netflix, Amazon, Disney, and HBO, whose ongoing expansion is imminent. At this point, the more effective regulatory framework for dealing with these platforms is likely to be the EU's competition policy, rather than its audiovisual measures.

The new regulations may also experience the same challenge in enforceability experienced in implementing the content quota in the 1990s. This can already be seen in the Netflix court case in Germany, as well as in the case of the Czech Republic, where the revenue from the levy was expected to become part of the Czech Film Fund's budget in 2017 (Ministerstvo Kultury, 2016). However, the institution had not yet received any funds from on-demand audiovisual media services providers at the time of this writing. Our sources provide varying explanations for this, ranging from lack of political willingness to see the measures through, to European objections against the phrasing of the law.

Regardless of this study's focus on the EU, this remains a global concern. Other markets around the world have or are in the process of implementing similar measures that aim to counter U.S. dominance in the streaming market. In 2017, the Minister of Canadian Heritage and Netflix announced an agreement that would see the creation of Netflix's first production company outside the United States, together with an investment of over CAD $500 million in original English and French-language Canadian productions, over the upcoming five years (Canadian Heritage, 2017). Meanwhile, several other countries have implemented a goods and services tax that captures platforms such as Netflix, ranging between 10% and 25%, including Australia, South Korea, Japan, Singapore, New Zealand, Colombia, Chile, Argentina, and Uruguay. As in the case of EU member states, these measures are fundamentally different. In the case of Canada, the funds will support new and original content creation, and potentially, distribution on the Netflix platform, however this is a temporary solution, and not a legal investment obligation, at least for the moment. Meanwhile, the goods and services taxes cannot usually be traced back to the media industries and thus may not necessarily be used to support the production or circulation of audiovisual content.

Although the number of case studies analyzed in this study has offered a diverse image of media regulation in member states, it has also limited the scope of our study. To this end, relevant discussions on competition and trade policy, as well as wider debates on cultural diversity, would significantly strengthen the research. Moreover, taking into consideration each national context would greatly benefit the discussion on the developments in the audiovisual sector. Particularly, a look at the number of players captured by this legislation, the funds obtained, as well as the output supported by the investments would provide a clearer image of whether the goals set by these measures are being reached. Similarly, it would be interesting to trace investments made by Netflix in EU markets and try to assess their potential contribution to the sustainability of each market.

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