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**The Promotion of European Works: An  
Analysis on Quotas for European  
Audiovisual Works and their Effect on  
Culture and Industry**

**Piero Papp**

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# European Union Law Working Papers

**Editors: Siegfried Fina and Roland Vogl**

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Stanford Law School  
Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305-8610

University of Vienna School of Law  
Department of Business Law  
Schottenbastei 10-16  
1010 Vienna, Austria

### **About the Author**

Piero Papp holds an LL.M. in International and European Business Law with distinction from the University of Vienna. Prior to his LL.M. studies, he completed an LL.B. in International and European Law with distinction at the Hague University in the Netherlands. The author can be contacted at [pieropapp@gmail.com](mailto:pieropapp@gmail.com).

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## **Abstract**

This paper examines the impact, which EU level quotas on audiovisual works have on the internal market and on European culture. By evaluating quotas on broadcast providers and on-demand audiovisual providers, I identify the inherent issue of quantitative restrictions and the varying impact it has on each audiovisual media service. I measure the success of EU quotas based on whether they achieve the policy goals of the European Union: cultural diversity and developing the audiovisual industry. My research method is to first define the policy goals of the EU by evaluating the drafting history of the Television without Frontiers Directive and the Audiovisual Media Services Directive, in order to identify the intentions and justifications for EU level quotas. I then conduct an impact assessment, identifying real and potential effects the quotas will have on the internal market and culture, and evaluate how the results align with the policy goals of the EU. My findings indicate that prior legislation on broadcasting has hindered EU policy goals while current legislation on non-linear services will not contribute to EU policy goals. This paper challenges the necessity for European quotas as a means to ensure cultural diversity and employment. Some view quotas as necessary to protect European identity from U.S. cultural dominance and to protect the industry from the overpowering U.S. market. However, I argue that quantitative restrictions have a negative impact on the quality of European works, which ultimately affects both the cultural value of European works and the creation of a pan-European audiovisual industry.

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## INTRODUCTION

On September 19, 2020, on-demand video services such as Netflix and Amazon will be required by European Union law to have at least 30% of programmes within their catalogues to originate in the European Union (EU). The new rule comes from an amendment to the Audiovisual Media Services Directive (AVMSD) adopted in 2018. The Amendment requires all on-demand audiovisual media services to dedicate 30% of their catalogue to European works and ensure their prominence. Prior to this requirement, the EU has refrained from regulating the quantity of European programs streaming services must contain in their catalogues and have only required that Member States take measures to ensure the promotion of European works by on-demand audiovisual media services. The promotion of European works is a concept which has been around for nearly 30 years and originally only applied to broadcasting. European content requirements are not a new phenomenon and have applied to broadcasting since the adoption of the AVMSD's predecessor, The Television without Frontiers Directive (TWFD). Prior to the emergence of on-demand streaming technology, broadcasting was the principal audiovisual media service, which fell under the ambit of the European Union when the TWFD was enacted in 1989, as a response to the growing commercialization of broadcasting. The TWFD was adopted to ensure the free movement of broadcasting services within the internal market while preserving public interest objectives of the Member States. The Directive's most controversial provision was the obligation of broadcasters to dedicate a majority of transmission time to European works.

The aim of the quotas was to increase the production of European works and to promote cultural diversity while protecting the culture of Member States from outside influences.

During the drafting of the Directive, the issue on quotas was so controversial among Member States that its adoption nearly failed. The quota further led to an international dispute between the United States and Europe, in which the United States claimed the quota violated the General Agreement on Tariffs and Trade. The United States further threatened retaliation if the quota were to be adopted. The quotas on broadcasting have remained in force since its adoption in 1989, and since the beginning of 2020, on-demand audiovisual services will be subject to content quotas.

The on-demand quotas share the same policy goals as broadcasting and were enacted to ensure a level playing field between broadcasters and on-demand services. The European Union has argued that in the last ten years on-demand audiovisual services have not done enough to promote European works, therefore, a quota is necessary to increase the production of European works and to promote cultural diversity amongst its Member States. There are many Member States, academics, and stakeholders that argue against quotas and their effects on the internal market. For instance, the largest streaming service, Netflix, has opposed the quota and claims that quotas can have negative effects on the quality of content and can be harmful to consumers. These concerns have been supported by various academics who have argued on the negative effects the broadcasting quota has had on the European audiovisual industry. One of the main arguments against a quota is that content requirements favor quantity over quality and does not reflect the market demand for European content. On the other hand, proponents

have argued that without quotas the European audiovisual industry would be overshadowed by the United States' audiovisual market, thereby preventing its own development.

This paper answers how the quotas on both broadcasting and on-demand services have both failed and succeeded in reaching their goals. Primarily, findings indicate that quota systems may help national markets but at the cost of harming the European internal market. The paper will analyze the intentions behind quotas through a discussion on the drafting history of the TWFD and the AVSMD and its 2018 amendment. The reasoning behind quotas and the policy goals they aim to achieve will be critiqued to formulate a conclusion on the effects of each quota. The findings on the analysis of broadcasting quotas will then be applied to assess the potential effects the new quota will have, while taking into consideration the technological and situational differences between the two types of services.

The first chapter will discuss the history of the TWFD, followed by an analysis in Chapter II of the positive and negative effects the quota has had on the internal market during the lifespan of the Directive. Chapter III will discuss in depth the recent emergence of on-demand services and its inclusion in the AVMSD. Chapter III will discuss the drafting history of the AVMSD in connection to on-demand video services, as well as the drafting history of the 2018 amending Directive. The final chapter will analyze the potential effects the new quota will have on the internal market and provide an alternative solution which may deem less harmful to the audiences and businesses.

## I. TELEVISION WITHOUT FRONTIERS

### 1.1 History of Broadcasting

The TWFD came as a result of a merging acceptance within Europe that broadcasting no longer fell strictly under a public service. Historically, from the 1920's until the 1980's, television and radio broadcasting were under public control, functioned largely as a monopoly, and fell outside any commercial competitive industry.<sup>1</sup> While in the United States broadcasting falls within the commercial sphere, in Western Europe broadcasting was considered a public service as broadcasting was linked to the notions of national cultural identity, maintained public sphere and social unity.<sup>2</sup>

Prior to the development of EU law governing media policy, cooperation cross border was limited to issues concerning the operational and legal aspects of broadcasting such as copyright and frequency coordination.<sup>3</sup> This coordination was conducted through the European Broadcasting Union, an alliance of public service media organizations established in 1950. The European Broadcasting Union fostered programming exchanges between members and issued non-binding recommendations to national administrations.<sup>4</sup> Similarly, The Council of Europe also issued non-binding recommendations to its

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<sup>1</sup> George Terzis, *European Media Governance: National and Regional Dimensions* (Bristol: Intellect, 2008) 17–25.

<sup>2</sup> Brants, K., and De Bens, E 'The Status of TV Broadcasting in Europe' in Jan Wieten, Graham Murdock and Peter Dahlgren (eds), *Television Across Europe: A Comparative Introduction* (London Sage, 2000) 8.

See also, Georgina born and Tony Prosser, 'Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations' [2003] 64(5) *The Modern Law Review*, 671.

<sup>3</sup> Maria Michalis, 'Focal Points of European Media Policy from Inception till Present: Plus ça change?'. in Donders and others (eds), *The Palgrave Handbook of European Media Policy* (Palgrave Macmillan 2014) 130.

<sup>4</sup> *ibid* 30.

Member States but on human right issues concerning freedom of speech.<sup>5</sup> Soft law and limited cross border coordination reflected the European media order at the time, where broadcasting fell strictly within the ambit of national control.<sup>6</sup>

This order remained during the founding of the European Economic Community (EC), the predecessor of the European Union (EU), which was not granted any competence over public service broadcasting, as it was considered by the Member States too closely linked to national sovereignty.<sup>7</sup> Only in 1974, when the European Court of Justice (ECJ) gave its judgment in the landmark case *Sacchi vs Italy*, did broadcasting fall under the ambit of the EC treaty.<sup>8</sup> The case concerned a cable operator, Giuseppe Sacchi, who claimed that the Italian public service broadcaster's monopoly on advertising revenue restricted the trade of goods within the EC. While the ECJ did not find a restriction of the trade of goods, the case gave the ECJ the opportunity to define television signals as an activity of economic nature which falls under the EC Treaty's freedom to provide services.<sup>9</sup> Six years later, the Court confirmed the *Sacchi* ruling in the *Debaue* case, where the Court stated in reference to *Sacchi vs Italy* that 'the broadcasting of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services.'<sup>10</sup> Moreover, the *Debaue* case brought attention to the lack of harmonization of rules on broadcasting.

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<sup>5</sup> *ibid.*

<sup>6</sup> Jackie Harrison and Lorna Woods, *European Broadcasting Law and Policy* (Cambridge University Press, 2007) 67.

<sup>7</sup> *ibid.*

<sup>8</sup> Case 155/73 *Giuseppe Sacchi*, *Judgment* [1974] EU:C:1974:40.

<sup>9</sup> *ibid.*

<sup>10</sup> Case 52/79 *Procureur du Roi v Debaue Judgment* [1989] EU:C:1980:83, para 8.

The *Debauve* case was a preliminary ruling concerning a Belgian law that prohibited commercial advertising through broadcasting. The law made no distinction on the origin of the advertisements, thereby prohibiting transmissions from both national and foreign broadcasters. The national court in Belgium raised the question whether a prohibition which makes no distinction based on the origin of the advertisement, is in violation with Articles 59 and 60 (freedom to provide services) of the EEC Treaty.<sup>11</sup> In its ruling, the Court observed that television advertising was subject to widely divergent systems of law in various Member States, and that ‘[I]n the absence of any harmonization of the relevant rules, a prohibition of this type falls within the residual power of each Member State to regulate, restrict or even totally prohibit television advertising on its territory on grounds of general interest.’<sup>12</sup> This position also extends to prohibiting television advertising originating in other Member States, provided the same terms are applied equally to national and foreign television organizations.<sup>13</sup> As national laws were highly diverse, it was nearly impossible that a broadcast could comply with the rules on advertising in its own state and in two or more other Member States. So long as Member States could apply the *Debauve* doctrine to restrict the retransmission of broadcasts originating in other Member States, the creation of a common market for cross-border broadcasting was improbable. However, as quoted above, the Court hinted in its judgment that the solution to this legal conundrum would be the harmonization of the relevant laws pertaining to broadcasting. These rulings paved way for the single market policy-making

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<sup>11</sup> *ibid* para 1.

<sup>12</sup> *ibid* para 15.

<sup>13</sup> *ibid*.

on broadcasting.<sup>14</sup> Where the *Sacchi* ruling declared broadcasting as a tradable service, the *Debauve* case prompted the EEC to harmonize relevant rules on broadcasting via a directive (TWFD), on the legal basis of Article 100 of the Treaty establishing the European Economic Community (Article 114 TFEU).<sup>15</sup> These judgments were later illustrated by the Commission in the Green Paper on the Establishment of the Common Market for Broadcasting, where the Commission emphasized the necessity of harmonization due to the near impossibility of a broadcaster to comply with national laws of various Member States.<sup>16</sup>

#### 1.1.1. *From public to commercialized broadcast*

The determination that television broadcasting would be subject to competition rules and not regarded as a cultural institution laid down the foundation for EU media policy. In the following years, new forms of distribution such as cable and satellite expanded the industry for broadcasting and frustrated one of main purposes for the monopolistic structure of broadcasting: limited radio spectrum.<sup>17</sup> In addition to the development of technology, the shift in globalization promoted multiculturalism and the existing monopolistic public broadcaster structure began to be perceived on a political and social level as politically biased and socially unrepresentative.<sup>18</sup> State principles, such as a

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<sup>14</sup> Alison Harcourt, *The European Union and the Regulation of Media Markets* (Manchester University Press, 2005) 25.

<sup>15</sup> Treaty establishing the European Economic Community [1957] OJ 1 12/1, Art. 100.

<sup>16</sup> European Commission, 'Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable' COM (1984) 300 final, 254, 260, 261.

<sup>17</sup> Simon Delaere and Cristina Cullell-March, 'Radio Spectrum Policy in the EU: Concepts, Trends, Issues' in Donders and others (eds), *The Palgrave Handbook of European Media Policy* (Palgrave Macmillan 2014) 362.

<sup>18</sup> Michalis, 132.

unified national identity and public sphere, notions linked to a public service, began to be challenged as unnecessary core characteristics of a public service.

As a result of technology and globalization, new private players began to enter the market, and several of the larger EU countries subsequently started to reform their broadcasting markets.<sup>19</sup> In 1976, Italy's Constitutional Court stated, that while a public-service monopoly was necessary at a national level to ensure pluralism, it was not necessary at the local level. This ruling led to the expansion of new commercial radio and television stations, and many of these stations began to operate as national broadcasting stations, disregarding the court's restrictions.<sup>20</sup> In 1981 the Court ruled again in favor of the market, declaring that pluralism at the local level was not compromised by private commercial networks operating nationally.<sup>21</sup> By the time Italy finally introduced a Broadcasting Act in 1990, the broadcasting system had already been established by the market.<sup>22</sup>

The French government in 1981 licensed two national commercial channels and introduced a pay for TV service. Later in 1986, the principal public service channel was privatized, making France one of the most commercialized markets in Europe.<sup>23</sup> In 1986, Germany introduced a dual system of broadcasting regulation, providing guarantees for

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<sup>19</sup> Peter J. Humphreys, *Mass Media and Media Policy in Western Europe* (Manchester University Press, 1996) 159-228.

<sup>20</sup> Giuseppe Eusepi, 'Broadcasting System in Italy: Evolution and Perspectives ' (1995) 82 *Public Choice*, 310.

<sup>21</sup> Humphreys, 179.

<sup>22</sup> *ibid* 180.

<sup>23</sup> *ibid* 181.

existing public broadcasters while introducing a new commercial sector.<sup>24</sup> Unlike the case with France, Germany continued to value the traditional public service institutions during their development of a commercial market. While the majority of smaller states maintained a strong commitment to the public service model, these examples demonstrate that the initiative of restructuring media markets came from national decisions and not from the EC.<sup>25</sup>

### 1.1.2. *The emergence of a European media policy*

With the development of commercialized markets, the balance between economic and social cultural aspects of broadcasting created tension, leading to discussions on who best serves to mitigate the issue. The question on whether EC level policy was the appropriate avenue led many states fearful that the EC's predominant economic nature would cause a shift in balance further away from democratic and sociocultural issues.<sup>26</sup> A group of countries including Belgium, Denmark, and the Netherlands advocated in having the Council of Europe establish a broadcasting policy at the European level, with the expectation that the Council of Europe would promote democratic and sociocultural values as opposed to the economic initiatives proposed by the EC.<sup>27</sup> Resultantly, the involvement of both the EC and the Council of Europe in broadcasting policy led to a race to the bottom, where the policy instruments adopted by both organizations had to be

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<sup>24</sup> *ibid* 186.

<sup>25</sup> *ibid*.

<sup>26</sup> Michalis, 133.

<sup>27</sup> *ibid*.

watered down and harmonized in order to avoid conflicting rules.<sup>28</sup> As a result, the EC lacked a strong regulatory framework for broadcasting, which at the time was comprised mainly of the TWFD.

The TWFD was introduced in 1989.<sup>29</sup> The tension between economic and democratic social values is strongly reflected in its drafting. One of the main objectives of the Directive is to ensure the free movement of broadcasting services within the internal market without prejudice to the public interest role. This is primarily achieved through Article 2, which states that Member States shall not restrict the retransmission on their territory of television broadcasts from other Member States. This is known as the “country of origin” principle and is the foundation on which the Directive is based. The TWFD set out further minimum rules on advertising, including the protection of minors and the right of apply, but deliberately refrained from regulating on politically sensitive issues, such as culture, content, and pluralism. However, cultural issues were not completely absent. The highly contested provision on broadcasting quotas made its way into the Directive after several highly disputed rounds of negotiations.

The intentions behind the broadcasting quotas are best understood through an evaluation of the TWFD’s drafting history and the economic relationship between the United States and the EU at the time of its drafting. Since the 1920s, the United States has been the dominant producer and provider of audiovisual programmes to broadcasters

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<sup>28</sup> *ibid.* See also Michel Dupagne, *EC policymaking: The case of the “Television Without Frontiers Directive”* (Kluwer Academic Publishers 1992) 111.

<sup>29</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298.

in Europe. Prior to World War 1, Europe had been the preeminent producer of motion pictures until the devastations of the war crippled the European film industry, allowing the U.S. film industry to fill the gap.<sup>30</sup> By the late 1980s, the U.S. film industry generated over US\$2.5 billion in trade, with half of the revenue coming from the European market.<sup>31</sup> European broadcasting services were increasingly becoming dependent on imported programmes from the United States. The major hindrance affecting the European market was not a dearth of creative talent, but the shortage of production facilities.<sup>32</sup> For most Member States of the EC, it was cheaper to broadcast U.S. programmes than it was to produce their own content or to broadcast programmes from other Member States.<sup>33</sup> The EC grew worried that in the absence of Community measures, the United States dominant hold on the European broadcasting market would likely continue. The EC also feared that the U.S. cultural traits embedded in its programmes would influence the cultures of Member States, threatening the unitary development of the EC.<sup>34</sup> The growing concerns of U.S. cultural and economic domination materialized and the EC called for measures to integrate the market and promote unification.

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<sup>30</sup> Robert Sklar, *Film: An International History Of The Medium* (Prentice Hall, 1993) 61-99.

<sup>31</sup> Paul Presburger and Michael R. Tyler, 'Television Without Frontiers: Opportunity and Debate Created by the New European Community Directive' [1990] 13(3) *Hastings International and Comparative Law Review*, 495, 501-502.

<sup>32</sup> Steven Greenhouse, 'For Europe, U.S.. May Spell T.V.' *N.Y. TIMES* (New York, July 31, 1989).

<sup>33</sup> Shaun P. O'connell, 'Television without Frontiers: The European Union's Continuing Struggle for Cultural Survival' [1996] 28(2) *Case Western Reserve Journal of International Law*, 508.

<sup>34</sup> COM (1984) 300 final, para 28.

### 1.1.3. *The pursuit for a European level media policy*

The EC's inclination towards an EC level broadcasting policy was first expressed by the European Parliament in the Hahn Report of 1982.<sup>35</sup> The Report urged the establishment of a European television program, a project instrumental for European unification. This notion was brought forward by a Parliamentary Resolution, which called upon the EC to draft a report addressing the legal foundation for which the EC has competence over audiovisual media, and the feasibility of introducing a European television program.<sup>36</sup> The Parliament sought, through pan-European media initiatives, to cultivate a European collective identity:

European unification will only be achieved if Europeans want it. Europeans will only want it if there is such a thing as a European identity. A European identity will only develop if Europeans are adequately informed. At present, information vis à vis the mass media is controlled at national level.<sup>37</sup>

In the pursuit of a European Television channel and an EC level broadcasting policy, the EC subsequently presented an interim report in 1983, followed by the renowned Green Paper on the Establishment of the Common Market for Broadcasting in 1984.<sup>38</sup> Where the EC's interim report dealt with the scope for establishing a European television

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<sup>35</sup> European Parliament, 'Report on radio and television in the European Community, Drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport ('The Hahn Report')' [1982] Working Doc. 1-1013/81.

<sup>36</sup> European Parliament, 'European Parliament Resolution on radio and television broadcasting in the European Community' [1982] OJEC No C 87/110.

<sup>37</sup> Richard Collins, *Media and Identity in Contemporary Europe* (Intellect Books, 2002) 13.

<sup>38</sup> European Commission, 'Realities and tendencies in European television: perspectives and options' (Interim Report) COM (1983) 229 final, and COM (1984) 300 final.

channel, the Green Paper analyzed how the common market for national broadcasting could be established.<sup>39</sup> The Green Paper served as a policy core for introduction of EC level regulation on broadcasting.<sup>40</sup> The Green Paper discussed economic and legal issues, such as the freedom to provide services and the harmonization of legislation, but it did not discuss the promotion of European works.<sup>41</sup> However, The Green Paper does discuss the cultural value in creating a single broadcasting market. The Paper observes that television in the community could serve as a “source of cultural enrichment” and that “the dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas.”<sup>42</sup> The Paper further elaborates on the role of a single broadcasting market, stating that broadcasting is a powerful medium for the communication of all kinds of information, ideas and opinion, and it thereby influences the political, social, educational, and cultural values of Community citizens. It contends that broadcasting’s influence in these areas makes it an especially important factor in the development of the EC becoming an increasingly integrated economic, social, and political entity.<sup>43</sup>

In 1985, Parliamentary reports were published in response to the EC’s Green Paper Report, advocating for measures to promote the European audiovisual media industry. These reports were followed by resolutions which, unlike the reports, called specifically for the introduction of European content quotas in the EC’s proposal for a directive. The

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<sup>39</sup> David Ward, *The European Union and the Culture Industries: Regulation and the Public Interest* (Routledge, 2016) 191.

<sup>40</sup> Dupagne, 106.

<sup>41</sup> COM (1984) 300 final.

<sup>42</sup> *ibid supra* note 20.

<sup>43</sup> *ibid supra* note 20 (3).

resolutions argued that content quotas would “encourage the emergence of Community program makers independent of the broadcasting organizations and, thereby, provide a creative and cultural stimulus in Europe”, and, further, that “only the establishment of a Europe-wide internal market will enable the broadcasting industry to compete with international producers.”<sup>44</sup>

The proposal for a European quota is also in response to Member State’s already existing national quota regimes, primarily France’s quota legislation. While the majority of Member States did not have a pre-existing quota regime, the existing quotas restricted the freedom to provide services among Member States. National quotas obstructed the cross-border diffusion of foreign programmes by discriminating between national and foreign programmes, thereby causing an inequality of opportunities for programmes from other Member States. This gave legislators two options: abolish the quota system which restricts the freedom to provide services, or harmonize quota regulation.<sup>45</sup> Instead of challenging one of the largest Member States in the EC, the EC chose the route of harmonizing national legislation through a common European quota regime, which would promote both economic and cultural goals.

## 1.2 Drafting the Television without Frontiers Directive

These resolutions and the Green Paper served as a policy basis for the formulation of the Commission’s proposal. In 1986, the EC introduced a proposal for a broadcasting

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<sup>44</sup> European Parliament ‘Resolution on a framework for a European media policy based on the Commission’s Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable (‘The Hahn Resolution (No. 2)’)[1985] Doc. A2-75/85.

<sup>45</sup> Oliver Castendyk and others, *European media law* (Kluwer Law International 2008) 440.

directive, incorporating the Green Paper's recommendations and a quota for European programmes. Through the proposed Directive, the cultural aim of EU broadcasting policy shifted from 'cultural unity' associated with pan-European media experiments and the call for one European identity, to the notion of 'cultural diversity' to be promoted via internal market liberalization and trade protection (quotas).<sup>46</sup>

Article 2 of the proposed Directive would have required broadcasters to dedicate 30% of their program to European works, with a progressive increase to 60% after three years.<sup>47</sup> The proposal further stipulates that broadcasters would have to dedicate at least 5% of their programming budget to community works of independent producers, with a progressive increase to 10% after three years. One of the objectives stated in the proposal is to promote the distribution of television programmes for "economic reasons and in the interests of cultural exchange and European integration."<sup>48</sup> This can be understood better as unity in diversity, as opposed to a single European identity.<sup>49</sup> The EC argued that the development of the European television industry serves to produce more programmes with European characteristics, thereby exposing viewers to more European culture. The

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<sup>46</sup> European Commission, 'Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities' COM (1986) 146 final/2.

<sup>47</sup> COM (1986) 146 final/2, art 2.

<sup>48</sup> *ibid*, Explanatory Memorandum, point 3.

<sup>49</sup> Monica Sassatelli, 'Imagined Europe: The Shaping of a European Cultural Identity through EU Cultural Policy' [2002] 5(4) *European Journal of Social Theory* 435-451 and Richard Collins, *Media and Identity in Contemporary Europe* (Intellect Books, 2002) 16.

Directive further stipulates that the purpose of a quota requirement is “directly to promote employment in the cultural industries, a clear economic goal.”<sup>50</sup>

### 1.2.1. *Broadcasting quotas: opposing positions*

The reactions to the proposal by Member states and interest groups were varied. France, having its own quota system in place and already an avid advocate for a European quota system, supported the inclusion of broadcasting quotas in the Directive. A number of broadcasting associations and broadcasters supported the principle of quotas while many others objected. The majority of Member States opposed the principle of quotas. As discussed prior, cultural and social issues were considered inherently linked to national sovereignty and was a competence exclusive to Member States. For instance, Belgium and Denmark were opposed to the Directive throughout the negotiations on the grounds that the EC lacked competence to regulate television broadcasting.<sup>51</sup> Smaller states also opposed any quota requirement, because the small size of their national audiences would make it difficult to recoup the costs of producing local content. Furthermore, smaller states worried that reliance on programmes from other Member States would be too costly in order to meet the quota requirements.<sup>52</sup> Member States, such as the Netherlands and Germany, also expressed concern that disrupting U.S. relations could potentially cause U.S. retaliation if the Directive were to

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<sup>50</sup> European Commission, ‘Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities’ COM (1986) 146 final/2, art 2.

<sup>51</sup> John D Donaldson, “‘Television Without Frontiers’: The Continuing Tension Between Liberal Free Trade and European Cultural Integrity’ [1996] 20(1) Fordham International Law Journal, 98.

<sup>52</sup> *ibid.*

be passed.<sup>53</sup> In fact, throughout the policy making procedure, the United States strongly condemned the adoption of a European quota. The United States Trade Representative Carla Hills sent a letter of protest to European Parliament members, contending that the proposed local content requirement would violate the General Agreement on Tariffs and Trade (GATT).<sup>54</sup>

Following the legislative procedure, the Council reviewed the reports made by the Economic and Social Committee (ESC) as well as with the European Parliament's Committee on Legal Affairs and Citizens' Rights (JURI).<sup>55</sup> By November 1987, the Directive faced a number of issues at the Council level. Several Member States expressed reservations towards the quotas, while France would only accept the proposal if the measures for quotas were amended to be more stringent, so as to ensure sufficient safeguards for the promotion of European works.<sup>56</sup> In January 1988, the European Parliament adopted a resolution based on the JURI's Report urging the Commission to amend the proposal and for the Council to include amendments into its common position.<sup>57</sup> The amendment of greatest concern called for the proposed program quota to be raised to 60% and to be read as 'an adequate proportion'. The Committees and the

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<sup>53</sup> Suzanne Schwarz, 'Television without Frontiers' [1991] 16(2) North Carolina Journal of International Law and Commercial Regulation, 352.

<sup>54</sup> *ibid.*

<sup>55</sup> European Parliament, 'Report on the proposal from the European Commission of the European Communities to the Council (COM(86) 146 final – Doc. C 2- 38/86) for a Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, drawn up on behalf of the Committee on Legal Affairs and Citizens' Rights, 'The Barzanti Report' [1987] Doc. No. A 2-0246/87.

<sup>56</sup> Ward, 200.

<sup>57</sup> Dupagne, 111.

Parliament were in favor of a strict European quota regulation.<sup>58</sup> The Commission, however, had to reconcile the political interests of the Member States and adjust the proposal accordingly.

From 1988 to 1999, the proposal underwent multiple revisions. After submission for a second reading of the proposal in 1988, the Commission revised the proposal once again so that the Directive would be aligned with the Council of Europe's Convention on Transfrontier Television.<sup>59</sup> The majority of the articles were agreed upon by the Member States, yet the question of quotas still remained. The Directive failed to gain the Council's approval in July 1989.<sup>60</sup> The Commission proposed a more flexible provision of "a majority proportion...where practicable" which was opposed by France, Greece, and the Netherlands on the grounds that the language of 'where practicable' did not offer sufficient protection for European productions.<sup>61</sup> The Member States positions on quotas were polarized. Germany and the UK opposed any binding limits on imports. In Germany, the Bavarian government challenged the EC's competence of the federal government to implement the Directive, as broadcasting falls under the authority of the Länder (the individual states), not the federal government.<sup>62</sup> Resultantly, only after an interpretive declaration was put on record that Articles 4 and 5 are merely political obligations, and thus are not binding, did Germany withdraw its negative vote.<sup>63</sup>

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<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*, 114.

<sup>60</sup> *ibid.*

<sup>61</sup> Schwarz, 353.

<sup>62</sup> Dupagne, 101. See also Eli Noam, *Television in Europe*, (Oxford University Press, 1991) 293.

<sup>63</sup> *ibid.*

While the French initially rejected the proposal, the opposition from Germany and the UK led them to back down from their demands and agree to the provision of “a majority proportion... where practicable.” However, the French Government received a guarantee of a “non-recul” clause, whereby the percentage of European works cannot be lower than the percentage from 1988, thus binding broadcasters from lowering their quota percentage. Yet even with such changes, a lack of consensus remained. The European Parliament disagreed with these revisions, and in May 1989, the Parliament adopted the Barzanti report by an absolute majority, calling for the 60% program quota to be restored.<sup>64</sup> The European Parliamentary elections in June further polarized the debate. Although France agreed to the non-binding provisions, the French delegation withdrew their support, acting under pressure from French producers and authors who wanted stronger regulation. The Netherlands also opposed it, fearing U.S. retaliation against its national industries, while Greece remained undecided.<sup>65</sup>

### 1.2.2. *From impasse to adoption*

The Council, once again failing to reach a decision on the Directive, received an extension of one month to make a decision. On October 6, 1989, the Council adopted the Directive by a qualified majority (10-2) with only Belgium and Denmark opposing. There are a number of reasons which led from impasse to adoption. In response to France rejecting the ‘soft’ quota, the Commission threatened to initiate infringement proceedings against France based on France’s quota regulations which violated the freedom to

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<sup>64</sup> *ibid* 113.

<sup>65</sup> *ibid* 114.

provide services. It was more important for France to maintain its status quo on quotas than to impose its rigorous standards onto other Member States. When France assumed the presidency of the Council in July 1989, it resultantly pushed for approving the Directive. As the President of the Council has the power to influence the content and order of the Council agenda, France chose to prioritize the issue of quotas, which placed pressure among the Member States to reach an agreement. Following the initiative of the President of France, the Audio-visual EUREKA (AVE) was founded, through a joint-declaration by 26 European States. The AVE was a project designed for strengthening the European audiovisual program industry.<sup>66</sup> The founding of AVE appeased the fears of producers and ensured Member States that there were adequate measures already in place promoting the economy and European culture.

It has also been suggested that excessive anti-quota lobbying by the United States contributed to the passage of the Directive. A former director of the BBC stated that “the American pressure has been of such a nature that it has irritated most European countries. It may have persuaded the French that the Directive may have been a good idea after all, because if it annoys the Americans that much, there must be something good about it.”<sup>67</sup> After final passage of the Directive, an EC spokesman summarized the struggle for passage as follows: “We have a directive today, thanks to the Americans.”<sup>68</sup>

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<sup>66</sup> Council of Europe ‘Audio-visual EUREKA: Follow-up to the Joint Declaration of 2 October 1989 – Joint Declaration on Audio-visual Eureka’ [1989] CM(89) 182.

<sup>67</sup> Kevin M. McDonald, ‘How Would You Like Your Television: With or Without Borders and With or Without Culture—a New Approach to Media Regulation in the European Union’ [1998] 22(5) *Fordham International Law Journal*, 15.

<sup>68</sup> CA Giffard ‘European Regulation on Transborder Television’ [1990] 27 (1) *California Western Law Review*, 7.

Finally, perhaps the most instrumental contribution to its passage is through political compromise. The Commission rejected the amendments suggested in the Parliamentary report, knowing the Directive had to be as flexible as possible in order to be accepted by all the parties in the Council. It was through these ‘package deals’ such as the “non-recurve” clause obtained by the French and the non-binding nature of the clause secured by the Germans that allowed the Council to overcome political deadlock and reach an agreement.<sup>69</sup>

### 1.3 The Television without Frontiers Directive

In 1997 and in 2007, the TWFD was amended, adding new definitions and clarifications. The Articles regulating the quota regime on broadcasting received minimal changes, such as the replacement of the words ‘and teletext services’ to ‘teletext services and tele-shopping’, along with minor adjustments to the definition of a European work and adding in the recitals a new purpose for the quota.<sup>70</sup> While the amendments made on the regulation of broadcasting quotas were insignificant, the 2007 Directive made significant changes to the Directive by including non-linear services under its scope. The regulation of non-linear services included in the 2007 Directive will be discussed in Chapter III. The Articles in the final version of the Directive pertaining to broadcasting are as follows:

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<sup>69</sup> Dupagne, 117.

<sup>70</sup> Council Directive 97/36/EC of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L 202.

#### Article 4

1. Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services, and tele-shopping. 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.
2. Where the proportion laid down in paragraph 1 cannot be attained, it must not be lower than the average for 1988 in the Member State concerned.....

#### Article 5

Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and tele-shopping, 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 broadcasters' 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 five years of their production.

Article 3 of the 2007 Directive also applies to broadcasters; however, Article 3 was amended to include non-linear services. Article 3 therefore reads as follows:

### Article 3

1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Community law.

During the negotiations, the originally proposed 60% quota was reduced to a “majority proportion”, which signified over 50%. However, the amount of transmission time dedicated for independently produced works increased from the originally proposed 5%, to 10%, albeit the original draft proposed a gradual increase to 10%. Moreover, the Directive excludes news, sports, games, etc. from the scope of Article 4, which means that the time transmitted by such programmes are not taken into account when calculating total transmission time. The rationale for this exclusion was provided first in the original proposal, which stated that such programmes were to be left out as they required little or no creative work.<sup>71</sup> Article 3 also allows Member States to implement stricter rules for broadcasters, making the Directive a set of minimum standards. However, standards which go beyond the minimum requirements can only apply to broadcasters under the Member State’s jurisdiction.

The Directive defines a European work in Article 6, providing for three categories of European works: works originating from a Member State; works originating from European third states party to the European Convention on Transfrontier Television; and

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<sup>71</sup> European Commission, ‘Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities’ COM (1986) 146 final/2. Ch II, para 50.

works which originate from other European third countries. The European work must be predominantly created by authors and workers residing in a Member State of the EU, and the production must be controlled by a body established in the EU. If the European work falls under category C, it is further required that the production be made within the context of an agreement relating to the audiovisual sector between the EU and the relevant European country.<sup>72</sup> Article 6 (4) extends the scope for co-produced works, but providing again for the requirement that the production is controlled by a producer established within the EU, and further that the community co-producer supplies the majority share of the total cost of the production.

#### 1.3.1. *Objectives of the Television without Frontiers Directive*

As discussed prior, the purposes of these quota provisions are both economic and cultural. The Directive reinstates these goals in its recitals. The first purpose of the provisions is economical, in that the quotas should foster the growth of the European media industry.<sup>73</sup> The second purpose is cultural, yet interestingly, the 1989 Directive does not include culture diversity as a primary purpose and the 1997 Amending Directive included a vague reference to culture. Recital 25 of the 1997 Amending Directive reads: “Article 128(4) of the Treaty establishing the European Community requires the Community to take cultural aspects into account in its action under other provisions of the Treaty”. In the 2007 Directive, Article 3i (3) pertaining to on-demand linear services

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<sup>72</sup> Council Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L 332.

<sup>73</sup> *ibid.* Recital 19 ‘promoting production and distribution of European audiovisual productions’.

makes vague reference to the cultural objective, stating the Commission should take into account the ‘objective of cultural diversity’ when reporting to the Parliament and Council on the application of paragraph 1 (promotion of European works).<sup>74</sup> The EC’s inability to regulate on culture signifies the value of the drafting history.

There are numerous occasions in the drafting history where the EC has advocated for a quota system for the purposes of ‘Unity in diversity’. The EC and its Member States went on to justify that the quota regulation does not violate the GATT, due to the quotas serving a cultural aim (See Chapter II). The 1989 Directive does not include any reasoning for the cultural purposes of the quotas. This is understood by the fact the EC lacked competence to regulate on the basis of culture. According to Article 151 (4) of the EC Treaty, which is now Article 167 (4) TFEU, the EC could only take cultural aspects into account of its actions for purposes specified in the Treaty, which was to respect and promote the diversity of its cultures.<sup>75</sup> However, Article 151 (4) EC Treaty authorizes only supportive measures.<sup>76</sup> Although the Directive provides an economic purpose for the quotas, the drafting history for the quotas have led many to argue that the EC has harmonized trans-border broadcasting with cultural aims when its regulatory competence allowed only for the regulation of economic issues. The legality of the European content quotas has thus been challenged.<sup>77</sup> However, it was made clear in the ECJ tobacco advertising case that Community legislation can pursue cultural goals alongside

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<sup>74</sup> Council Directive 2007/65/EC, art 1 (3i).

<sup>75</sup> Treaty establishing the European Economic Community [1957] OJ 1 12/1.

<sup>76</sup> Castendyk and others, 431.

<sup>77</sup> M. Dolmans, ‘Quotas without Content: The Questionable Legality of European content quotas under the Television without Frontiers Directive’, [1995] 1 *Das Recht der Europa*’ ischen Union, 331.

economic ones, provided an economic legal basis within the Treaty is fulfilled.<sup>78</sup> The Commission acting on an economic policy measure is a sufficient legal basis for enacting a European quota regulation.<sup>79</sup> The quota regulation is thus justified in being both an economic and cultural policy measure. The lack of reference to cultural aims in the Directive emphasizes the significance of understanding the intentions of the EC through the TWFD drafting history, and thereby understanding fully the cultural rationale.

#### 1.4 Concluding Remarks

The historical function of broadcasting as a public service sheds light on the complexities of regulating broadcasting on an EC level. The EC found establishing a European quota essential to circumvent the dominant prominence of U.S. programmes aired by European broadcasters. While there was a merging acceptance within Europe that broadcasting no longer fell strictly under a public service, the cultural aspect of broadcasting remained a sensitive and controversial issue, which could only be remedied through political compromise and appeasement measures.

By comparing these Articles with the original proposal, it is clear how political compromise led to a watered down version of what was originally intended. The EC's original goal, as reflected by the committee reports, parliamentary resolutions, and EC's original proposal, would suggest for a quota system similar to France's, but with a larger quota and binding nature. While the text of the Directive provides insight only on economic aims of the quota regulation, it is understood by the drafting history that the

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<sup>78</sup> Case C-376/98 *Tobacco Advertising Directive I* [2000] ECR I-8419.

<sup>79</sup> Oliver Castendyk, 439.

quotas have a much stronger cultural purpose than the Directive lets on. The Directive's historical context and drafting history will help to explain in the later chapters the intentions behind the enactment of the AVMSD and its amendments, as well to serve as a basis of comparison.

## II. ANALYSIS ON A BROADCAST QUOTA

Over the following years, after the adoption of the TWFD, the production of European works increased substantially, and the majority of Member States raised their broadcasting quotas to 50% or higher.<sup>80</sup> However, the extent to which such quotas have raised employment, developed the European cultural industries, and has contributed to a European integration has been profusely debated. The Directive has also received heavy criticism by the United States, which claims the quotas are disguised trade restrictions, which violate the GATT. Even after the adoption of the Directive, Articles 4 and 5 remained the most controversial aspect of the Directive. The purpose of this chapter is to provide a critique of the TWFD by observing the provisions of the TWFD and what affect they have had on culture and the internal market. The evaluation of positive and negative effects of the TWFD will also offer insights on whether the new quota on non-linear services will have the same or different effects. This analysis will further demonstrate how the TWFD failed/met in achieving its goal. While broadcasting quotas remain today, the shift towards on demand services skews any data on the broadcasting industry, making it harder to distinguish the effects of the broadcasting quota vs. the effects of new technology. This chapter will therefore only provide statistics on European works during the life span of the TWFD (1989-2010) till the beginning of the AVMSD (2010-2011).

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<sup>80</sup> European Commission 'Report From The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, First Report on the Application of Articles 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010, Promotion of European works in EU scheduled and on-demand audiovisual media services' COM (2012) 522 final 9, 12.

## 2.1 U.S. Allegations – Violation of the GATT

Throughout the Directive's drafting process and following the adoption of the Directive, the United States actively condemned the Directive's provisions on quotas. While the criticism of the Member States has been over the inefficiency of the quota and the EC's lack of competence, the U.S. has claimed its incompatibility with the GATT. Within a few weeks after the adoption of the Directive, the United States House of Representatives voted 342-0 on a resolution to denounce the Directive, calling it a trade violation of the GATT.<sup>81</sup> The resolution was not based on the issue of cultural sovereignty, but rather that the quota regulation is aimed at protecting the European industry from competition.<sup>82</sup> The House charged that the Directive violates several GATT provisions, such as Article I on Most Favored Nation (MFN) Treatment, Article III relating to National Treatment, and Article XI on quantitative trade restrictions.<sup>83</sup> The MFN standard of treatment is a commitment that a member of a GATT must treat another GATT member the same way it treats any third country, while the National Treatment principle prohibits discrimination between imported and domestically produced goods.<sup>84</sup> This issue was pivotal in the Uruguay Round of the GATT Negotiations, which spanned from 1986 to 1993. The Uruguay Round had as its objectives the further liberalization of international trade through the reduction of tariff and other non-tariff barriers and had on its agenda the issue of whether culture and

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<sup>81</sup> Schwarz, 362.

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

<sup>84</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) 198-206.

audiovisual media should be included under the GATT and the establishment of the General Agreement on Trade in Services (GATS).<sup>85</sup>

During the negotiations, the United States contended that audiovisual media constitutes as a “good” and therefore falls under the GATT. The United States proposed to introduce an audiovisual sector within the GATT to reaffirm their classification as a good.<sup>86</sup> The U.S. argued that while the MFN standard has an exception for custom unions, the MFN principle is violated by offering more favorable treatment to non-EC European nationals than to other contracting parties.<sup>87</sup> This refers to Article 6, which defines ‘European work’ to include works originating from third European states that are party to the European Convention on Transfrontier Television. The United States further claimed that the national treatment standard was violated by restricting the number of foreign programmes which may be broadcasted without a reciprocal restriction on European works.<sup>88</sup> Finally under Article XI, which prohibits any trade restrictions on imports and exports other than tariffs, the U.S. argued that a European quota is a trade restriction as it has the effect of limiting the number of foreign programmes that may be imported into the EC.<sup>89</sup>

The EC, in response, advanced their own arguments regarding the legality of the quotas under the GATT. The EC argued the quotas were only a political commitment and

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<sup>85</sup> O’Connell, 521.

<sup>86</sup> Jonas M. Grant, ‘Jurassic’ Trade Dispute: The Exclusion of the Audiovisual Sector from the GATT [1995] 70(4) *Indiana Law Journal* 1343-1344.

<sup>87</sup> O’Connell, 522.

<sup>88</sup> *ibid* 523.

<sup>89</sup> *ibid*.

not legally binding.<sup>90</sup> In regards to the GATT, the EC argued that broadcasting does not fall within the scope of the GATT, as it is a service and not a good, and additionally that audiovisual services should fall under a ‘cultural exception’.<sup>91</sup> France, which led the EC in the negotiations, was the primary advocate of a cultural exception, and advanced the argument that general principles of international trade recognize a “cultural exception” for products that have a cultural character, and the GATT and GATS should therefore include a cultural exemption.<sup>92</sup> The United States argued against the inclusion of a cultural exemption within GATT and GATS on the contention that cultural identities were too subjective to define, and therefore states could abuse the exemption.<sup>93</sup>

#### 2.1.1. *Uruguay Round Conclusions*

The U.S. and the members of the EC were unable to reach an acceptable compromise on the issue of cultural exemption and audiovisuals, and rather than abandon the entire deal and seven years of negotiation, audiovisuals were left out of the GATT and GATS.<sup>94</sup> While a cultural exemption was not agreed upon, “cultural goods” were included under the GATT, and the EC was granted an exemption from its MFN obligations concerning cultural protection agreement’s among the Member States.<sup>95</sup>

The international dispute that arose from the introduction of an EU level non-binding quota regulation demonstrates the gravity of the matter and illustrates that even if the

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<sup>90</sup> M. Grant, 1340.

<sup>91</sup> O’Connel, 524.

<sup>92</sup> Tina W. Chao, 'GATT's Cultural Exemption of Audiovisual Trade: The United States may have Lost the Battle but Not the War' [1996] 17(4) University of Pennsylvania Journal of International Law, 1128.

<sup>93</sup> O’Connel, 522.

<sup>94</sup> M. Grant, 1355.

<sup>95</sup> O’Connel, 526.

quota does not violate the GATT, it is indeed an international trade restriction. The United States' concerns that a cultural identity is difficult to define is not unfounded, and many have criticized the EC for not providing a sufficient link between audiovisual and cultural identity. International trade restrictions are capable of having the opposite effects of what is intended, and in the case of cultural exemption, the quotas should prove to have a positive effect on European culture in order to justify their restriction on trade.

## 2.2 Cultural Policy

During the Uruguay Round, U.S. representatives challenged the notion that viewing television would affect the cultural status of EC Member States. This challenge has been reiterated in the works of scholars, who have criticized the EC for not having provided a coherent evaluation of the relationship of cultural identity to television viewing.<sup>96</sup> The EC has also not provided a well-grounded analysis on how U.S. productions negatively affect the different cultures of EC Member States. As Irimi Katsirea argues, the European quota does not address why cultural identities in Europe are more affected by U.S. productions than by European ones.<sup>97</sup> The U.S. trade representative Carla Hills also pointed out that a European cultural identity is not necessarily protected by European-produced works:

We do not understand why the Spanish culture is more protected by a film produced in Germany by 'Europeans' than by a Spanish film of Mexican origin.... We do not understand

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<sup>96</sup> Irimi Katsirea, 'Television without Frontiers Directive' in Donders and others (eds), *The Palgrave Handbook of European Media Policy* (Palgrave Macmillan 2014) 302.

<sup>97</sup> *ibid* 303.

why a film about French cultural history, in the French language, promotes French culture any less simply because it is not of 'European origin.'<sup>98</sup>

As each European culture is unique and diverse, it is unrealistic to assume that European cultures share more common values with each other than from non-European cultures. For instance, Mexican and Spanish culture arguably share more similarities to each other than Spanish and Danish culture share to each other. The reasoning that a European quota will preserve the culture of Member States is, therefore, partially flawed. However, the quotas do not only serve to protect culture but also to promote European integration by exposing Member States to each other's cultures. What this suggests is that these two different cultural goals do not augment each other. If it is necessary to limit the number of imports of foreign programmes in order to protect the Member State's culture, the increase of imports from another Member State which does not share similar cultural traits would thus go against the original aim of protecting one's own culture. Protection of culture and European integration are, therefore, not mutually inclusive.

### 2.2.1. *Cultural requirements*

The European quota's definition of a European work does not guarantee any expression of a European culture in the European work. Article 6 only uses residency and financial criteria to determine a European work but provides no requirements for the work to contain any European characteristic. As Katsirea states:

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<sup>98</sup> Janet L. Conley, 'Hollywood's Last Hurrah--Television Without Frontiers Directive May Close Borders to the European Community's Broadcast Market' [1993] 14(1) U. Pa. J. Int'l Bus. L., 108.

The European quota's cultural conception is marred by the ill-conceived definition of a 'European work' under Article 6. In view of the more and more international character of the television business, it is unlikely that this definition can guarantee the expression of a European cultural identity.

For instance, the criteria could be fulfilled by U.S. subsidiaries and the work could be filmed entirely in the United States.<sup>99</sup> Article 6 has therefore been strongly criticized for allowing U.S. films to disguise themselves as European works.<sup>100</sup> This would indicate that a film with no reference to European culture could qualify as a European work, whereas a film such as Steven Spielberg's "Schindler's List", a film about the Holocaust, would not qualify as a European work.<sup>101</sup> This demonstrates how the economic and cultural aims of the quota do not always complement each other. The European works origin requirement is based on economic grounds aiming to develop the audiovisual industry, however, through its economic basis the cultural goals are undermined as the definition gives leeway to circumvent European cultural expression.

As the definition of European work is only a minimum standard, most Member States have imposed additional cultural requirements for a European work. Member States generally require national language requirements. Belgium requires "a considerable proportion of European works should be works originally produced in the Dutch language", while the Netherlands requires public service channels to dedicate 50% of

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<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*

<sup>101</sup> M. Grant 1350.

transmission time to programmes in Dutch and 40% for private channels.<sup>102</sup> France requires 60% of transmission time be dedicated to European works with 40% to be originally produced in the French language, Portugal requires channels to broadcast programming originally produced in Portuguese for 50% of transmission time, and Spain requires a majority of European works to be in one of the official Spanish languages.<sup>103</sup> Other countries such as Norway, Iceland, Ireland, Denmark, and Germany have softer language requirements, calling for broadcasters to contribute to the promotion of the national language, with no defined numerical quantity.<sup>104</sup> The imposition of language criteria is supported by Article 8 of the TWFD, which states that Member States may, for the purposes of language policy, introduce stricter rules on the basis of language criteria to broadcasters under their jurisdiction.

### 2.2.2. *National identity vs. cultural diversity*

These additional language requirements have been effective in increasing the production of domestic works and arguably in preserving national culture, however, the additional requirements have frustrated the goal of developing a more pan-European cultural identity or at the least an exposure to each other's cultures. While the language requirements have ensured that European works are not merely 'disguised' European works, they have disrupted the circulation of European works within the internal market.

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<sup>102</sup> Media Act of 21 April 1987 (NL) art 71g.

<sup>103</sup> David Graham and others, 'Study on the application of measures concerning the promotion of the distribution and production of European works in audiovisual media services (i.e. including television programs and non-linear services)' (Final Study Report) [2009] SMART No. 2007/0001 (Independent Report 2009) 89-97.

<sup>104</sup> *ibid.*

Language requirements act as barriers to cross-border trade in programmes since it is more onerous for non-domestic producers to meet the requirements. For example, films and TV shows produced in Germany will not meet the language requirement of France unless the German film or TV show was produced originally in the French language. These requirements, therefore, indirectly discriminate between domestic European works and non-domestic European works. While indirect discrimination on goods and services are prohibited under the treaties, national quotas pursue cultural policy objectives that can be considered “overriding requirements relating to the general interest”, thereby, being exempt from the treaties.<sup>105</sup> This issue once again emphasizes that the policy goal to protect national culture is not compatible with the policy goal to promote cultural diversity.

### 2.2.3. *Viewer preference for domestic over non-domestic European works*

The cultural diversity objective is further circumvented by European citizen’s strong demand for domestic and U.S. works over non-domestic European works. Research on the Audiovisual Media Services (AVMS) industry has been conducted and documented in independent research studies that have been prepared for the European Commission. The Commission has referred to the findings in these reports in its analysis on the effectiveness of EU law. These reports contain key information for this discussion, such as the preferences of viewers, and will be used throughout this discussion.

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<sup>105</sup> Irini Katsirea, *Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Member States* (Kluwer Law International 2008) 280-287.

The independent reports have found that the majority of non-domestic European works are flow programmes such as talk shows and current affairs programmes, which generally are not of interest to audiences outside their domestic market.<sup>106</sup> Language requirements also lead to channel schedules that are specific to a Member State, thereby limiting the demand for these channels in other Member States.<sup>107</sup> EU viewers also have a greater appetite for U.S. works than European works. An independent report adopted by the Commission asked broadcasters various questions to understand their influence on the decision to purchase programmes from the US. The broadcasters which contributed to the study purchased 47% of their programmes from outside the EU, with 41% being from the U.S. and 6% from outside the U.S.<sup>108</sup> Broadcasters suggested that U.S. storylines have broad appeal whereas European storylines are specific to their national culture and resultantly may not captivate outside audiences.<sup>109</sup> There is also a familiarity in U.S. productions due to their prominence in the world market, which also affects consumer preference.

Broadcasters have responded to consumer preferences and have resultantly prioritized U.S. productions over non-domestic European works. Another independent study adopted by the Commission found that in 2007, the average transmission time of non-domestic European works was 8.2% and even lower during peak-time with 7% of

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<sup>106</sup> David Graham and others, 'Impact Study of Measures (Community and National) Concerning the Promotion of Distribution and Production of TV Programs Provided for Under Article 25(a) of the TV Without Frontiers Directive' (Final Report) [2005] The Audiovisual, Media and Internet Unit. Directorate-General Information Society and Media. European Commission (Independent Report 2005) 165-170.

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

<sup>109</sup> *ibid.*

qualifying transmission hours and 2.9% of the total viewer hours.<sup>110</sup> In this regard, the EU's goal on European integration through exposure to different cultures via broadcasting has not been met. The Commission has also reiterated in numerous reports on European works that the Directive has not managed to achieve European integration. The latest report by the Commission on European works references the study aforementioned to conclude that the promotion of European works in linear services has "a limited effect on the circulation of programs throughout the EU as it does not ensure the distribution of non-domestic European works" and that "the Commission calls on Member States to take account of the low circulation of non-domestic European works and address this issue where possible."<sup>111</sup>

#### 2.2.4. *The effect on culture, final arguments*

The quota's minimum requirements on a qualifying European work have allowed Member States to introduce stricter requirements which have the effect of limiting both U.S. and non-domestic European productions. One may contend that language requirements is the logical corollary of a quota system based on the protection of culture, and, as there is no "European identity", the quota has the unintended effect of placing non-domestic European works at an even greater competitive disadvantage. With a limited amount of transmission time for non-domestic works, broadcasters are more willing to choose U.S. productions over non-domestic European productions. The cultures in Europe are vast and unique, and thus the goal of Member States to protect

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<sup>110</sup> Independent Report 2009, 174.

<sup>111</sup> COM (2012) 522 final 9, 12.

their national cultures does not always coincide with the EU's goal to promote European integration. Therefore, the Directive may have had the effect of partitioning the internal market by limiting the freedom to provide services instead of developing an open market. Prior to the Directive, only France had a quota regulation in place, and as a result of the Directive, every Member State eventually introduced a strict or flexible quota regime, which resultantly limited the number of European works that could be imported into Member States that tied language or other requirements to their quotas.

In conclusion, the cultural goals behind quotas are not entirely compatible with each other, and the argument for protecting national culture not only disrupts the goal of cultural diversity, but also has various economic effects on the internal market. Nonetheless, while the TWFD provides no guarantee of European expression in the definition of a European work, national requirements have ensured their citizens are being exposed to cultural works, and to that extent the quota has achieved the policy goal of cultural preservation. The following section will reiterate many of the issues previously discussed but further emphasize their effects on television and film industries and on the functioning of the Internal Market.

## 2.3 Industrial Policy

### 2.3.1. *Adoption of quota by Member States*

The production of works based in Europe have increased substantially as a result of the Directive. The first independent study sampled 13 Member States and found an

increase in qualifying transmission time from 52.1 % in 1998 to 57.4% in 2002.<sup>112</sup> For independent productions, there was an increase from 16.2% in 1993 to 20.2% in 2002.<sup>113</sup> The study found that Member States which applied Article 4 more strictly had a greater increase in European works than in Member States where Article 4 was implemented flexibly.<sup>114</sup> This indicates the appreciable effect Article 4 had on the scheduling of European works. By 2010, the average transmission time of European works by the 27 Member States reached 64.3%, well exceeding the minimum majority requirement set out by the Directive, and the transmission of independent works has also increased to an average 34.9%, although the Directive only required 10%.<sup>115</sup> Aside from language requirements, many Member States have also imposed requirements on broadcasters to contribute to the production of the national cultural industries. For instance, Spain requires 5% of annual income of broadcasters to be allocated towards European films, while France applies a 5.5% levy on the broadcaster's annual revenue exceeding 11 million euros, which is distributed to the film industry.<sup>116</sup> Such requirements have also contributed to the development of production facilities and European films and television.

### 2.3.2. *Evaluation of Articles 4 and 5*

The Commission, in its reports, measures the TWFD's success based on the percentage of transmission time dedicated to European works. At face value, it would appear that the EU has successfully achieved developing a strong audiovisual industry,

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<sup>112</sup> Independent Report 2005, 14.

<sup>113</sup> *ibid* 14.

<sup>114</sup> *ibid* 17.

<sup>115</sup> COM (2012) 522 final, 10.

<sup>116</sup> Independent Report 2009, 96.

however, it is questionable whether transmission time is an adequate indicator of success. For instance, what value does transmission time have if it does not adequately represent consumption/viewership? As will be discussed below, many scholars and economists argue that transmission time is not the proper measurement to assess the development of the industry, and moreover, that it can be harmful towards the industry's development.

Articles 4 and 5 require a percentage of the transmission time to be dedicated to European works but have no safeguards built in to prevent measures which counteract the industrial objective. For instance, as mentioned by Irina Kistrea, broadcasters can satisfy the requirements by means of repetitive transmissions of old programmes, or by devoting more transmission time to news, sports and game shows, which do not fall within the scope of Article 4.<sup>117</sup> However, according to the 2011 Independent Report, recent independent European works (of up to 5 years old) make up an average of 85.2% of the total Independent European hours in 2010, indicating a healthy growth of new productions.<sup>118</sup> There was also concern that European works would be scheduled during off- hours, reserving primetime for US works, yet this did not occur.<sup>119</sup> In the European Commission's Monitoring Reports, it was found that even ten years after the Directive entered into force, primetime viewings remained dominated by domestic productions, followed by US productions.<sup>120</sup> The 2002 independent study found that on average,

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<sup>117</sup> Katsirea, 'Television without Frontiers Directive', 302.

<sup>118</sup> *ibid* 12.

<sup>119</sup> Sally Micova, 'Content quotas: what and whom are the protecting?' in Donders and others (eds), *Private Television in Western Europe: Content, Markets, Policies* (Palgrave Macmillan 2013) 13.

<sup>120</sup> Sixth Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC 'Television without Frontiers', 24 October 2007, COM (2007) 452 final.

65.3% of prime time viewing by primary channels was dedicated to European works, the majority of which were domestic works.<sup>121</sup> Domestic content on average had more prominence than U.S. productions, due to both there being a greater appetite for domestic content by viewers and as a result of national requirements which require the prominence of European works during peak hours.<sup>122</sup>

Hence, overtime, many of these concerns were not an issue as the necessity for broadcasters to stay competitive and the already established demand for domestic content encouraged the production and prominence of European works. However, as will be discussed further in the next section, the production of domestic content may be in greater response to its demand as opposed to the compliance with the quota. Therefore, the arguments hold true when the demand for European works no longer reflect the quantity required by the quota, and so issues such as repeating programmes and dedicating primetime to non-domestic works may emerge.

### 2.3.3. *Growth of the AVMS Industry – National Industry vs. European Industry*

Over the lifespan of the TWFD, the audiovisual entertainment industry has grown exponentially. According to the 2006 Commission Report on the application of the TWFD, 660 channels were broadcasted in 2001, and by 2004 there were over 860 channels active in the EU-25.<sup>123</sup> Prior to the Directive, there were fewer than 90 channels

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<sup>121</sup> Independent Report 2002, 114.

<sup>122</sup> Independent Report 2009, 90.

<sup>123</sup> European Commission, 'Fifth Report from The Commission to The Council, The European Parliament, The European Economic and Social Committee and The Committee of The Regions on The Application of Directive 89/552/EEC "Television without Frontiers"' Com (2006) 49 final, 4.

existing in 1989. In another Commission Report of 2012, it was reported that by 2010, there were 7,622 television channels in EU-27, of which 3,126 were local channels.<sup>124</sup> The TV industry revenue in 2009 was just over €77 billion in 2009, an increase from €61.1 billion in 2002.<sup>125</sup> In a report by the European Audiovisual Observatory on the financial data of 86 TV groups operating in 15 EU countries, it was found that the investment in original programming by these groups remained stable over the years 2009-2013, at a rate of more than €15 billion, with approximately €7.5 billion towards independent productions.<sup>126</sup> The Audiovisual industry has grown over the past 30 years as a result of the TWFD, and broadcasters have been successful in producing enough content without the reliance on U.S. content. However, the independent studies in which this information is derived from have suggested that while European quotas have contributed to the increased development of European productions, the method in doing so has indirectly fragmented the European market.

At the cost of increasing production, the majority of European works fail to be of a certain quality that appeals to non-domestic audiences, and thus the export/import of European works remain very low. In 2000, a study on the geographical origin of fiction programmes broadcasted during primetime found that the UK, Germany and France dedicated 0% of transmission time to non-domestic European content, while Italy

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<sup>124</sup> COM (2012) 522 final, 7.

<sup>125</sup> Independent Report 2011, 79. See also Independent Report 2002, 10.

<sup>126</sup> Deirdre Kevin, 'Investments in original content by audiovisual services' [2015] European Audiovisual Observatory, 8.

dedicated 6% and Spain dedicated 12% to non-domestic European content.<sup>127</sup> Throughout the day, the following percentages of non-domestic European works in the fiction category were transmitted in the sample week: the UK 0%, Germany 5%, France 15%, Italy 4%, and Spain 7%.<sup>128</sup> On a European wide average, it was found that by 2010 the transmission of non-domestic European works was at a low of 8.1%.<sup>129</sup>

The prevalence of domestic and US productions over non-domestic European productions have led many to argue that the quotas reinforce national objectives to protect the national market instead of develop an integrated European market.<sup>130</sup> As mentioned prior, the little demand for non-domestic European works is largely due to the lack of quality in European works that may have been produced as a result of the quota. ‘Quality’ is measured by the cost of production, or rather the cost per hour of a programme.<sup>131</sup> The independent reports adopted by the Commission distinguished between two different types of audiovisual productions: stock and flow programmes. When a program is made it can be shown a number of times on TV, and in most cases, programmes with the most effort made in creation are the ones that have higher replay value. Programmes with high production value are termed as ‘stock’ programmes, while programmes that use less effort in production and which are less repeatable are termed ‘flow’ programmes. For instance, drama, narrative comedy, documentaries, fictions, and feature films generally fall under the category of stock programmes, while game shows,

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<sup>127</sup> Andrea Esser, ‘Audiovisual Content in Europe: Transnationalization and Approximation’ [2007] 15(2) *Journal of Contemporary European Studies*, 170.

<sup>128</sup> *ibid* 170.

<sup>129</sup> Independent Report 2011, 11.

<sup>130</sup> Katsirea, ‘Television without Frontiers Directive’, 302.

<sup>131</sup> Independent Report 2002, 28.

talk shows, and cooking shows are good examples of flow programmes.<sup>132</sup> Stock programmes are considered as a proxy measure for the quality of production.<sup>133</sup> The majority of content that has been created are flow programmes, as they are low cost-per hour productions. Stock programmes such as mini-series or original documentaries can cost between €50K and €2 million per hour, while typical flow programmes can cost as little as €1K to €10K an hour if produced in volume.<sup>134</sup>

The independent research report in 2002 found that between 1993 and 2002 the proportion of European stock programmes on primary channels decreased from 37.9% to 35.6%.<sup>135</sup> Primary channels reduced the proportion of stock programmes in favor of increasing the generally cheaper European flow programmes.<sup>136</sup> This addresses one of the largest criticisms of the Directive; broadcasters are forced to prioritize quantity over quality. Instead of investing in fewer, higher production value programmes, it is argued that broadcasters have been required to spread their resources thin to make a greater number of low cost productions. The broadcasters sampled in the independent reports stated that certain genres in non-domestic European works, such as documentaries, feature films, and fiction have higher demand than flow programmes, but are also higher cost per-hour productions.<sup>137</sup> This is problematic for achieving an open market, as flow

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<sup>132</sup> Independent Report 2002, 31.

<sup>133</sup> *ibid*, 28.

<sup>134</sup> Independent Report 2009, 114.

<sup>135</sup> Independent Report 2002, 115.

<sup>136</sup> *ibid* 115.

<sup>137</sup> *ibid* 167.

programmes generally target their domestic audience and have little appeal for viewers from other Member States.<sup>138</sup>

Examples from other countries outside of the EU also suggest that the industry's trade deficit is affected by quotas. South Korea is a prime example of the negative effects its old quota regime had on its audiovisual industry. In 1967, the government of South Korea introduced an import quota regime, which led to filmmakers producing "quota quickies", i.e., low quality movies made to gain the rights to import more foreign movies. Such "quota quickies" were rarely exported as they lacked any appeal to foreign audiences. After the screen quota was in force, the number of Korean films exported per year declined rapidly. In the 1970s, almost 80 films were exported per year, and from 1980 to 1986, the number of films dropped to 17 per year.<sup>139</sup> This similarly compares to the low percentage of European works exported into other European countries, albeit for different reasons.

The quota is not the sole contributor to low quality content. Even without the quota, audiences have a strong preference for domestic content, or, content in their native language. This also would explain why smaller countries, which share a language with a larger country, have the highest imports of non-domestic European works.<sup>140</sup> For instance, the independent study of 2002 found that Belgium, Austria and Ireland have the highest imports of non-domestic European works. The percentage of non-domestic

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<sup>138</sup> Independent Report 2011, 95-105.

<sup>139</sup> Jimmyn Parc 'Evaluating the Effects of Protectionism on the Film Industry: A Case Study Analysis of Korea' in Murschetz P. and others (eds), *Handbook of State Aid for Film* (Springer International Publishing 2018) 350.

<sup>140</sup> *ibid* 145.

European works as qualifying hours was roughly 28% in Belgium, 29% in Austria, and 54% in Ireland.<sup>141</sup> The demand for domestic content has been illustrated in certain cases where broadcasters have transmitted a percentage of domestic content well above the required quota percentage.<sup>142</sup> This may suggest that broadcasters produce a greater quantity of low quality content to meet the demand for content in the native language of its viewers, however, a fixed percentage on European works cannot reflect the quantitative demand of viewers which is subject to vary. Even if the quota corresponds to an existing demand, the strong preference for domestic or own language content has progressively decreased over time. European works are relatively less attractive to young adults who tend to watch more U.S. content than their elders.<sup>143</sup> The issue on quotas will become more apparent as the demand for domestic content continues to decrease, indicating that a numerical quota on European content does not guarantee its consumption. Preferences for international content will only continue to increase with the effect of globalization and the internet. This will be discussed more in depth in the next chapter.

#### 2.3.4. *Language requirements, an impediment to the internal market*

With an already established preference for domestic content, the quota system and language requirements have reinforced national preferences for domestic content with the result of a surplus of low quality content only suitable for the respective domestic audiences and a lack of supply of high quality European content that was suitable for all

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<sup>141</sup> Independent Report 2002, 109.

<sup>142</sup> Independent Report 2011, 213.

<sup>143</sup> *ibid* 213.

European audiences. The 2012 Commission’s first report on the AVMSD states “It is of key importance to have European works that appeal to audiences across borders. This can be achieved for example by means of co-productions that have an appeal for a wide European audience.”<sup>144</sup> The Commission Report also refers to the co-produced ‘*Borgia*’ television show as one of the limited examples of a successful audiovisual work that has crossed national borders. It may be argued that such examples were limited due to numerical quotas and national language requirements. *The Borgias*, for instance, was a high budget show produced originally in the English language. Language requirements discourage co-productions as broadcasters are compelled to invest in content produced in their domestic language. Dedicating resources in producing higher volumes of content also discourages investing more resources which yield a lower volume of higher quality content. It has been argued that if broadcasters in every Member State invested in producing fewer but higher quality content, that content would have greater international appeal thereby yielding greater profits and broadcasters would have more access to high value non-domestic European works.

The final 2011 research report argues that the rules in place has had the effect of preventing “European productions from taking full advantage of a single European audiovisual market, with its ability to raise higher levels of funding to invest in quality creation and to produce strong European content for export, fostering the European audiovisual economy and cultural influence.”<sup>145</sup> This was the envisaged goal of the

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<sup>144</sup> COM (2012) 522 final, 9.

<sup>145</sup> Independent Report 2011, 213.

Directive. The EU institutions anticipated broadcasters would meet the quota requirements through a collaborative exchange of works, and not through merely satisfying the requirements with predominantly domestic works. The combination of quantity and language requirements compel broadcasters to transmit a higher volume of lower quality domestic content, thereby reinforcing national markets and preventing the creating of one European market.

I contend that language and cultural requirements undermine a harmonized European quota regime, and instead foster a system of *de facto* national quotas. The issue of quality once again illustrates the mismatch in cultural and economic aims. The objective of promoting and preserving cultural identity is not dependent on the quality of transmitted works. As cultural expression is subjective, the mere transmission of a work in the Member State's language may be deemed satisfactory in promoting their culture.<sup>146</sup> In other words, the maintenance of national or regional languages as a means of cultural expression is not contingent on the transmission of high quality films and television. However, the quality of European productions seems imperative to internal market integration. Resultantly, a secondary demand for high-quality non-national works has instead been met through U.S. content, which has further strengthened their stronghold on the European market.

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<sup>146</sup> Micova, 12-20.

## 2.4 Concluding Remarks

The quota regime on broadcasting illustrates the indirect consequences of an artificial barrier to trade. Where the system has benefited Member States through the increased production of European works, it comes with the cost of hindering the development of the internal market. The quota regime has indeed promoted the development of national audiovisual film industries and national culture has been preserved, but the goals of the Directive to promote cultural diversity or to create a pan-European identity were not met as a consequence. Through the maintenance of national language requirements and through prioritizing quantity over quality, domestic preferences and preferences for high quality U.S. content over low quality non-domestic content are indirectly reinforced.

### III. THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

The previous chapters have addressed the origin of the quota regime, the intentions behind the regime through an overview of the historical situation of broadcasting in Europe, and the drafting history of the TWFD. An analysis of its effects has also shed light on the consequences a trade barrier can have on cultural diversity and the internal market. The history and effects of quotas provides a great overview of the potential effects the new quota system on video on demand (VOD) services can have on cultural diversity, though to a limited extent. The technological differences between broadcasting and VOD bring different issues in regards to consumer choice and preferences, and the reduced percentage and difference in transmission time vs share in catalogue make for different situations. This chapter will provide an overview of the introduction of content quotas for non-linear services in the 2007 TWFD amendment to the 2018 AVMSD amendment. The chapter will then address the new effects the quota will have on VODs, the effects the VOD quota will have with the quota on broadcasting, and address previous effects that are resolved with the new quota.

#### 3.1 On-demand Audiovisual Services – A New Era

Where the transmission of audiovisual programmes was first achieved through radio spectrum technology, by the 1990s it was proven that the transmission of audiovisual content could be achieved through another medium - the internet. The first workable prototype of the internet came in the late 1960s by a U.S. funded project known as

ARPANET, which allowed multiple computers to communicate on a single network.<sup>147</sup> By the 1970s, the technology continued to grow, allowing data to be transmitted between multiple networks, and in 1983, ARPANET began to assemble the “network of networks” that became the modern internet.<sup>148</sup> In 1990, computer scientist, Tim Berners-Lee, invented the World Wide Web, which is the common means of accessing data online in the form of websites and hyperlinks.<sup>149</sup> With the invention of the internet and the World Wide Web, VOD services first appeared in the early 1990s through the use of video compression technology.<sup>150</sup> However, the technology was still in its early phase of development, and with low bandwidth there were very few cases of video streaming until the 2000s.<sup>151</sup> In 2005, Google Video and YouTube launched their services, marking the new era of video streaming. Broadcasters began to introduce their own VOD services, mainly through “catch-up television”, which allow users to re-watch content already broadcasted with the ability to fast forward and rewind, features that were only available through VHS or DVD. As of today, there are several types of VOD services. Companies like Netflix, Disney+, or Canal+ are categorized as subscription video on demand (SVOD) services as they use a subscription model that requires users to pay a monthly fee to access a bundle of programmes.<sup>152</sup> On the other hand, services such as Apple’s

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<sup>147</sup> Camille Paloque-Bergès and Valérie Schafer, ‘Arpanet (1969–2019)’ [2019] 3(1) *Internet Histories*, 5.

<sup>148</sup> *ibid.*

<sup>149</sup> *ibid.*

<sup>150</sup> Baochun Li and others, ‘Two decades of Internet video streaming: A retrospective view’ [2013] 9(33) *ACM Transactions on Multimedia Computing, Communications and Applications*, 2-6.

<sup>151</sup> *ibid.*

<sup>152</sup> Grece C and Fontaine G, ‘On-demand Audiovisual Markets In The European Union - Developments 2014 and 2015’, 87.

iTunes or Amazon's video which offer content on a pay-per view basis are known as transactional video on demand services (TVOD).<sup>153</sup>

### 3.1.1. *The regulation of non-linear services*

In 1989 when the TWFD was adopted, the internet was nascent, and the EC could not properly envision a world where videos could be played by other means than broadcasting. Only with the growing prevalence of VOD services did the TWFD in 2007 go through a fundamental overhaul, expanding its scope to cover new forms of audiovisual services, and leading to its change of name to the "Audiovisual Media Services Directive" (AVMSD).<sup>154</sup> With the emergence of VOD services, television broadcasters faced a new type of competitor which was not subject to any of the rules television broadcasters were bound to. In response to the new developments, the Commission introduced a new proposal in 2005 to amend the Directive, calling for the inclusion of "television-like" services as an attempt to establish fairer conditions between traditional broadcasters and the emerging VOD services.<sup>155</sup> The Commission's proposal also stated that the objective of the amendment was to ensure that VOD service providers can fully benefit from the internal market through the principle of country of origin

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<sup>153</sup> *ibid.*

<sup>154</sup> Vance Little, 'Audiovisual Media Services Directive: Europe's Modernization of Broadcast Services Regulations' [2008] 1 *Journal of Law and Technology*, 1.

<sup>155</sup> European Commission, 'Proposal for a Directive amending Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities' COM (2005) 646 final, para 120.

which broadcasters already enjoyed.<sup>156</sup> In other words, the goal of the amendment was to create a level playing field between broadcasters and VOD services.

Unlike with the history of broadcasting, VOD in Europe was not an emanation of the state used for a public service but instead was introduced through private companies for commercial purposes. VOD was thus not sensitive in nature like broadcasting and was developed in a time when there was no longer the notion that media was strictly an inherent function of the state. The regulation of VOD, thus did not share the same controversy that the regulation of broadcasting underwent. Member States did not share the same fear of losing their sovereignty as they did in the 1980s. The circumstances in which VOD was created and the ever growing expansion of the internal market, along with a pre-established framework for media service, made for the regulation of VOD a well embraced decision.<sup>157</sup> The proposal to include VOD in the Directive was supported by the majority of Member States and broadcasters who sought fair competition between VOD services.<sup>158</sup>

In the 2007 amendment, Article 1 (3i), on the promotion of European works by VOD services stated: “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.”<sup>159</sup> Unlike

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<sup>156</sup> *ibid.*

<sup>157</sup> See Procedure 2005/0260/COD on the COM (2005) 646 final Proposal, available at < <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:32007L0065>> accessed 1 February 2020.

<sup>158</sup> *ibid.*

<sup>159</sup> Council Directive 2007/65/EC, art 3(i).

the Article on broadcasting, Article 1 (3i) makes no reference to dedicating a majority proportion of their catalogue to European works.

### 3.1.2. *Tools to promote European works*

Until the new amendment in 2018, there has been no numerical quota on the catalogues of VOD service providers. Instead, it has been left to the states to establish their own methods of promoting European works. For this reason, the Directive provides different examples for the promotion of European works. The promotion of European works by on-demand services include: financial contribution to the production and rights acquisition of European works and a share in the catalogues and/or; prominence of European works in the catalogues.<sup>160</sup> Unlike broadcasting which requires a percentage of transmission time to be dedicated to European works, VOD service users need only the availability of European works in the VOD catalogue to access them upon their demand. As mentioned in the previous chapter, financial contribution is the same requirement that many Member States have introduced on broadcasters. Prominence of European works, on the other hand, can come in different forms, such as ensuring that European works are available on the front page of the VOD service, or that the VOD creates a catalogue dedicated to European works.<sup>161</sup> In some way, this is similar to the requirement on broadcasters imposed by certain member which require European works are transmitted during peak hours. Although with the peak hour requirement the user is not left with a

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<sup>160</sup> *ibid.*

<sup>161</sup> DG Connect, 'Promotion of European works in Practice' (European Commission Website, 3 July 2014) <<https://ec.europa.eu/digital-single-market/en/news/promotion-european-works-practice>> accessed 12 January 2020.

choice on whether they want to view the European content during that hour. The prominence requirement merely brings attention to the user of European works.

What is notable is that the Directive gave Member States the freedom to implement their own methods in promoting European works among VOD services, whereas with broadcasting the Directive specifically sets out quotas as one of the required methods Member States must implement. Chapter IV will discuss in more detail the promotional tools applied by Member States.

While the AVMSD broadened its scope to create a level playing field between linear and non-linear services, the EU decided to apply a graduate regulatory approach towards non-linear services in order to account for the nascent nature of the on-demand video industry and to leave room for innovation and development.<sup>162</sup> The 2007 amended Directive includes recital (48), which states “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...” and further that “It is important to regularly re-examine the application of the provisions relating to the promotion of European works by audiovisual media services.”<sup>163</sup> This graduate approach has resultantly led to the 2018 quota requirement.

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<sup>162</sup> Little V, 233.

<sup>163</sup> Council Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L 332.

Unlike the drafting history of the 1989 TWFD, the Parliament did not challenge the Commission's proposal on an unspecified proportion of European works to be promoted by on-demand audiovisual media service providers. On this issue, the Commission's proposal went through several readings based on disagreement towards the system of regulation. The Commission in its original proposal intended to create a basic minimum standard that applied to media service providers, aside from the additional requirements onto broadcasters.<sup>164</sup> Through the legislative process the term "media service providers" was changed to "on-demand audiovisual media services", making the provision distinct to on-demand providers and thus creating a two-tier system of regulation.<sup>165</sup> The EU's decision to regulate the two types of services distinctively is due to the degree of control over the VOD service users. The understanding is that when the control is in the hands of the individual and not with the service provider, the individual has the freedom to make their own choices, which therefore justifies imposing lighter regulation on non-linear services.<sup>166</sup>

### 3.2 From the TWFD to the AVMSD

The TWFD has undergone several reforms, one in 1998 and another in 2007, leading to its replacement by the 2010 AVMSD. For the sake of clarity and readability, the TWFD has been codified in the 2010 AVMSD and is at present the cornerstone of media

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<sup>164</sup> COM (2005) 646 final, 24 art 3(f).

<sup>165</sup> European Commission, 'Amended proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ("Audiovisual media services without frontiers")' COM (2007) 170 final.

<sup>166</sup> *ibid* 16 para 28.

regulation in the EU.<sup>167</sup> The AVMSD retains the same policy goals as the TWFD and embodies the same provisions and amendments of the TWFD, with additions and adjustments that account for the new technologies. Instead of regulating only television broadcasting, the 2010 AVSMD was designed to be future proof by having a broader scope to regulate all audiovisual media services and to be able to catch future forms of services yet accounted for.

The previous chapters focused on linear services covered by the TWFD, e.g. television broadcasting. The model of a linear service is defined as a schedule of programmes selected by the media service provider where the viewer is not in control of the transmission.<sup>168</sup> The AVMSD regulates new audiovisual media services (VOD) not contained in the TWFD (prior to 2007) and has made a distinction on the treatment between linear and non-linear services. Non-linear services refer to “on-demand” video services, which was defined in the 2007 TWFD amendment as “an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.”<sup>169</sup>

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<sup>167</sup> Jenny Weinand, ‘The Revised Audiovisual Media Services Directive 2018- Has the EU Learned the Right Lessons from the Past?’ [2018] 82(1) UFITA, 269.

<sup>168</sup> European Commission, ‘Principles for Regulating Audiovisual Media Services at European Level’ (European Commission Website, 23 March 2018) < <https://ec.europa.eu/digital-single-market/en/general-principles>> accessed 5 February 2020.

<sup>169</sup> Directive 2007/65/EC, art 1(g).

### 3.2.1. *Non-linear services subject to the AVMSD*

According to Article 1 of the 2018 AVMSD, for a service to qualify as an on-demand media service within the meaning of the Directive, the following criteria should be met:

- The principle purpose of the service or a dissociable section of the service is devoted to providing programmes;<sup>170</sup>
- The service must be under the editorial control of an audiovisual media service provider;
- The purpose of the service must be to inform, entertain or educate the general public;
- The service must be supplied by means of electronic communications networks;
- The service must enable the user to view the service at the time of their choosing and on their own demand;
- The service is provided on the basis of a catalogue of programmes chosen by the media services provider.

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<sup>170</sup> The principal purpose is defined in the AVMSD as the provision of programmes in order to inform, entertain or educate. Following the judgment of the Court in Case C-347/14, the principal purpose requirement is also met if the service has a dissociable section from the main activity of the service provider which provides audiovisual content. The 2018 AVMSD has included examples of a dissociable section in recital 3, for instance “stand-alone parts of online newspapers featuring audiovisual programmes or user-generated videos where those parts can be considered dissociable from their main activity.” The recital further explains that audiovisual content which is merely incidental does not satisfy the definition of an ‘audiovisual media service’. For instance, online videos on a news website which complement the written press articles will not qualify as an audiovisual media service. Only where the audiovisual content is separable from the main activity and fulfills the principal purpose requirements will it qualify under Article 1 of the 2018 AVMSD as an ‘audiovisual media service’. For more information, see Recital 3 of the 2018 AVMSD and for more information on principal purpose, see Recital 22 and 23 of the 2010 AVMSD.

The prime example of an on-demand video service is Netflix, which will be a focal point in this discussion. With Netflix, the user has the ability to select any film or TV-show from Netflix's catalogue and, unlike traditional television broadcasting, is able to pause, rewind/forward, and come back to the film/ tv-show at a later time upon individual demand. Services such as SVOD, TVOD, and catch-up TV, will fall under the definition in Article 1. However, video-sharing platforms such as YouTube or Daily Motion are not caught under the definition, as they do not have editorial control and instead host user generated content.<sup>171</sup>

### 3.2.2. *The replacement of broadcasting – a new market*

The Commission issued its first report on the implementation of the AVMSD in 2012. The report concluded that the EU regulatory framework “has served citizens and businesses well”. The report also referred to the need to accommodate the legislative framework to the changing situation of the audiovisual sector, while preserving the original policy goals.<sup>172</sup> The EU's consideration that VOD services may partially replace broadcasting may have been an understatement. From 2010 to 2014, revenues from on-demand services in the EU-28 countries rose 272%, attaining €2.5 billion.<sup>173</sup>

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<sup>171</sup> Christian Grece and others, ‘On-Demand Audiovisual Markets in the European Union’, 8-15.

<sup>172</sup> European Commission, ‘Report from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions First Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU "Audiovisual Media Service Directive"’ COM (2012) 203 final, 10.

<sup>173</sup> Ivana Katsarova ‘Briefing EU Legislation in Progress – The Audiovisual Media Services Directive’ (European Parliamentary Research Service, 25 January 2019) <<https://epthinktank.eu/2017/06/28/the-audiovisual-media-services-Directive-eu-legislation-in-progress/>> accessed 10 January 2020.

The ability to watch content on individual demand solves all of the inherent problems associated with broadcasting, such as an inability to pause programmes, apply subtitles, forward/rewind, and watch at a time of the individual's choosing. The remaining value in broadcasting technology comes from content such as sports or news, which viewers may prefer to watch live. Broadcasting also retains value for areas with greater satellite signal than internet coverage or for persons not connected to the internet. This is predominately the case for older citizens. Notably, broadcasters have adapted to the advancements in technology and have introduced catch-up TV services on their own broadcast/broadband platforms.<sup>174</sup> The growing replacement of VOD over broadcasting has been observed by the Commission which accounts for the emergence of technological developments that expand access to VOD services. The report refers to the integration of Internet and Web 2.0 features into televisions and other connected devices such as tablets, smart phones, and consoles which provide access to VOD services through apps and catch-up TV services.<sup>175</sup>

### 3.3 The Drafting of Directive (EU) 2018/1808

In 2015 the European Parliament in its resolution on the Digital Single Market Act called on the Commission to review the AVMSD and propose new revisions which would align linear and non-linear services, as well as to set out minimum common standards at EU level that apply to all AVMS.<sup>176</sup> In another resolution on Preparing for a Fully Converged Audiovisual World, the EU Parliament called on the Commission to

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<sup>174</sup> COM (2012) 203 final, 9.

<sup>175</sup> *ibid.*

<sup>176</sup> Katsarova, 5-6.

step up promotion of European works through on-demand AVMS.<sup>177</sup> The Council also highlighted the need for adaption to technological change and outlined in its conclusions, areas to which particular attention must be paid, including the effectiveness of measures for promotion of European works and possible alternatives.<sup>178</sup>

Resultantly, the Commission, in its Communication on a Digital Single Market Strategy for Europe announced that the AVMSD would be revised in 2016.<sup>179</sup> A public consultation was held on the Directive as part of the evaluation for its revision. The public consultation drew a total of 434 replies.<sup>180</sup> Respondents included commercial broadcasters, public services providers, VOD operators, national administrations, European-level representative associations, national representative associations, and more. On the matter of promoting European content, there was no general consensus amongst stakeholders. Some Member States and regulators supported to maintain the status quo, finding that current regulation was sufficient for the promotion of EU works. Other Member States called for more flexibility in their choice of implementation, while other Member States called for strengthening regulations on non-linear services in order to avoid distortions of competition among players. The digital/internet industry and VOD services supported maintaining the status quo, while the Cinema, Film, and TV industry favor reinforcing existing rules onto on-demand services. Telecom operators supported measures based on market dynamics rather than on quota systems. The majority of the

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<sup>177</sup> Parliament, ‘European Parliament resolution of 12 March 2014 on Preparing for a Fully Converged Audiovisual World’ [2013] Doc. No. A7-0057/2014, para 37.

<sup>178</sup> The Council, ‘Council conclusions on European Audiovisual Policy in the Digital Era - Education, Youth, Culture and Sport Council meeting’ [2014] Meeting. No. 3349.

<sup>179</sup> COM (2015) 192 final.

<sup>180</sup> Katsorva, 8.

broadcasting sector called on the Commission to ensure a level playing field by regulating new services and granting flexibility to existing rules.<sup>181</sup>

In 2016 the Commission issued its second report on the implementation of the AVMSD, identifying various problems with the framework for on-demand services. The report states that the effectiveness of the AVMSD rules on promotion of European works by on-demand services are reduced by a number of factors. For instance, the varying approaches to promoting European works have fragmented the level of obligations imposed across Member States.<sup>182</sup> This has resulted in “forum shopping”, whereby VOD service providers target a certain country but choose to establish in another with more favorable regulatory treatment.<sup>183</sup> The report has also noted that VOD providers have invested significantly less in original productions than broadcasters. The report states that the investment of the main TV groups in original programmes in 15 countries amounted to €15.6 billion in 2013, making up 24% of their revenues (€85 billion), while on-demand providers invested only €10 million in original content, making up 1% of their total revenues (€1.5 billion).<sup>184</sup> The Commission therefore concluded in its report that the lack of specified obligations for on-demand services “may have not been as effective” in comparison to the rules on TV broadcasting.<sup>185</sup>

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<sup>181</sup> European Commission, ‘Synopsis report of the Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century’ [2016] <<https://ec.europa.eu/digital-single-market/en/news/report-public-consultation-review-audiovisual-media-services-Directive-avmsd>> accessed 20 November 2019.

<sup>182</sup> European Commission, ‘Commission Staff Working Document - Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU’ COM (2016) 170 final , Annex 7.

<sup>183</sup> *ibid* 32.

<sup>184</sup> *ibid* 38.

<sup>185</sup> *ibid*.

### 3.3.1. *A 20% quota proposal*

After an extensive review, the Commission made its proposal for the revision of the AVMSD in 2016, in which the Commission attempted to balance the interests of stakeholders and reflect the issues expressed by the European Parliament and the Council. The proposal's provision on promotion of works stated that on-demand service providers must reserve at least 20% share of European works in their catalogue and must ensure adequate prominence of such works.<sup>186</sup> The relatively low percentage in comparison to the existing 50% transmission quota on broadcasting reflects both the Commission's aim to balance the diverging interests and to account for the greater degree of freedom users enjoy in viewing European content through VOD services. However, unlike the requirement on broadcasting, the provision excludes the "where practicable" clause, making the provision binding.<sup>187</sup> Moreover, in order to ensure that quota obligations do not undermine market development and to allow new players in the market, companies with no significant presence on the market are not subject to the quota requirement.<sup>188</sup>

Views on the Commission's proposal were varied. Advisory committees such as the Committee of the Region welcomed the Commission's proposal but considered that the

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<sup>186</sup> European Commission, '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 12, 28.

<sup>187</sup> *ibid.*

<sup>188</sup> *ibid.*

20% minimum requirement does not go far enough.<sup>189</sup> Similarly, the European Economic and Social Committee adopted an opinion on the proposal calling for the 20% minimum to be increased to 50% in order to be in line with the quota on broadcasting.<sup>190</sup> Both the Association of Commercial Televisions in Europe and the Association of Cable Europe opposed the quota, arguing that investment in European works should be demand-driven.<sup>191</sup> Other associations such as the Society of Audiovisual Authors urged the Parliament and the Council to set higher quotas in order to prevent forum shopping.<sup>192</sup> The big four Member States (Spain, France, Italy, and Germany), were among the Member States in favor of increasing the percentage.<sup>193</sup>

### 3.3.2. *Revisions to the proposal*

Through the ordinary legislative procedure, the proposal was referred to the European Parliament's Committee on Culture and Education on 9 June 2016. The Committee suggested that the quota be raised from 20% to 30%, given that the current average among EU countries stands at 27%.<sup>194</sup> In 2017, Members of Parliament voted to amend the proposal to have a 30% quota instead of the proposed 20%.<sup>195</sup> During this time, the Council reached a similar consensus on the basis of a compromise text presented by the

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<sup>189</sup> Katsarova 13.

<sup>190</sup> European Economic and Social Committee, 'Review of the Audio-Visual Media Services Directive' (Opinion) [2016] TEN/599 34, 157-161.

<sup>191</sup> Katsarova 13.

<sup>192</sup> *ibid.*

<sup>193</sup> *ibid.* 14.

<sup>194</sup> Committee on Culture and Education, 'Report on the 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' [2017] Doc No. A8-0192/2017.

<sup>195</sup> Katsarova 15.

Maltese Presidency.<sup>196</sup> The text also proposed a minimum 30% quota of European works in VOD catalogues. Agreement in both the Parliament and Council led to trilogue talks among the three institutions, with a view to adopting the amended proposal. On June 6, 2018, an agreement was reached, and Members of Parliament were successful in the inclusion of a 30% quota on the catalogue of VOD service providers.<sup>197</sup> While the proposed Directive was accepted in the first reading by both the Parliament and the Council, it took over two years and nine trilogue meetings for negotiators from Parliament to reach an agreement.<sup>198</sup> Moreover, the agreement among Member States to amend the Directive was not unanimous. In the Council, The Czech Republic, Ireland, Denmark, The Netherlands and Finland voted against the Directive, while the United Kingdom and Luxembourg abstained from voting.<sup>199</sup> However, a Joint Statement by Finland, Ireland and the Netherlands indicates that their vote against the Directive was not due to the proposed quota on VODs, but rather on another issue pertaining to the regulation of video sharing platforms.<sup>200</sup>

The European Parliament declared: “In order to support the cultural diversity of the European audiovisual sector, Members of Parliament ensured that 30% of content in the

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<sup>196</sup> *ibid.*

<sup>197</sup> *ibid.*

<sup>198</sup> *ibid.* 16.

<sup>199</sup> European Council, ‘Voting result 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 (Audiovisual Media Services Directive) in view of changing market realities Adoption of the legislative act 3646th meeting of the COUNCIL OF THE EUROPEAN UNION (Economic and Financial Affairs)’ ST 13908 2018 INIT.

<sup>200</sup> European Council, ‘Draft 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 (Audiovisual Media Services Directive) in view of changing market realities (first reading)’ ST 13052 2018 ADD 1.

video-on-demand platforms' catalogues should be European.”<sup>201</sup> Following this political agreement, the Council voted to adopt the new Directive on 6 November 2018. The Amended Directive was published in the EU Official Journal on 28 November 2018, giving Member States till 19 September 2020 to transpose the new Directive.<sup>202</sup>

### 3.3.3. *The new provisions on VOD providers*

The relevant amendments are found in Article 13 of the AVSMD. They are as follows:

1. Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 % share of European works in their catalogues and ensure prominence of those works.

2. Where Member States require media service providers under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds, they may also require media service providers targeting audiences in their territories, but established in other Member States to make such financial contributions, which shall be proportionate and non-discriminatory.

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<sup>201</sup> ‘New rules for audiovisual media services approved by Parliament’ (European Parliament Website – Press Releases, 2 October 2018) < <https://www.europarl.europa.eu/news/en/press-room/20180925IPR14307/new-rules-for-audiovisual-media-services-approved-by-parliament>> accessed 2 April 2020.

<sup>202</sup> Katsarova, 17.

3. In the case referred to in paragraph 2, the financial contribution shall be based only on the revenues earned in the targeted Member States. If the Member State where the provider is established imposes such 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.

6. The obligation imposed pursuant to paragraph 1 and the requirement on media service providers targeting audiences in other Member States set out in paragraph 2 shall not apply to media service providers with a low turnover or a low audience. Member States may also waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services

7. The Commission shall issue guidelines regarding the calculation of the share of European works referred to in paragraph 1 and regarding the definition of low audience and low turnover referred to in paragraph 6, after consulting the Contact Committee.”<sup>203</sup>

The Commission organized a stakeholders workshop in February 2019 as part of the preparatory works for the Commission Guidelines.<sup>204</sup> There was no common stakeholder

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<sup>203</sup> Directive (EU) 2018/1808, art 13.

<sup>204</sup> European Commission, ‘Preparatory work for AVMSD guidelines - Report on the Stakeholder Workshop’ (European Commission Website, 21 March 2019)

view on the calculation of the share, nor was there a common view on the definitions of low audience. Public service broadcasters expressed the calculation be defined by hours and minutes while VOD providers favor a calculation by title (i.e., 1 film and 1 series each equal one title).<sup>205</sup> For the definition of low turnover, the Commission acknowledged that there is a general lack of data for VOD market, and that audience measurements could be quite expensive. For the definition of low turnover, the main suggestion by stakeholders was the calculation of market share.<sup>206</sup>

Finally, the Commission has published the Guidelines on July 7, 2020, only two months before the expiration of the transposition period.<sup>207</sup> The guidelines conclude that the share of European Works for VOD services will be calculated per titles instead of by unit of time.<sup>208</sup> The Commission reasons that unlike television broadcasting, VOD services are not limited by time constraints. The inclusion of a programme in a VOD catalogue is not dependent on the availability of a time slot in a 24 hour programming schedule. Moreover, the inclusion of a programme of certain duration in a VOD catalogue does not imply the exclusion/replacement of another programme. The Commission also states that calculating by title will be less burdensome on VOD providers, as they are more likely to have an account of the number of European titles in their catalogue as opposed to the number of hours in their catalogue which derive from European titles. Monitoring by the relevant

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<<https://ec.europa.eu/digital-single-market/en/news/preparatory-work-avmsd-guidelines-report-stakeholder-workshop>> accessed 10 January 2020.

<sup>205</sup> *ibid.*

<sup>206</sup> *ibid.*

<sup>207</sup> European Commission, 'Communication from the Commission - Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover' COM (2020) C 223/03.

<sup>208</sup> *ibid.* sec. 1, part 1.

national authorities will also be less burdensome, as they only have to track the number of titles instead of verifying the total viewing time. The Commission takes the view that every film should constitute as a title in a catalogue, whereas for a television series, each season constitutes as one title.<sup>209</sup> For instance, a television show which is made up of three seasons in 30 episodes will count as three titles. The Commission reasons that the calculation by seasons will reduce incentives for providers to favor European works of longer duration (more episodes) in order to satisfy the quota.

As regards the threshold of low turnover, the Commission refers to the Recommendation 2003/361/EC concerning the definition of micro, small and medium sized enterprises, concluding that micro enterprises should be excluded from the obligations to promote European works.<sup>210</sup> According to the Recommendation 2003/361/EC, microenterprises have a total annual turnover not exceeding EUR 2 million.<sup>211</sup> As for low audience, the Commission considers it appropriate to exempt providers that have an audience share of less than 1% in the Member State concerned.<sup>212</sup> The audience is to be determined by the number of users/viewers of a particular service divided by the total number of users of VOD services in a given national market, and then multiplied by 100 to obtain a percentage.

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<sup>209</sup> *ibid.* sec. 1, part 2.

<sup>210</sup> *ibid.* sec. 3, part 3

<sup>211</sup> European Commission, 'Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises' COM (2003/361/EC) art 2.

<sup>212</sup> COM (2020) C 223/03, sec. 3, part 4.

### 3.4 Concluding Remarks

The emergence of VOD has posed to new issues for the EU in regards to the AVMS industry. VOD services directly compete with the well-established industry of broadcasters, and yet VOD services have inherently distinctive features, which make regulating the two types of media services in the same manner problematic. The EU has accounted for the nascent nature of VOD services and chose a graduated approach to regulating VOD services. Such an approach, however, was problematic as it fragmented the methods in which Member States promote European works. The 2018 AVMSD aims to fix these issues by imposing a minimum 30% quota on VODs, a percentage based on the pre-existing average share of European works already established in the market. The intentions behind the quota remain the same as the original intentions behind broadcasting quotas – cultural diversity and developing an internal market. The following chapter will conclude this discussion, and address whether the policy goals of the new quota will be achieved.

#### IV. ON-DEMAND QUOTAS: A COMPARATIVE ANALYSIS

The promotion of European works by on-demand services retains the same goals set out by the 1989 TWFD: cultural diversity and developing the internal market. In many ways, the inherent nature of a quota will have the same effect regardless of the medium it aims to restrict. Yet in other ways, VOD services are able to resolve many of the issues that were rooted in broadcasting. For instance, the freedom to watch any specific program during any specific time in the day eliminates the issue of different primetime viewing schedules in each of the Member States. At the same time, quotas on VOD services have created new issues, such as hindering VOD services outside of the EU from entering the market and resultantly reinforcing the market power of key players. This chapter will analyze the cultural and economic goals of the 2018 VOD quota, taking into account the findings of the previous chapters, and reach a consensus on whether the method of quotas is effective in achieving cultural diversity and economic goals, such as promoting competition and expanding the industry.

##### 3.5 Cultural Policy

One of the major issues in the TWFD was its inability to promote cultural diversity via broadcasting. Many of the issues in achieving cultural diversity were due to the limited functions of the technology, the low quality of productions, and the strong domestic preferences for local content. A broadcaster could not target multiple national markets due to language barriers, differences in peak hours, and low quality content which only appeals to its domestic audience. Localization proved to be the most

successful method in targeting multiple national markets, however, the risk and resources necessary to localize makes the practice unfeasible for the large majority of broadcasters. VOD technology has circumvented these issues, breathing new life in the audiovisual industry. The prominence of non-domestic European works in the EU is stronger than ever. In 2017, a study by the EAO found that non-domestic European titles accounted for 82% of all European titles on SVOD and 38% on TVOD.<sup>213</sup> This is a remarkable difference compared with the data on transmission of non-domestic European works by broadcasters (8.1%). With this data alone, it could be concluded that the policy goal to promote cultural diversity through the exchange of European works has already been achieved even before the amendment was adopted. The data from this study comes at a time when the VOD market had matured and became largely prominent across the EU. The circulation of European works through VOD can be attributed to the nature of the service and due to the significant contribution made by the company Netflix in the SVOD sample.<sup>214</sup> Netflix CEO Reed Hastings declared that: “For the bulk of our content, we are going to try and do all pan-European or global deals. We can’t wait for the Commission, they may or may not pass rules.... We are going to try and solve the problem [of cross-border demand] commercially.”<sup>215</sup>

One of the great advantages of a VOD service is its ability to offer content upon the demand of the user. Unlike broadcasting, a VOD service can establish itself in one Member State and use a single platform to also target audiences outside of its Member

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<sup>213</sup> Francisco Javier and others, ‘Yearbook 2018/2019 Key Trends’ [2019] European Audiovisual Observatory, 26.

<sup>214</sup> *ibid.*

<sup>215</sup> Christian Grece and others, 141.

State without the concern of diverging peak hours. The individual user freedom of VOD services also encourages the diversification of its catalogue, thereby encouraging the inclusion of more non-domestic European content. Broadcasting on the other hand offers no user control, and therefore chooses content that will have greater appeal to a collective audience (i.e., domestic content). The ability to target multiple national audiences has encouraged VOD providers to apply a pan-European approach over a domestic approach in supplying European content. The 2017 study found that on average a TV fiction program is available on TVOD in two territories and in six countries for SVOD.<sup>216</sup> The higher figure for SVOD directly results from the weight Netflix carries in the sample. When Netflix was taken out of the sample, the average number of countries per available title is 3.<sup>217</sup>

As Netflix is the dominant SVOD service in the EU (and the world), their market strategy serves as the benchmark example of a SVOD. Netflix has localized its service in various countries across the EU while offering pan-European content which has universal appeal. The 2017 study found that a total of 76% of EU-28 titles available on SVOD and TVOD are high-end miniseries of one to two episodes and 3-13 episode series, which is “evidence that high-end drama is the format that travels best.”<sup>218</sup> Netflix has invested over 1.5 billion in original content and has a policy of purchasing pan-European rights,

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<sup>216</sup> *ibid.*

<sup>217</sup> *ibid.*

<sup>218</sup> *ibid.*

making its European content accessible in a number of Member States.<sup>219</sup> Another issue discussed in the circulation of non-domestic European content through broadcasting was the prevailing preference for content to be in the domestic language of the viewer. Netflix has been able to thrive in this regard, not by offering domestic European content in each Member State, but by localizing its service through offering subtitles and dubbing for the majority of its content. Adjusting an on-demand service to accommodate for the language preference of a Member State is one of the greatest costs to achieving localization by a VOD service. On-demand platforms face costs associated with encoding digital masters, preparing different language versions, and creating subtitles for a title in every language. These costs have been particularly high in the EU due to the vast number of languages spoken within the EU, and Netflix has yet to fully localize its content in every Member State. By solving the issue of language barriers, Netflix is then able to focus its resources on acquiring European titles which are accessible to viewers across the EU who then have access to dubbing or subtitles in the viewer's local language.<sup>220</sup> This strategy allows Netflix to reach all audiences in the EU by offering European content with universal appeal and without targeting each individual Member State through local domestic content.

While Netflix has increased the availability of non-domestic European content across the EU, the majority of these works come from the larger Member States. Ted Sarandos,

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<sup>219</sup> Christian Grece and others, 'On-Demand Audiovisual Markets in the European Union' (Final Report a study prepared for the European Commission DG Communications Networks, Content & Technology) [2012] Smart No. 2012/0026, European Audiovisual Observatory, 141.

<sup>220</sup> Thomas L. McPhail and Steven Phipps, *Global Communication: Theories, Stakeholders, and Trends* (5th edn, Wiley Blackwell 2019) 123-126.

Netflix's head of content has been clear on his strategy for content production in local markets: "We are getting better at making a local show at least pan-regional and at best global. We've seen that recently with *3%* and with *Dark* from Germany. Those U.S. numbers for us on those foreign language shows would be big hits on cable in the US."<sup>221</sup>

As Netflix aims to create content which appeal to its international audience and not to individual states, Netflix produces the majority of its content in Member States such as Germany, Spain, France, the UK, and Italy.<sup>222</sup> Netflix has little incentive to produce content from smaller Member States with small populations and little international appeal. This is where national language quotas can become problematic for companies like Netflix, who will have little incentive to invest in original content that only appeals to a small population. Instead, Netflix has found that the best approach is to include programming from other audiovisual service providers which are already in operation in those countries.<sup>223</sup>

### 3.5.1. *The 30% quota's effect on cultural policy*

The strategy described above achieves cultural diversity without the application of the 30% quota. As indicated, the data provided already shows that on-demand services have provided a large percent of non-domestic European before the quota was adopted.

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<sup>221</sup> Colin Dixon 'Netflix Q1 2018 – the drivers of impressive growth' (nScreenMedia, 16 April 2018) <<https://nscreenmedia.com/netflix-q1-2018-subs-27-revenue-40/>> accessed 13 January 2020.

<sup>222</sup> Giuseppe Richeri, 'Audiovisual industry and the structural factors of the television crisis' [2017] 11 (1) *MATRIZES*, 136.

<sup>223</sup> McPhail and Phillips, 124.

This indicates that cultural diversity will continue to be achieved not as a result of the quota, but due to the digital revolution and globalized strategies from VOD companies.

Moreover, the 30% quota on non-linear services contains the same issues found with the quota on broadcasting. The definition of a European work in a VOD's catalogue is only tied to financial criteria and does not guarantee any expression of a European culture in the European work. However, as the EU has become more international, a lack in its definition of European expression will likely have no effect on content produced as there is a genuine demand from EU citizens for European content.<sup>224</sup> The main issue with the quota in achieving cultural diversity is the Directive's cultural policy continues to promote cultural diversity, while at the same time preserving national identity. These policies inherently conflict with one another, and language or regional requirements may cause the same effects which occurred in broadcasting. While VOD's are offering a high percent of non-European content, it remains to be seen how this will change if Member States begin to introduce language or regional requirements in their territories. As it stands, the quota may have a greater risk of harming cultural diversity than promoting cultural diversity.

### 3.6 Industry Policy

The 30% quota aims to increase the investment of original European content by VOD service providers, thereby increasing employment in the audiovisual industry and

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<sup>224</sup> Luis A. Albornoz 'Protecting and Promoting Audiovisual Diversity – The UNESCO Convention on Cultural Diversity and the Challenges of the Digital Environment' in Luis A. Albornoz and Trinidad G. Leiva (eds), *Audiovisual Industries and Diversity - Economics and Policies in the Digital Era* (Routledge 2019) 40.

improving the infrastructure of audiovisual production facilities. One of the main justifications for the imposition of on-demand quotas was due to their lack of investment in original European content in 2013-2014. As mentioned prior, the Commission, in its evaluation of the audiovisual market, raised concern that on-demand services invested only €10 million in original content from total revenue of €1.5 billion. This information is based on the findings of the European Audiovisual Observatory which has been included in a publication of the European Audiovisual Observatory on “*Investments in original content by audiovisual services*”.<sup>225</sup> The study is based on seven EU countries: Germany, France, Italy, Sweden, UK, Spain, and Netherlands. The data shows a steady increase in investment from 2009 to 2014. The report states, “The provision of original content for the online world is a relatively new development, which appears to be growing exponentially..... New content is of particular importance value for competing SVOD operators in order to create new brands of programming and distinguish between them from other services.”<sup>226</sup> The publication, therefore, suggests that investment in original content drives competition for on-demand services, and resultantly the quantity invested in original content will continue to rise in the following years. Yet the Commission has appeared to take a different approach in its reasoning on the basis of such data. In the Commission’s evaluation, no regard is paid to the exponential growth of investment by on-demand services from 2009 to 2014, nor was any analysis provided on factors which may influence the low percentage of investment.<sup>227</sup> The low percentage

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<sup>225</sup> Deirdre Kevin, ‘Investments in original content by audiovisual services’ [2015] European Audiovisual Observatory.

<sup>226</sup> *ibid* 43.

<sup>227</sup> COM (2016) 170 final, 38.

was merely compared to the higher percentage of investment by broadcasters to conclude that the current provisions in place are not effective. This perspective holds a general assumption that without proper regulations in place, on-demand services are not guaranteed to invest in original content. However, such a conclusion is skewed without properly identifying the reasons behind the low investment.

During the years of 2009 to 2014, a number of on-demand services selected in the study were extended services of broadcasters, who would add programmes already transmitted via cable onto their online platforms. The study states that “The total VOD revenues include online TV consumer revenues, online film consumer revenues, SVOD consumer revenues and TVOD consumer revenues”.<sup>228</sup> The study thus includes the revenues of non-linear services which are a subsidiary service to the main linear service which offers original content made for broadcasting. Only in a few cases did broadcaster’s offer exclusive original content for their on-demand services. With such on-demand services, it is unreasonable to report their lack of investment in original content as an overall failure in the promotion of European works, as the investment by the VOD owner is merely placed first in broadcasting. These VOD services are an extension of broadcasting and, therefore, should not be included in the evaluation of investment by VOD services. Recital 27 of the AVMSD states “In general, for television broadcasting or television programmes which are also offered as on- demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfillment of the requirements applicable to the

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<sup>228</sup> Kevin, 43.

television broadcast, i.e., linear transmission.”<sup>229</sup> The recital would suggest that VODs which serve to offer television programmes transmitted through broadcasting are separate and outside the scope of Article 13. The data which the Commission has applied to distinguish between VODs and broadcasters should therefore be inconclusive.

I also contend that a low percentage of investment does not indicate that the reason VOD services are investing less than broadcasters is due to a lack of regulation, but rather, because they do not have enough resources. As VOD services were still in their initial phase, it is not economically feasible to dedicate a large proportion of their revenue into investing in original content.<sup>230</sup> Broadcasters had invested 24% of their revenue compared to 1% by VOD services, yet with a difference of having €85 billion in revenue compared to only €1.5 billion in revenue by VOD providers. Being the established audiovisual service in Europe since the 1920s, broadcasters hold a dominant position in the market. Broadcasters have an established customer basis, infrastructure such as in-house production facilities, essential information on viewer preferences, and strong connections with governments and independent audiovisual businesses, which provides them with additional advantages to produce European content. With a greater amount of capital, a pre-established viewer base and access to production facilities, investing in original content poses less risk and yields greater results than VOD services with little capital, no production facilities, and a new customer base.

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<sup>229</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, recital 27.

<sup>230</sup> McPhail and Phillips, 125.

In order to overcome the market dominance broadcasters hold, VOD services have applied a strategy where they focus first on providing a wide array of less expensive popular content (blockbusters) to build up a critical mass of viewers, and then proceed to focus on investing in original content.<sup>231</sup> Netflix serves as a prime example of this strategy. Netflix, a U.S. company, launched its streaming service in 2007 and later in 2010 introduced the service in Europe.<sup>232</sup> Netflix introduced its service first in the UK, Ireland, and in the Nordic countries, and over the following years the company slowly expanded its service across the rest of Europe, acquiring a critical mass of viewers.<sup>233</sup> Netflix, the largest SVOD service, had not invested in any original (U.S. or European) content until 6 years after its service was launched.<sup>234</sup> In 2013, Netflix slowly began to invest in original content, starting with the Netflix series “House of Cards”, a U.S. production, and a few other series in the following years. By 2018, Netflix had produced over 1000 Netflix originals and in 2019 released 371 new original TV shows and movies.<sup>235</sup> The success of Netflix suggest that the lack of investment in original content by VODs in 2009 to 2014 may have simply been due to a market strategy of VODs and not due to a lack of regulation by the EU.

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<sup>231</sup> DG Connect, ‘Promotion of European works in Practice’ (European Commission Website, 3 July 2014) 4 < <https://ec.europa.eu/digital-single-market/en/news/promotion-european-works-practice>> accessed 12 January 2020.

<sup>232</sup> “Christian Grece and others, ‘On-Demand Audiovisual Markets in the European Union’ (Final Report a study prepared for the European Commission DG Communications Networks, Content & Technology) [2012] Smart No. 2012/0026 European Audiovisual Observatory, 100-120.

<sup>233</sup> ‘Filing to the United States Securities and Exchange Commission’ (Netflix Investors December 2019) <<https://www.netflixinvestor.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=13796760>> accessed 5 February 2020.

<sup>234</sup> Gina Keating, *Netflixed: The Epic Battle for America’s Eyeballs* (Portfolio.Penguin 2012)

<sup>235</sup> Gavin Bridge, ‘Netflix Released More Originals in 2019 Than the Entire TV Industry Did in 2005’ (Variety, 17 December 2019) < <https://variety.com/2019/tv/news/netflix-more-2019-originals-than-entire-tv-industry-in-2005-1203441709/>> accessed 17 January 2020.

The Commission has continued to cite the 1% investment as a justification for the amendment after its entry into force.<sup>236</sup> While it cannot be determined to what extent each of these factors contributed to the lack of investment, the Commission has not thoroughly analyzed the data, and therefore its conclusion on the exact correlation between VOD investment and quota regulation is problematic.

### 3.6.1. *EU regulation as a means to harmonize*

One of the primary reasons the EU has justified the quota is for the necessity to harmonize quota regulation among Member States. Quotas already existed in more than half of the Member States, either as a stand alone obligation (e.g. Cyprus, Hungary, Lithuania, Malta, Slovakia), or in combination with other obligations (e.g. France, Italy, Poland, Romania, Spain).<sup>237</sup> The Commission's review addressed the concern of forum shopping due to different standards of regulation among the Member States. The new amendment has addressed this issue by allowing the Member State which is targeted by the VOD to impose a financial contribution on the VOD, thereby limiting the principle of origin rule.<sup>238</sup> A minimum quota is also necessary to ensure that quotas are not undermined by VOD providers who utilize the principle of origin rule in a state with no quotas. In other words, the quota limits the exploitation of the principle of origin rule by setting a minimum restriction in every State. In some ways, the new quota is an

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<sup>236</sup> European Commission, Memo, 'Digital Single Market: updated audiovisual rules' (European Commission Website, 2 October 2018)

<[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_18\\_4093](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_4093)> accessed January 10 2020.

<sup>237</sup> European Commission, Memo 'Digital Single Market – Commission Updates EU Audiovisual Rules and Presents Targeted Approach To Online Platforms' (European Commission Website, 25 May 2016) <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_16\\_1895](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_1895)> accessed 10 January 2020.

<sup>238</sup> Directive (EU) 2018/1808, art 13 (2).

achievement in that it strikes a fair balance between states with low and high standards of content regulation. For the original broadcasting quotas, the EU managed to reach an agreement by accepting the majority proportion of transmission time requirement but on the conditions that it applies only where practicable. For non-linear services, the EU has achieved the reverse: a non-majority share of European works but with the omission of the where practicable clause. The binding force of the clause guarantees certainty of its implementation while still not imposing a strict majority proportion obligation.

### 3.6.2. *National Content Requirements*

While minimum harmonization may balance internal market interests with national interests, quotas can still be harmful to the internal market when Member States impose stricter language or regional requirements. The issue on the indirect discrimination of language requirements remains the same as discussed with broadcasting: national language requirements discourage the exchange of non-domestic European works, and thereby limits the exportation and importation of non-domestic European works. Yet without such a rule, larger Member States will dominate the EU quota. SVOD providers will invest in European content in larger states like France, Germany, and Italy aiming to create content with universal appeal.

A European quota without language requirements has the consequence of the quota only representing the larger countries at the cost of undermining the rest of the EU Member States. However, with national language requirements it becomes highly burdensome for certain VOD providers to invest in original content in each Member

State, and may discourage VOD providers from localizing their service in each Member State. This will be discussed further in the next section.

The Commission has stated in a questions and answers memo on their website that minimum harmonization is needed so that all Europeans can have access to at least some European audiovisual content.<sup>239</sup> The EU's position that every EU citizen should have the right to view European audiovisual content is well-founded, yet it raises the question as to whether this responsibility should be bestowed upon commercial entities or upon the state. Like public broadcasting, should the state offer a public VOD service which all EU citizens can freely access? Does such an imposition on a commercial service not interfere with the citizen's freedom of choice? An EU citizen may wish to pay for a VOD service that specializes in certain content, while paying for another service that offers European content. For instance, a citizen may not be interested in purchasing a service which no longer specializes in Japanese anime or U.S. reality TV shows. Some Member States have addressed this by granting derogation for thematic catalogues. For instance, The Italian Communication Authority allows VOD providers subject to the national quota regulation to derogate from content quotas when at least 70% of the total programming time available relates to a specific theme for a defined audience.<sup>240</sup> This exception has not been included in the new amendment, however, the amendment

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<sup>239</sup> European Commission, Memo 'Digital Single Market – Commission Updates EU Audiovisual Rules and Presents Targeted Approach To Online Platforms' (European Commission Website, 25 May 2016) <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_16\\_1895](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_1895)> accessed 10 January 2020.

<sup>240</sup> Susanne Nikoltchev (ed.), *Video on Demand and the Promotion of European works*, (European Audiovisual Observatory 2013) 18.

permits Member States to waive such obligations ‘where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services.’<sup>241</sup>

A quantitative requirement on VOD services disrupts the freedom of VOD providers to have editorial control of their catalogues. Businesses respond to the interests of consumer and accordingly provide a wide array of services which consumers can choose from. Where there is a demand for European content, businesses will meet that demand and citizens will have access to European content in the proper forum. It is arguable that a quota is unnecessary in ensuring citizens access to European content as user demand controls the market. For instance, in response to the new quota on VOD services, Erik Barmack, Netflix’s vice president of international originals, stated that “our goal is to have more shows out of Europe regardless, because that’s what our members want.”<sup>242</sup> At the time this statement was made, Netflix’s catalogue had 20% of European content, which accounts for thousands of hours of European content that citizens have access to.<sup>243</sup> The issue thus does not lie in citizens having access to European content, but whether the amount of required content will go beyond the demand of its viewers, and whether the quality of European works will be affected.

A quota on non-linear services therefore poses the same issue mentioned in the previous chapter: An artificial requirement on quantity does not reflect consumer demand and therefore does not guarantee its consumption. As argued by Luis Albornoz, “The

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<sup>241</sup> Directive (EU) 2018/1808, art 13 (6).

<sup>242</sup> Stewart Clarke, ‘European Content Quota for Streaming Services to Be Finalized by End of 2019’ (Variety, 24 December 2018) < <https://variety.com/2018/tv/news/european-content-quota-streaming-service-finalized-end-2019-1203094034/>> accessed 20 January 2020.

<sup>243</sup> Richeri, 136.

consumption of works locally or regionally produced will depend on their quality, proper promotion and potential appeal.”<sup>244</sup> Viewership of content is based on its quality and not its quantity. AVMS providers may have to allocate their resources towards quantity of European works at the cost of ensuring high quality content. Resultantly, the value of the service could be diminished from a higher percentage of low quality content in the catalogue. It may be argued that if a quota has the result of producing a high quantity of low quality European works as opposed to a lower quantity of high quality European works, the quota will create a negative effect on the general perception of European programmes, and thereby, reduce the brand image of a European work. This suggests that a quota can do more harm to the industry and to consumers if the quota results in an influx of lower quality European works. As discussed prior, the inclusion or production of low quality works can occur either as a result of language requirements, insufficient demand, or lack of resources. For larger companies like Netflix and Amazon, quota requirements are manageable, however, it remains to be seen how medium size on-demand services will manage to meet the quotas and stay competitive. On-demand services which do not have the resources to invest in original content will be at a significant disadvantage with VOD services like Netflix or the recent Disney +, as the new strategy among on-demand services is to keep their original content exclusively on their own platforms.<sup>245</sup> VOD service providers which are not capable of investing in original content will therefore have less availability to European works and will not be able to compete with larger competitors. As only micro enterprises are exempt from the

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<sup>244</sup> Albornoz and Leiva, 191.

quota, there is a great risk that medium size enterprises will be at a further disadvantage in competing with companies like Netflix and Amazon. Considering that any enterprise with a turnover over EUR 2 million could be subject to the quota, such enterprises will likely not have the resources to invest in original content, and will be limited in its choice of European licensed content. Arguably, this will reinforce the dominant position larger VOD providers currently hold on the market.

### 3.6.3. A level playing field between linear and non-linear services

One of the primary reasons to introduce a quota is to create a level playing field between linear and non-linear services, however, while linear and non-linear services may both provide audiovisual programmes, the technological differences between the two services leads to fundamentally different outcomes when each are applied the same treatment. A non-linear service can transmit, per channel, no more than 8760 hours of content per year (total hours in a year), which over 4330 hours (half a year) must be European works. A viewer is only capable of watching these European works during the time they are transmitted. A VOD has no limit to the hours of content that can be viewed by a user and the content is not contingent to a certain time of the day. The user has access to all hours of European content upon their request.<sup>246</sup> With this in mind, all hours transmitted by a linear service that are not viewed by a viewer are hours of European works no longer available to the viewer, while with a VOD, the total amount of European hours within its catalogue will always remain available to the user. In this regard, if we

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<sup>246</sup> Lilian Richieri Hanania, 'Trade, culture and the European Union cultural exception' [2019] 25(5) *International Journal of Cultural Policy*, 573.

measure European content by its availability, VODs offer a significantly higher portion of available European works than broadcasters. As discussed prior, the Commission has acknowledged the inherent time constraints in linear services and has decided to calculate shares per titles for VODs. Nonetheless, whether the calculation is based on hours or by title, the content offered on a VOD is fixed, and therefore the same reasoning applies.

In addition to the availability of European works, VOD services do not enjoy the same advantages that broadcasters enjoy when it comes to meeting the quota. Broadcasters are able to meet quota requirements by repeating the same programmes, whereas European works within a VODs catalogue can only be counted once by its title. Broadcasters are also able to fill transmission time during non-peak hours with low quality flow programmes or repeats. For broadcasters, this is an economically advantageous strategy, yet VOD services do not share the issue of non-peak hours, and therefore VODs do not share the same economic incentive to provide low quality content.

Moreover, in the case of broadcasting, increasing the amount of non-European works reduces the available time for European works, thereby reducing its availability. In comparison, a VOD, by increasing the amount of non-European works, the available time for European works will remain unaffected. The introduction of a quota creates a different effect on VODs than broadcasters. The limitless size of a VOD catalogue indicates that, unlike broadcasting, the inclusion of new programmes does not imply the exclusion/substitution of other programmes. Therefore, the inclusion of non-European works in a catalogue does not jeopardize the availability of European works. However, a

content quota makes the increase of non-European content contingent to the increase of European works. A quota requirement therefore is capable of implying the exclusion/substitution of non-European works. VOD and broadcast are two distinct services which require distinctive solutions. A percentage on a catalogue is not the correct method to creating a level playing field between linear and non-linear services.

I contend that the EU institutions did not have a well-grounded basis for the imposition of on-demand quotas, and that the inherent problem in a quota is that a quantity based measure does not guarantee its quality, and thereby does not guarantee its consumption. Moreover, a percentage on a limitless catalogue is not an effective means to ensure a level playing field between broadcasters and on-demand service providers. The most effective method to promote European works is by ensuring there is a demand for European works through quality based measures. As Philip Drake states in his article on the re-evaluation of distribution policies in the EU, ‘The key issue remains demand—audiences across Europe have access to European films, yet more often than not they choose not to see them, whether in the cinema, on television or on VOD.’<sup>247</sup>

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<sup>247</sup> Philip Drake, ‘From Co-productions to ‘Co-distribution’? Re-evaluating Distribution Policies for European Film’ In Julia Hammett-Jamart and others (eds) *European Film and Television Co-Production. Policy and Practice*’ (Palgrave Macmillan 2018) 101.

## 3.7 Alternative Solutions

### 3.7.1. *Prominence Obligations*

In 2016, Netflix had over a thousand pan-European titles in its catalogue.<sup>248</sup> The availability of European works is not an issue. Instead, measures to ensure their consumption should be the main policy goal in promoting European works. For this reason, the AVMSD prominence obligation is a step in the right direction. In 2013, the Commission held a consultation with national audiovisual regulators on the tools used in the application of Article 13 AVMSD.<sup>249</sup> A number of national regulators stated that a share in a catalogue is not an efficient tool for promoting European works, and may force providers to neglect content which is more attractive from a profit-oriented view.<sup>250</sup> According to one regulatory authority, the results of three successive evaluations indicate that there is no proof of correlation between presence of films in a catalogue and their consumption.<sup>251</sup> The regulatory authority provided a study on two different VOD providers: VOO and Belgacom. VOO provided 46% of European works and Belgacom VOD provided 27% of European works. Although VOO offered a higher share of European works, the consumption of works was higher by Belgacom VOD. The

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<sup>248</sup> Gilles Fontaine and Christian Grece, *Origin of films and TV content in VOD catalogues in the EU & Visibility of films on VOD services* (European Audiovisual Observatory 2016) 132.

<sup>249</sup> European Commission, 'Promotion of European works in on-demand services - Contributions from the audiovisual regulators' (European Commission Website, 11 March 2014) < <https://ec.europa.eu/digital-single-market/en/news/promotion-european-works-demand-services-contributions-audiovisual-regulators>> accessed 20 January 2020.

<sup>250</sup> DG Connect, 'Promotion of European works in Practice', 4.

<sup>251</sup> CSA BE, 'Évaluation du dispositif de mise en valeur des oeuvres européennes et de la Fédération Wallonie-Bruxelles dans les services de vidéo à la demande (VOD) – article 46 du décret SMA;’ [2012] available at < <https://www.csa.be/document/evaluation-du-dispositif-de-mise-en-valeur-des-oeuvres-europeennes-et-de-la-federation-wallonie-bruxelles-dans-les-services-de-video-a-la-demande-vod-art-46-du-decret-sma/>> accessed 20 March 2020.

regulatory authority suggests this is a result of higher percentage of promotion occurrences found in Belgacom VOD. While there are many factors that influence the consumption of an audiovisual work, promotional tools have a significant impact on their consumption. This has been reiterated in a publication by the EAO, where it was found through a series of evaluations that the decision to promote European works rather than impose catalogue quotas resulted in a positive outcome.<sup>252</sup> Member States have applied various promotion tools such as: indicating the country of origin in the catalogue (e.g. Romania, Poland); using trailers or visuals (France); or highlighting recent European works (Estonia).<sup>253</sup> To maintain a demand for European content the EU should take further measures in promoting the consumption of European works. Promotional tools strike a fair balance between promoting European content and editorial freedom of the provider. Prominence requirements may encourage VODs to offer higher quality content. If European works are to be displayed on the front page, the type of content displayed on the front page will influence the VOD's brand image, and a VOD will likely ensure higher quality content on its front page. The question once again arises whether this would already occur naturally without regulation. However, promotional tools do not risk causing the same degree of harm as a quota and therefore, is a more promising measure to promote European works.

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<sup>252</sup> Nikoltchev, 'Video on Demand and The Promotion of European works', 43.

<sup>253</sup> DG Connect, 'Promotion of European works in Practice', 5.

### 3.7.2. *Quality Measures*

Over the lifespan of the TWFD, the Commission hired Attentional Ltd. as the principal contractor to carry out research on the TWFD and analyze its impact on the internal market. In its final report in 2011, the report concludes on the system of quotas with the following:

If the viewing of European works is no longer driven by the volume of European works, is volume any longer the best measure? If the above analysis is correct, the volume measure could deliver less and less viewing to European works. What could arrest or hold back this development? There is a simple answer: quality. The work has to be good enough to keep its audience – and quality, as we have argued earlier in this section, is a function of investment. Would it therefore make sense to consider moving the regulatory emphasis from volume to value, i.e. investment?<sup>254</sup>

Perhaps the most effective way to promote European works and ensure their consumption is to provide an environment where content producers are incentivized to produce high quality content and are given the recourses necessary to do so. Contributions to a Member State's audiovisual industry are an effective means to encourage investment in local content. Local producers need incentives to enter into Co-productions. The quota on broadcasting was unsuccessful in creating a pan-European audiovisual industry and in effect, reinforced a system of segmented national markets. As it currently stands, there are few pan-European production and distribution companies in

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<sup>254</sup> Independent Report 2011, 216.

Europe. To create a market of European works which can appeal to audiences all across the Member States, the EU would be best served by shifting its focus towards measures designed to promote and incentivize European co-productions and investment in local content. A good example of such an approach is the MEDIA sub-program 2014-2020, which offers different funding schemes and actions to encourage European co-productions. This program, however, remains limited by its budget and limited focus on traditional forms of distribution.<sup>255</sup> The Council suggested in 2019 in its conclusions on improving the cross-border circulation of European audiovisual works that the Commission should explore ways to further develop the MEDIA sub-program and promote measures to increase cooperation among regional and national bodies.<sup>256</sup> It remains to be seen how the new quota system will affect the audiovisual market, however, past example of quotas and a misguided basis for imposing quotas is likely to cause more harm than good to the AVMS industry.

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<sup>255</sup> Drake, 90-98.

<sup>256</sup> The Council, 'Council conclusions on improving the cross-border circulation of European audiovisual works, with an emphasis on co-productions' [2019] C 192/05.

## CONCLUSION

Within the last 50 years, the audiovisual industry has changed drastically. From the transition in public to commercial broadcasters and the emergence of on-demand audiovisual services, the audiovisual industry is constantly evolving. Although the industry continues to evolve, the regulatory strategy in promoting European works remains much the same as it was 30 years ago. Broadcasters remain subject to a majority proportion quota and non-linear services will now be subject to a 30% quota on their catalogues. The objectives also remain the same for both linear and non-linear services: cultural diversity and developing the internal market.

The aim of this paper was to provide insight over the EU's standpoint on the promotion of European audiovisual works and to provide critique on their ability to successfully carry out the objectives of the EU. Any measure which restricts trade and runs contrary to the principles of the WTO should be thoroughly analyzed and shown by verifiable facts capable of achieving its goal.

Through an analysis of the drafting history behind the TWFD and the AVMSD, the justifications for a broadcast quota and for on-demand quotas have been distinguished. The quota imposed on broadcasters was an effort to restore a recovering industry impacted by the world wars and to create a sense of European identity in an effort to strengthen the European Community. The imposition of quotas on non-linear services is an effort to create a level playing field between broadcasters and on-demand services and is based on the findings that on-demand service providers were not investing into enough

European content when left unregulated. The quotas are, therefore, an aim to correct the market, which the EU believes will help ensure the development of the market and protect/promote cultural diversity.

As demonstrated through this discussion, the EU has not provided a well-grounded analysis in its reasoning. While the drafting history has provided insight on the reasoning behind the EU's system of quotas, it also draws attention to a lack of reasoning behind the system of quotas. In 1989, the Commission was criticized for not providing an empirical analysis on the relationship between cultural identity and television viewing, nor did it provide an impact assessment on industry. The quota regulation was a mix and match as a result of political compromises, as opposed to a meticulously crafted set of rules designed to create a certain result. The EU justified quotas on the findings that on-demand services had only invested 1% of their revenue towards original content. Once again, the EU failed to assiduously identify all factors influencing the low 1% turnover, such as the fact that a majority of non-linear services were broadcasters' catch-up services and that the on-demand market was still in its initial phase of development. This paper has further highlighted the discrepancies between linear and non-linear services which make the application of a quota yield different results. Arguably, this is counter-intuitive to the on-demand quota's original aim of creating a level playing field.

This paper also identified, through the works of academics and through the findings of impact studies, that a quota on broadcasting was unsuccessful in integrating the audiovisual market and instead may be one of the greater contributions to its fragmentation. The low level of non-national content is a strong indicator of a

fragmented market and highlights that national identity of Member States prevailed over unity in cultural diversity. In this regard, the quota was successful in the production of national content and the protection of nationality identity, but may have come with the consequence of hindering a pan-European market and cultural diversity. The findings of the studies described here indicate that a quantitative requirement may have caused broadcasters to produce fewer high quality European works and instead a greater quantity of low quality European works. Hence, while the quota was successful in producing significant amounts of content, inevitably the majority of that content lacked universal appeal and was therefore incapable of being exported outside of its domestic audience. The strong demand for domestic content in Europe, however, may have also been a strong contributor to the market fragmentation. In either case, the quota was not able to achieve its goals.

The discussion in chapter II on broadcasting describes the effects of a quota in light of the new 2020 quota for on-demand services. In the future, quantity-over-quality will remain an issue for VOD services and language requirements can be expected to continue to restrict the availability of non-domestic European works. Non-linear service technology has allowed broadcasters to overcome issues such as peak hours, localization, and user control, which has contributed to more availability of non-domestic European works. Moreover, as the world has become even more globalized, VODs have the chance to create an even greater demand for European works. Companies such as Netflix have responded to these needs, and, hopefully, more companies will be able to provide European content with international appeal.

This paper draws the conclusion that the market will achieve the goals of the EU without the help of European quotas. Quotas on broadcasting were not successful in achieving a pan-European market nor will they likely be different with VOD services. A system of quotas risks causing harm to the market and to VOD services which do not have enough resources to invest in original content. The consumption of European content can only be guaranteed by the quality of the work, which is not the function of a quantitative restriction. Where quantity is measured by the number of programme hours or titles, quality is measured on the cost of production or the cost per hour. I, therefore, suggest that the EU shift its focus towards endeavors which will increase the quality of European works, instead of focusing on quantitative measures.

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