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Cultural Exception, Single Market Objectives and Regulatory Gaming in the EU Audiovisual Media Services Directive: The Adverse Effects of Financial Obligations

Giuseppe Colangelo 

Department of Innovation in Humanities, Sciences, and Society, University of Basilicata, Italy
Email: giuseppe.colangelo@unibas.it

Abstract

European policymakers have long sought to strike an appropriate balance between supporting EU-native cultural production and pursuing the objectives of internal market harmonisation. To this end, the 2018 reform of the Audiovisual Media Services Directive (AVMSD) introduced a set of measures for on-demand audiovisual media (VOD) providers, including catalogue quotas, prominence requirements and financial contributions. However, the coherence and effectiveness of these provisions remain highly contested. In particular, national implementations of financial obligations have produced adverse effects. They have intensified fragmentation among Member States and enabled them to prioritise domestic works over non-national European productions. Such fragmentation of the European audiovisual market will also preserve a heterogeneous ecosystem of producers, making it exceedingly difficult for a local service to scale and evolve into a pan-European platform. Consequently, despite the ambitions of EU policymakers, the emergence of European champions capable of competing with foreign players on an equal footing is likely to remain elusive. Moreover, the AVMSD rules on financial obligations create opportunities for regulatory gaming, insofar as Member States use the policy goal of fostering cultural and linguistic diversity as a convenient pretext for subsidising their local economies.

Keywords: Audiovisual media services directive; cultural diversity; investment obligations; video-on-demand providers

I. Introduction

Balancing internal market objectives with cultural interests has long been a delicate and demanding task for European policymakers. Because cultural and linguistic diversity is a core Union policy goal,¹ culture remains an area in which the EU holds only supporting competence.² The Treaties explicitly exclude any harmonisation of the laws and regulations of the Member States in this field.³ Consequently, the Union may undertake actions intended to support, coordinate or supplement the initiatives of the Member States, but it cannot replace or harmonise them. The EU is specifically mandated to encourage cooperation among Member States and, where necessary, to support and

¹ TFEU, Art. 167(1).

² TFEU, Art. 6.

³ TFEU, Art. 167(5).

complement their efforts in areas such as improving the knowledge and dissemination of culture and history, conserving and safeguarding cultural heritage, promoting non-commercial cultural exchanges, and fostering artistic and literary creation, including in the audiovisual sector.⁴ Furthermore, the Union is required to take cultural considerations into account in all of its actions under the Treaties, particularly to ensure the respect and promotion of cultural diversity.⁵

In this context, the Audiovisual Media Services Directive (AVMSD) offers an illustrative example of how the EU seeks to balance internal market objectives with cultural considerations.⁶ From the outset, the Directive clarifies that audiovisual media services provided across borders through various technologies are instrumental in pursuing the Union's objectives.⁷ Therefore, certain measures are necessary to facilitate the transition from national markets to a common programme production and distribution market and to ensure fair competition.⁸ At the same time, this must occur without prejudice to the public-interest role fulfilled by audiovisual media services, which are cultural services as much as they are economic ones.⁹ As a result, national regulatory authorities are tasked with ensuring respect for media pluralism, cultural diversity, consumer protection, the proper functioning of the internal market and the promotion of fair competition.¹⁰

From this perspective, the AVMSD has been characterised as a distinctive regulatory hybrid that juxtaposes the liberal, market-integrating ethos of the EU's single market with enduring protectionist impulses.¹¹ These impulses stem from longstanding concerns that global audiovisual content and media services might come to dominate European screens, thereby endangering the Union's cultural diversity and weakening its domestic audiovisual industries. On the one hand, regulatory intervention proceeds from the premise that the EU audiovisual market consists of diverse national markets characterised by different languages, cultures and market sizes.¹² By this view, factors such as small market size, a limited number of companies and significant linguistic and cultural differences make it more difficult to produce profitable audiovisual content in Europe.¹³ On the other hand, EU institutions are required to take values such as cultural diversity into

⁴ TFEU, Art. 167(2).

⁵ TFEU, Art. 167(4).

⁶ Directive (EU) 2018/1808 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, [2018] OJ L 303/69; 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), [2010] OJ L 95/1.

⁷ Directive 2010/13/EU, *supra* note 6, Recital 2.

⁸ *Ibid.*

⁹ *Ibid.*, Recitals 2 and 5.

¹⁰ Directive (EU) 2018/1808, *supra* note 6, Art. 30.

¹¹ S Broughton Micova, "The Audiovisual Media Services Directive: Balancing Liberalisation and Protection" in E Brogi and PL Parcu (eds), *Research Handbook on EU Media Law and Policy* (Cheltenham, Edward Elgar Publishing 2021), p 264. See also J Farchy and J M'Barki, "Measuring Cultural Diversity: Policy and Methodological Issues" (2023) 13 *European Journal of Cultural Management and Policy* 12400, arguing that the articulation of an ostensibly ambitious policy in defence of cultural diversity may, at times, operate merely as a veneer for a more conventional protectionist strategy designed to privilege national industries.

¹² M Komorowski, C Iordache, I Kostovska, S Tintel and T Raats, "Investment obligations for VOD providers to financially contribute to the production of European works, a 2021 update" (2021) 7, available at <<https://researchportal.vub.be/en/publications/investment-obligations-for-vod-providers-to-financially-contribute/>> (last accessed 6 March 2026).

¹³ See, e.g., Attentional, KEA European Affairs and Valdani Vicari & Associati, "Study on the Promotion of European Works in Audiovisual Media Services" (2018) Report for the European Commission, available at <<https://digital-strategy.ec.europa.eu/en/library/study-promotion-european-works>> (last accessed 6 March 2026).

account and to respect the fundamental contribution of traditional public-service broadcasters to the democratic, social and cultural needs of their respective societies.¹⁴ In this regard, the emergence of new players – particularly on-demand audiovisual media (VOD) services – is viewed as posing a serious threat to EU-native cultural production.¹⁵

Cultural diversity is therefore portrayed both as a key policy objective to be safeguarded alongside internal market goals and as one of the main sources of market fragmentation and reduced competitiveness within Europe. The AVMSD is consequently expected to pursue a twofold aim: to promote a level playing field by ensuring regulatory parity between (homegrown) traditional audiovisual players and (foreign) VOD providers, and to offer Member States opportunities to support their local audiovisual markets.

The distinct nature of cultural considerations has been relevant to the development of the regulatory framework governing audiovisual services. This seems evident in the financial obligations that the AVMSD permits Member States to impose on VOD providers that are not even established within their territory but merely target audiences there.¹⁶ On the altar of cultural exception, the Directive has thus sacrificed the country-of-origin (COO) principle, allowing a derogation from what constitutes a fundamental cornerstone of several areas of EU secondary legislation and a key mechanism for anchoring regulation in internal market freedoms.

Against this background, and in view of the forthcoming revision of the AVMSD,¹⁷ the aim of the paper is to demonstrate how the strategy of promoting the production of European works through the imposition of financial obligations on VOD providers may generate significant unintended consequences. This is particularly so given the substantial discretion afforded to Member States in the transposition and enforcement of these measures.

Notably, the AVMSD provision on financial obligations has exacerbated the fragmentation of the European audiovisual market, effectively preserving the EU as a patchwork of diverse national markets.¹⁸ Whereas several Member States have opted to introduce both direct investment obligations and levies to support a national fund, a few have limited themselves to direct investment obligations alone, while others have opted for levies without any accompanying direct investment obligation. Some are currently exploring the introduction of investment obligations, whereas others have so far chosen not to adopt any measures at all.¹⁹ A further layer of fragmentation concerns the significant differences in the rates applied to the turnover generated in each Member State, as well as the fact that the base itself varies in some cases.

In addition, several Member States have opportunistically leveraged the AVMSD regulatory architecture on financial obligations to pursue narrow national interests. First, given that national policymakers have historically prioritised the protection of domestic

¹⁴ C Iordache, T Raats and K Donders, “The “Netflix Tax”: An Analysis of Investment Obligations for On-Demand Audiovisual Services in the European Union” (2022) 16 *International Journal of Communication* 545.

¹⁵ See, e.g., European Commission, Commission Staff Working Document, “Impact Assessment accompanying the document 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” SWD (2016) 168 final.

¹⁶ Directive (EU) 2018/1808, *supra* note 6, Art. 13(2).

¹⁷ European Commission, “Commission seeks views and information for the evaluation of the Audiovisual Media Services Directive” (2025), available at <<https://digital-strategy.ec.europa.eu/en/news/commission-seeks-views-and-information-evaluation-audiovisual-media-services-directive>> (last accessed 6 March 2026).

¹⁸ K Stout and G Colangelo, “Cultural Levies and the EU Audiovisual Market” (2023) ICLE Issue Brief, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4507108> (last accessed 6 March 2026).

¹⁹ For a continually updated overview of the national transposition of the Directive, see European Audiovisual Observatory, “Mapping AVMSD Transposition”, available at <<https://www.obs.coe.int/en/web/observatoire/avmsd-tracking>> (last accessed 6 March 2026).

works over the promotion of non-national European content, several Member States implement the provision in ways that channel the collected revenues predominantly – if not exclusively – towards supporting local productions. Second, some national authorities also deploy these rules to advance economic objectives rather than genuine cultural aims, weaponising the latter as a subtle and largely fictional justification for departing from the COO principle. Such potential regulatory gaming by Member States risks undermining the system as a whole and jeopardising the delicate balance between internal market objectives and cultural interests.

Finally, to the extent that Member States require foreign VOD providers to contribute to the production of local content, such obligations may give rise to a risk of overproduction. This, in turn, may generate additional negative externalities, including inflationary pressures that could ultimately undermine the sustainability of local production itself.

For all these reasons, the national implementation of the AVMSD provision on financial obligations appears to give rise to significant side effects in terms of both internal market integration and economic efficiency, while failing to ensure the attainment of the cultural policy objective it is intended to pursue.

The paper is structured as follows. Section II outlines the recent evolution of the European regulatory framework governing audiovisual services, with particular emphasis on the central role played by the policy objective of promoting cultural diversity. Section III examines whether the financial obligations introduced under the AVMSD constitute an appropriate instrument for advancing European cultural policy objectives. Section IV investigates the implications of how Member States have implemented the AVMSD investment obligations at national level. Section V concludes by summarising the insights that the analysis offers for the forthcoming revision of the AVMSD.

II. The evolving legal framework: from AVMSD 2010 to AVMSD 2018

The general aim of the AVMSD has consistently been to adapt the regulatory framework to technological and market developments in the transmission of audiovisual media services. As audiovisual content is increasingly delivered by new players, through new channels and emerging technologies, European policymakers have sought to ensure that the regulatory regime remains fit for purpose and capable of evolving in line with rapidly changing patterns of content consumption.

In line with this perspective, the European Commission proceeded from the premise that VOD services offer content that is identical or comparable to that of traditional television yet are not subject to the same regulatory constraints.²⁰ Consequently, the primary rationale for modernising the regulatory framework was to create a level playing field between traditional audiovisual service providers and VOD services.

Furthermore, the Commission expressed concern that divergences in national rules applying to emerging VOD services risked creating barriers to competition within the internal market.²¹ To address this issue, when advancing the proposal for the 2010 AVMSD, the Commission argued that establishing minimum rules for such services at EU level would enhance legal certainty and enable businesses to benefit from the COO principle.²²

²⁰ European Commission, Commission Staff Working Document, “Annex to the 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 - Impact Assessment – Draft Audiovisual Media Services Directive”, COM(2005) 646 final, §3.2.2.

²¹ *Ibid.*, §3.2.1.

²² *Ibid.*, §4.1.

Under the COO principle, which already applied to broadcasting services, audiovisual media service providers are required to comply only with the laws of the Member State having jurisdiction over them, while being free to operate across all Member States.

The COO principle is the “core” of the AVMSD 2010 and is regarded as “essential” for the creation of the internal market.²³ While this principle does not prevent Member States from adopting higher standards at national level, a receiving Member State with stricter rules than those laid down in the Directive may not restrict the reception of services from another Member State on the basis of those stricter rules. Only in specific circumstances defined by the AVMSD may exceptions be invoked. Such derogations from the COO principle are permitted solely where the measures are necessary for specific objectives (namely, public policy, the protection of public health, public security, or consumer protection), are proportionate to those aims, and are adopted in response to a situation of prejudice or a serious and grave risk of prejudice to those objectives.²⁴

In this regard, the AVMSD 2010 mirrors the provisions of the e-commerce Directive, which introduced both the COO principle for information society services and the strict conditions applicable to derogation measures.²⁵ The COO principle has become a fundamental cornerstone of several areas of EU secondary legislation and has been consistently reaffirmed by the Court of Justice (ECJ).²⁶ In the specific context of information society services, the European Commission has promoted the COO principle as a key mechanism for anchoring regulation in internal market freedoms, preventing overregulation, and accommodating both the practical realities of business operations and the need for rapid responses to emerging societal challenges.²⁷

For the purposes of this analysis, it is particularly noteworthy that the e-commerce Directive also constitutes a principal reference point for the cultural exception, as it expressly provides that its provisions do not affect measures adopted at either EU or national level to promote cultural and linguistic diversity or to safeguard media pluralism.²⁸

The acknowledgement of the distinct nature of cultural considerations has been central to the development of the regulatory framework governing audiovisual services. This recognition has also served to justify possible derogations from the COO principle. The policy objective of promoting cultural diversity has, in fact, consistently driven regulatory evolution in this field. In particular, on the premise that the promotion of European works is essential to safeguarding cultural diversity, EU-level intervention in relation to VOD services has been deemed necessary.²⁹ Accordingly, the AVMSD seeks to establish and ensure the proper functioning of a single European market for audiovisual media services, while at the same time contributing to the promotion of cultural diversity, providing an adequate level of consumer protection, and safeguarding media pluralism.³⁰

Admittedly, the idea of adopting culturally specific measures did not emerge only with the advent of VOD services. Under the 1989 Television without Frontiers Directive, Member States were already required to ensure that broadcasters reserved a majority proportion of their transmission time for European works, as well as at least 10% of their transmission time or programming budget for European works produced by independent

²³ Directive 2010/13/EU, *supra* note 6, Recital 33 and Art. 3(1).

²⁴ *Ibid.*, Art. 3(4).

²⁵ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178/1, Art. 3.

²⁶ For a recent endorsement of the COO principle, see ECJ, 30 May 2024, Joined Cases C-662/22 and C-667/22, *Airbnb Ireland and Amazon Services Europe v. Autorità per le Garanzie nelle Comunicazioni*, EU:C:2024:432.

²⁷ See European Commission, “Amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market” COM (1999) 427 final, [2000] OJ C 248E/69.

²⁸ Directive 2000/31/EC, *supra* note 25, Recital 63 and Art. 1(6).

²⁹ European Commission, *supra* note 20, §4.2.3.

³⁰ European Commission, *supra* note 15, 3. See also Directive 2010/13/EU, *supra* note 6, Recital 4.

producers.³¹ In this light, the decision to extend such an approach to VOD services is hardly surprising. As stated in the 2010 AVMSD, since on-demand services have the potential to replace traditional broadcasting, they too should promote the production and distribution of European works and thereby contribute to the promotion of cultural diversity.³²

However, it is undeniable that the rise of VOD players has intensified the attention of European policymakers, ultimately shaping the distinctive regulatory framework that is now in place.

This regulatory stance began with the 2010 AVMSD, whose Article 13 provided that support for European works could take the form of financial contributions by VOD services to the production of (or acquisition of rights in) European works, a minimum share of European works within VOD catalogues, or the attractive presentation of such works in electronic programme guides. With the 2018 revision of the AVMSD, the perceived risks facing EU-native cultural production in the audiovisual sector became even more pronounced. These heightened concerns justified the adoption of a more stringent regulatory framework built around two potentially cumulative requirements: a quota for European works (including prominence obligations) and the imposition of financial obligations to support their production.³³ Furthermore, the objective of promoting cultural and linguistic diversity is expressly invoked to justify an exception to the application of the COO principle.

Indeed, in the Commission's view, cultural diversity is being undermined by the limited contribution of VOD providers to the promotion of European works.³⁴ According to this narrative, the low level of obligations imposed by some Member States has resulted in significant gaps in both the supply and the visibility of European content on VOD services.³⁵ Therefore, the underlying rationale is that combining quota and prominence requirements with investment obligations will increase consumers' exposure to European works.³⁶ Accordingly, the revised Article 13 of the 2018 AVMSD requires VOD providers to ensure that at least 30% of their catalogues consist of European works and that these works benefit from prominent placement. In addition, the Directive allows Member States to impose further financial obligations on VOD providers, with the revenues earmarked for supporting the production of European works.³⁷

Prominence may be ensured through various means, such as, for instance, creating a dedicated section for European works accessible from the service's homepage, enabling users to search specifically for European works through the service provider's search tool, featuring European works in marketing campaigns, or promoting a minimum percentage of European works within the catalogue, for instance through banners or similar promotional tools.³⁸

With regard to investment obligations, the Directive leaves considerable discretion to Member States, as they are, first and foremost, free to decide whether to introduce such obligations at all. Should a Member State opt to do so, the obligations may be structured in different ways: they may consist of direct contributions to the production of, or acquisition

³¹ 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, [1989] OJ L 298/23, Articles 4 and 5.

³² Directive 2010/13/EU, *supra* note 6, Recital 69.

³³ The requirement regarding financial contributions apply to media service providers in general, including VOD services.

³⁴ European Commission, *supra* note 15, 9 and 25.

³⁵ *Ibid.*

³⁶ *Ibid.*, 26, arguing that a share in the catalogue alone would not necessarily lead to more consumption of European works.

³⁷ Directive (EU) 2018/1808, *supra* note 6, Article 13(1–2).

³⁸ *Ibid.*, Recital 35.

of rights in, European works, or alternatively, the payment of a levy to support a national fund.³⁹ Finally, Member States retain discretion to define both the base on which the financial obligation is calculated and the rate to be applied to that base.

“Given the direct link between financial obligations and Member States’ different cultural policies,” a Member State is allowed to impose such financial obligations on media service providers established in another Member State that target its territory, thereby derogating from the COO principle.⁴⁰ In that case, financial obligations should only be charged on the revenues generated through the audience in the targeted Member State.⁴¹

Where a Member State imposes financial contributions on media service providers, such contributions should strive for an adequate promotion of European works while avoiding the risk of double imposition for media service providers.⁴² In this way, if the Member State where the media service provider is established imposes such a financial contribution, it should take into account any financial contributions imposed by targeted Member States.⁴³ In any case, providers with a low turnover or low audience are not subject to both catalogue quotas/prominence requirements and financial obligations.⁴⁴

III. AVMSD investment obligations: a questionable instrument for advancing cultural policy goals

The obligations introduced by Article 13 of the AVMSD are fundamentally driven by a single overarching concern and rest on two main premises.

Regarding the former, they reflect EU policymakers’ fear that the growing presence of foreign streaming services may erode the cultural production of European audiovisual works and, more specifically, that the EU audiovisual landscape may fall victim to a form of colonisation by the American model. Within this context, regulatory intervention is grounded in the premise that Europe’s cultural and linguistic diversity endows European works with the characteristics of public goods. As a result, a well-known form of market failure arises: public goods cannot be left entirely to market forces, as they would otherwise be systematically underproduced. A second premise is that VOD providers are essential gateways to European audiences. This would justify a form of public-utility regulation, treating such providers as common carriers entrusted with the responsibility of safeguarding the continued production and availability of European audiovisual works.

Against this backdrop, doubts have emerged regarding the initiative’s justification for departing from normal competitive dynamics. Indeed, it remains unclear on what empirical grounds the Directive presumes that the emergence of new technologies and new entrants competing with traditional broadcasters will inevitably undermine Europe’s cultural and linguistic diversity.

The current and future audiovisual landscape is, by necessity, shaped by innovation and technological evolution. This should be regarded as a healthy and welcomed development, as it expands and diversifies viewing habits and promotes multi-homing (i.e., users’ ability and willingness to engage simultaneously with multiple services).⁴⁵ From a competition perspective, multi-homing is a crucial factor in mitigating the risk of market concentration. In any event, regardless of technological shifts, audiovisual production

³⁹ *Ibid.*, Recital 36 and Art. 13(2).

⁴⁰ *Ibid.*, Art. 13(2).

⁴¹ *Ibid.*, Art. 13(3).

⁴² *Ibid.*, Recital 39.

⁴³ *Ibid.*, Art. 13(3).

⁴⁴ *Ibid.*, Art. 13(6).

⁴⁵ H Kim and SW Lee, “SVOD Multi-Homing Users in Six Countries: Analyzing Legacy Media Usage, demographics, Lifestyle, Expectations, and Usage Habits” (2024) 14 Sage Open.

will continue to respond to viewers' preferences, and market participants will adapt their strategies accordingly. Recent research has shown, for example, that because users display a strong preference for domestic productions, VOD players are increasingly tailoring their content offerings to meet local demand.⁴⁶ More broadly, viewers' choices suggest that, although the globalisation of content distribution through VOD services has eased traditional geographical constraints, cultural and historical factors still play a decisive role in shaping media consumption patterns.⁴⁷ Further, the advent of VOD services has expanded the diversity of content available to users. While early catalogues were largely concentrated on films and television fiction, they have progressively diversified to encompass a broader range of formats and genres, including entertainment, cultural and educational programming, lifestyle, health, travel, sports, children's content, and reality television.⁴⁸

Similarly, although VOD services play an increasingly important role in the production, distribution, and consumption of audiovisual content,⁴⁹ there is no empirical evidence to suggest that any major VOD provider functions as an unavoidable gateway to European consumers. The online streaming sector remains competitive and dynamic⁵⁰, and VOD services tend to complement rather than replace traditional media.⁵¹ Indeed, research shows that users who subscribe to streaming services also tend to consume more

⁴⁶ A Broocks and Z Studnicka, "Gravity and Trade in Video on Demand Services" (2025) 161 *Review of World Economics* 571. See also A Papatthanasopoulos and D Varoutas, "Analyzing the Dynamics of the SVOD Market in the EU-27: Factors Influencing User Subscriptions and Revenue Growth" (2026) 50 *Telecommunications Policy* 103110.

⁴⁷ Broocks and Studnicka, *supra* note 46.

⁴⁸ See, e.g., JA Tran, "Audiovisual media service in Europe – 2024 Data" (2025) European Audiovisual Observatory Report, 40, available at <<https://www.obs.coe.int/en/web/observatoire/-/audiovisual-media-services-in-europe-2024-data>> (last accessed 6 March 2026).

⁴⁹ See, e.g., Ampere Analysis, "Content spending in the major TV and video streaming markets in Europe from 2016 to 2025, by company type" (2024), available at <<https://www.statista.com/statistics/1484135/video-content-spending-europe-by-company-type/>> (last accessed 6 March 2026); Statista, "Revenue of the video-on-demand market in Europe from 2017 to 2027" (2024) available at <<https://www.statista.com/forecasts/1493272/vod-revenue-europe>> (last accessed 6 March 2026); Statista, "Penetration rate of video-on-demand in Europe from 2017 to 2030" (2024), available at <<https://www.statista.com/forecasts/1493283/penetration-rate-vod-europe>> (last accessed 6 March 2026).

⁵⁰ See, e.g., Statista, "Revenue of the over-the-top (OTT) market in Western Europe in 2029, by source" (2024), available at <<https://www.statista.com/statistics/323033/online-tv-video-revenue-europe/>> (last accessed 6 March 2026). Admittedly, from a strictly antitrust perspective, it remains an open question whether the market for audiovisual content should be assessed as a single relevant market in its entirety or whether it should instead be subdivided, for example, into subscription video-on-demand (SVOD), transactional video-on-demand (TVOD), advertising-supported video-on-demand (AVOD), hybrid models, and pay-per-view services. Nonetheless, with specific regards to SVOD services, see European Commission, 15 March 2022, Case M.10349, *Amazon/MGM*, para. 206, reporting the prevalence of multi-homing among subscribers to such services ("The majority of the market investigation participants took the view that end-customers multi-home across 2 to 3 different platforms accessible via a paid subscription").

⁵¹ See, e.g., Statista, "Revenue of the traditional TV and home video market in Europe from 2020 to 2030', by segment" (2025), available at <<https://www.statista.com/forecasts/1259602/europe-revenue-tv-home-video-market-segment>> (last accessed 6 March 2026). See also G Fontaine, "Audiovisual services spending on original European content 2014-2024 data" (2025) European Audiovisual Observatory report, available at <<https://rm.coe.int/investments-in-original-european-content-2014-2024-data-september-2025/4880282a02>> (last accessed 6 March 2026), noting that, while global streamers' spending on European content has sharply increased in the recent years, it did not substitute for broadcaster spending, which continued to increase at a moderate pace. See also LE Iancu, "Top players in the European AV industry. Concentration, statute, origin and profile. 2024 figures" (2026) European Audiovisual Observatory report, available at <<https://www.obs.coe.int/en/web/observatoire/-/new-media-us-players-got-over-80-of-all-revenues-from-svod-and-in-video-ott-ads>> (last accessed 6 March 2026), analysing market performance in terms of revenues generated across the EU audiovisual sector and reporting competition among at least ten major groups (albeit largely of non-European origin), as well as intensified rivalry between traditional operators (notably broadcasters and telecommunications companies) and OTT players.

traditional television.⁵² Accordingly, the shift from the traditional broadcast “push” model to a personalised, on-demand streaming “pull” system has resulted in an overall expansion of the market rather than a substitution effect.

In addition, it has been shown that VOD services have significantly contributed to the expansion of broadband connectivity, thereby helping to reduce the digital divides.⁵³ In this sense, VOD services appear to function as a remedy for certain market failures rather than a source of them.

Interestingly – and somewhat paradoxically – it is also highly questionable whether the imposition of financial contributions constitutes an appropriate instrument for the pursuit of cultural policy objectives.

This concern is confirmed by the very architecture of the AVMSD. Indeed, as noted, Article 13 AVMSD imposes two types of obligations on VOD providers: content catalogue quotas combined with prominence requirements, and financial contributions. While the former are mandatory, the latter remain optional for Member States. However, in this setting, the extent to which investment obligations represent an appropriate and necessary instrument for promoting European works remains uncertain. Stated differently, the AVMSD does not articulate why catalogue quotas and prominence requirements, taken alone, are inadequate to achieve this policy objective. These measures are already designed to enhance the discoverability and visibility of European works within VOD catalogues. Despite persistent concerns regarding both the challenges of monitoring prominence⁵⁴ and the effectiveness of quotas in ensuring cultural diversity⁵⁵, European works currently account for 32% of VOD catalogues.⁵⁶

The Directive itself implicitly acknowledges the primary role of catalogue quotas and prominence requirements by making them mandatory, while leaving investment obligations to the discretion of Member States. In doing so, it effectively abdicates any responsibility for providing guidance on the extent to which such investments are necessary.

Furthermore, Member States retain full discretion in determining as to whether to require media service providers to make financial contributions to the production of European works and, if so, whether such obligations should take the form of direct contributions (such as investment in the production of, or the acquisition of rights in,

⁵² Kim and Lee, *supra* note 45.

⁵³ R Katz, J Jung and F Callorda, “The Role of Video on Demand in Stimulating Broadband Adoption” (2024) 48 *Telecommunications Policy* 102751.

⁵⁴ DR Idiz, K Irion, J Ebberts and R Vliegthart, “European Audiovisual Media Policy in the Age of Global Video on Demand Services: A Case Study of Netflix in the Netherlands” (2021) 12 *Journal of Digital Media & Policy* 425.

⁵⁵ See J Farchy, G Bideau and S Tallec, “Content Quotas and Prominence on VOD Services: New Challenges for European Audiovisual Regulators” (2022) 28 *International Journal of Cultural Policy* 419, considering quotas as relics of a bygone era dominated by broadcast television and, consequently, as an obsolete and ill-suited instrument for regulating VOD services. Similarly, M Trinidad García Leiva and LA Albornoz, “VOD Service Providers and Regulation in the European Union: An Audiovisual Diversity Approach” (2021) 27 *International Journal of Cultural Policy* 267, observing that in a non-linear environment – where users freely choose among vast catalogues and determine when to watch – the mere presence of a title in a catalogue does not ensure that users will select it or even become aware of it. This appears to be corroborated by recent data. As shown in C Grece and JA Tran, “SVOD Usage in the European Union – 2024 Data” (2025) *European Audiovisual Observatory Report*, 62, available at <<https://rm.coe.int/svod-usage-in-the-eu-2024-data-july-2025-c-grece-j-a-tran-/1680b69b5f>> (last accessed 6 March 2026), an analysis conducted on a sample of Member States reveals that, while European works constitute around 30% of VOD catalogues, they account for only 25% of actual consumption. The gap is particularly pronounced in Germany and Denmark (–11%), whereas Poland and Spain stand out as the only countries in which European content is consumed more than its share in the catalogue (+4% and +2%, respectively).

⁵⁶ See European Audiovisual Observatory, “Key Trends 2025” (2025) 28, available at <<https://www.obs.coe.int/en/web/observatoire/-/key-trends-2025-report-just-published>> (last accessed 6 March 2026) reporting that 22% are of EU27 origin and a further 10% of all works are of other European origin (mainly produced in the UK).

European works) and/or the payment of a levy to support a national fund. Member States are also free to decide whether these forms of financial contributions should operate as alternatives or be imposed cumulatively. In addition, the direct contribution schemes adopted by Member States vary considerably with respect to the eligibility criteria governing qualifying investments. Accordingly, the implicit assumption appears to be that, from a policymaking perspective, all these options are neutral, as they are deemed equally effective and proportionate for achieving the objective of promoting European works. In other words, this approach presumes that the objective can be pursued with or without investment obligations, through direct contributions or indirect contributions, or through any combination of the two.

These inherent contradictions illustrate that, in the absence of a rigorous economic analysis, a regulatory intervention risks resting on assumptions that are not only unverified but also manifestly unreasonable.

Moreover, from a different perspective, additional doubts have been articulated even by those who share European policymakers' apprehension regarding the risks to cultural and linguistic diversity posed by the global influence of the American production model. From this standpoint, the limitations of investment obligations stem from their capacity to stimulate the production of European works while failing to address the equally critical issues of their distribution and circulation. In particular, some scholars have expressed concern that the current AVMSD provisions do not sufficiently counteract the negative effects of foreign streaming services on local production cultures, as these services may continue to commission content that is locally produced yet globally oriented, thereby instrumentalising culture as mere window dressing.⁵⁷ Further, it has been observed that the mere existence of content produced by European companies is far from guaranteeing genuine cultural diversity.⁵⁸ Likewise, efforts to preserve a plurality of small and medium-sized producers do not necessarily result in greater diversity of genres if market incentives encourage all producers to replicate the formats and narratives that perform best. As a result, rather than being driven by cultural objectives, financial incentives for local production risk ultimately serving primarily the economic interests of domestic industries.⁵⁹

Finally, the economic consequences of a potential overproduction should not be overlooked. Indeed, insofar as Member States require foreign VOD providers to contribute to local content production, an increase in the volume of such content can reasonably be expected. This, in turn, may generate negative externalities by creating inflationary pressures that risk undermining local production altogether.⁶⁰ Notably, cultural levies can drive up the cost of all inputs associated with local production, thereby reducing the number of local producers capable of remaining competitive.⁶¹ As a result, over the long

⁵⁷ See, e.g., B Hagedoorn and S Becker, "Beyond the Dutch Quota: Media Policy and Cultural Diversity in Local Video-on-Demand Production (2013–2023)" (2025) 13 *Media and Communication* 9593; DR Idiz, J Noordegraaf, and R Vliegthart, "Culture as Window Dressing? A Threefold Methodological Framework for Researching the Locality of Netflix Series" (2024) 20 *Critical Studies in Television* 93; KA Ibarra and C Navarro, "The Success of Spanish Series on Traditional Television and SVoD Platforms: From El Ministerio Del Tiempo to La Casa de Papel" (2022) 16 *International Journal of Communication* 482. See also Idiz, Irion, Ebbers and Vliegthart, *supra* note 54, critically underscoring that the specific type of financial obligation directly shapes the nature of the content produced.

⁵⁸ Farchy and M'Barki, *supra* note 11.

⁵⁹ *Ibid.*

⁶⁰ Stout and Colangelo, *supra* note 18.

⁶¹ See, e.g., Autorité de régulation de la communication audiovisuelle et numérique and Centre national du cinéma et de l'image animée, "Étude relative à la mise en œuvre du décret SMAD," (2024) 104, available at <<https://www.arcom.fr/sites/default/files/2024-12/Arcom-etude-relative-mise-en-oeuvre-du%20decret-smad-2024.pdf>> (last accessed 6 March 2026), referring to a cost increase of almost 30%, at least partly linked to the implementation of financial obligations.

term, local production may become increasingly dependent on a smaller number of firms with the capacity to absorb these heightened costs.

IV. National transposition of the AVMSD investment obligations: unintended consequences and opportunities for regulatory gaming

If the picture that emerges from the foregoing analysis is already troubling, the challenges associated with the national implementation of the AVMSD financial obligations are even more consequential. Indeed, by introducing a provision on financial obligations that was arguably unnecessary, the AVMSD has conferred broad discretion upon Member States in its implementation, which has often been exercised in ways that appear misaligned with the Directive's stated objectives, contributing to increased fragmentation of the internal market and enabling the pursuit of narrowly defined economic national interests, rather than the promotion of genuine cultural policy goals.

It is worth reminding ourselves that the lack of a level playing field between traditional broadcasters and on-demand services, together with persistent weaknesses in the internal market, was identified as a key policy challenge during the 2018 revision of the AVMSD.⁶² With regard specifically to the circulation of European works, these factors have been detected as primary drivers of market fragmentation, which continues to constitute the foremost impediment to the emergence of a genuinely integrated European audiovisual market.

To address this issue, the Commission's Impact Assessment proposed maintaining the status quo for television broadcasters while strengthening the obligations applied to VOD service providers.⁶³ Indeed, in the Commission's view, imposing a combined obligation on on-demand services – both to reserve a minimum share of their catalogues for European works and to ensure the prominence of those works – would help mitigate the current fragmentation caused by widely divergent national approaches.⁶⁴ Regarding the possibility for Member States to require financial contributions, the Impact Assessment noted that the resulting level of fragmentation would depend on both the number of Member States choosing to implement such contributions and the number of service providers affected.⁶⁵ Nevertheless, it concluded that allowing Member States flexibility to impose financial contributions represents a justified and proportionate means of limiting forum shopping practices, without undermining the COO principle or the wider objectives of the Digital Single Market.⁶⁶

In retrospect, this expectation has not been borne out. The national transposition of the AVMSD investment obligations have further exacerbated the fragmentation of the European audiovisual market, reinforcing a regulatory focus on production rather than circulation, and favouring domestic works over non-national European works.⁶⁷ This fragmentation is also likely to maintain a diverse landscape of producers, thereby significantly hindering the capacity of local services to scale up and develop into pan-European platforms. As a consequence, notwithstanding the ambitions of EU policymakers, the rise of European champions capable of competing with foreign players on equal terms will likely remain unattained.

⁶² European Commission, *supra* note 15.

⁶³ *Ibid.*, §5.2.1.3.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ See, e.g., Iordache, Raats and Donders, *supra* note 14, 551, arguing that the AVMSD amendments promoted “continued fragmentation” between Member States.

Furthermore, the considerable discretion afforded to Member States has created opportunities for regulatory gaming, whereby the ostensibly legitimate protection of cultural interests is strategically invoked to pursue pure economically oriented objectives.

Indeed, Member States have taken a variety of approaches to implementing Article 13(2) AVMSD.⁶⁸ Some countries (the Czech Republic, Croatia, France, Portugal and Spain) have introduced both direct investment obligations and levies to support national funds. Others (Denmark, Germany, the Netherlands, Poland and Romania) have opted for levies only, without imposing any direct investment obligations. A third group (Greece and Belgium) allows VOD providers to choose between direct investment obligations and indirect contributions, giving them flexibility in meeting their financial responsibilities. Meanwhile, Italy is, so far, the only Member State to rely exclusively on direct investment obligations. Finally, several countries (Bulgaria, Cyprus, Hungary, Ireland, Lithuania, Luxembourg, Malta, and Slovenia) have decided not to introduce any financial obligations at this stage, while others (Austria, Estonia, Finland, Germany, Latvia, Slovakia, and Sweden) are currently considering adopting such measures.

A further source of fragmentation concerns the rate applied to the turnover generated in each Member State. These rates range from the steep levels adopted by France (20–25%) and Italy (16%) to the more moderate approaches taken by other Member States, which typically apply levies in the 1–5% range. In some cases, even the tax base may differ. Indeed, although the base generally refers to turnover, various Member States introduce different thresholds or adjustments.

An additional layer of fragmentation stems from the wide range of quotas and sub-quotas introduced by several domestic legislations. Indeed, by entrusting themselves with a broad discretion in the implementation of the AVMSD provision, Member States have frequently earmarked specific portions of the financial contributions for distinct purposes, including the language of the works, the type of producer, or particular content categories and genres. A comparative analysis of national implementations reveals, for instance, quotas and sub-quotas reserved for works produced in the national language or regional dialects, for independent producers, for works created by women in roles such as scriptwriters or directors, as well as for specific genres, such as animation, fiction, documentary, reality and game shows.⁶⁹

The picture emerging from the analysis of national transpositions of the AVMSD financial obligations confirms concerns that the design of the provision is at odds with the broader policy objective of fostering a truly pan-European audiovisual industry. In practice, it has not only intensified fragmentation among Member States but has also induced them to prioritise national policy interests by favouring domestic works over non-national European productions.⁷⁰ In other words, the AVMSD rules on VOD financial obligations have *de facto* helped maintain the EU's audiovisual landscape as a patchwork of distinct national markets rather than advancing its integration.

These criticisms have also been raised by some regulatory authorities responsible for overseeing the application of the AVMSD at Member State level. For instance, the Italian Communications Authority has urged the Government to undertake a thorough reconsideration of the entire system by streamlining its structure and lowering the

⁶⁸ European Audiovisual Observatory, *supra* note 19.

⁶⁹ A useful source for analysing the different national provisions is the dedicated database provided by the European Audiovisual Observatory, available at <<https://opus.obs.coe.int>> (last accessed 6 March 2026).

⁷⁰ For data on the share of EU-27 works and the share of national works within EU-27 works in VOD catalogues by country, see, e.g., C Grece, "Film and TV content in TVOD, SVOD and FOD catalogues – 2024 data" (2025) European Audiovisual Observatory Report, available at <<https://rm.coe.int/vod-catalogues-2024-film-and-tv-content-june-2025-c-crece-/1680b637ba>> (last accessed 6 March 2026).

mandatory investment thresholds.⁷¹ As the Authority has observed, the complexity of the system may render the national framework unnecessarily burdensome.⁷² On the one hand, in a competitive arena populated by globally operating players, the excessive rigidity of the quota and sub-quota system risks unduly constraining the activities of media service providers, undermining their expansion and competitive capacity and, ultimately, potentially influencing market dynamics at both the European and global levels.⁷³ This may, in turn, frustrate the very objectives that the legislation seeks to achieve. On the other hand, a comparison with Spain suggests that the goal of stimulating dynamism within the audiovisual sector could be achieved with thresholds significantly lower than those currently applied in countries such as Italy and France.⁷⁴

Finally, the coherence and effectiveness of the AVMSD provisions in promoting European works are further undermined by another opportunistic strategy adopted by some Member States, which may not only prioritise domestic over non-national European works but may also exploit the discretion granted by the Directive to advance purely economic interests. In such cases, the policy goal of fostering cultural and linguistic diversity becomes a convenient pretext for subsidising the local economy.

The national transposition of the AVMSD in Belgium's Wallonia Region offers a prominent example of such risk of regulatory gaming. In 2023, the Government of the Fédération Wallonie-Bruxelles (FWB) amended its 2021 Decree by significantly increasing investment obligation rates, introducing a wide range of sub-quotas primarily designed to tie investments to local productions, and adding provisions that further restrict the modalities of investment.⁷⁵ Taken together, the amendments are driven by a common territoriality requirement and by the overarching policy goal of generating economic benefits for the Walloon Region. Thus, rather than being inspired by a purely cultural rationale, the terms and conditions governing investment-based contributions are determined by the Government in accordance with the principle that the investments made by each service provider must generate, for an equivalent amount, economic benefits within the Region.⁷⁶

In August 2024, Netflix filed an application with the Belgian Constitutional Court seeking the partial annulment of the 2023 Decree, arguing, among other things, that the amended investment-obligation scheme violates the COO principle and fails to comply with the AVMSD, as it primarily pursues economic objectives and therefore cannot properly be characterised as a measure intended to promote cultural and linguistic diversity.⁷⁷ In the alternative, Netflix requested that the Constitutional Court refer preliminary questions to the ECJ in order to clarify the principles governing investment obligations under the AVMSD.

⁷¹ Autorità per le Garanzie nelle Comunicazioni, “Segnalazione al Governo ai sensi dell’articolo 1, comma 6, lett. c), n. 1) della legge 31 luglio 1997, n. 249, sulle necessità di revisione del quadro normativo in materia di promozione delle opere audiovisive europee e di produttori indipendenti e di credito di imposta per le imprese di produzione cinematografica e audiovisiva” (2023), available at <<https://www.agcom.it/pubblicazioni/segnalazioni-al-governo/segnalazione-al-governo-27-giugno-2023>> (last accessed 6 March 2026).

⁷² *Ibid.*, 5.

⁷³ *Ibid.*, 9.

⁷⁴ *Ibid.*

⁷⁵ Ministère de la Communauté Française, 7 Décembre 2023, Décret modifiant le décret du 4 février 2021 relatif aux services de médias audiovisuels et aux services de partage de vidéos <https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2024-02-07&caller=summary&numac=2023048623> (last accessed 6 March 2026).

⁷⁶ *Ibid.*, Arts. 60 and 61, respectively amending Arts. 6.1.1 and 6.1.2 of the 2021 Decree.

⁷⁷ MLex, “Netflix sues Belgium’s French Community over financial contribution allowed in EU media law” (2024), available at <<https://www.mlex.com/mlex/articles/2245096/netflix-sues-belgium-s-french-community-over-financial-contribution-allowed-in-eu-media-law>> (last accessed 6 March 2026).

In its recent decision of March 2026, the Belgian Constitutional Court granted the requests for clarification and consequently referred the case to the ECJ for a preliminary ruling on some questions of interpretation.⁷⁸ Notably, among the other things, the ECJ is requested to clarify whether Article 13 of the AVMSD permits a Member State to allow media service providers to satisfy their obligation to make a financial contribution to the production of audiovisual works not only through investment in new productions, but also through the acquisition of broadcasting rights in European works already produced. If so, the Court is further requested to determine whether the principle of proportionality precludes a Member State from prohibiting a media service provider established in another Member State, but targeting audiences within its territory, from discharging that obligation by acquiring broadcasting rights in previously produced audiovisual works. Moreover, the ECJ is asked to clarify whether the principles of proportionality and non-discrimination preclude national legislation under which, when the contribution takes the form of direct investment in production, it must be divided between investment in European works (65%) and French-language Belgian audiovisual works (35%), while no such allocation applies where the contribution is made in the form of a payment to a designated public institution.

V. Concluding remarks

If policymaking is the art of balancing conflicting yet legitimate interests, the trade-offs inherent in reconciling cultural objectives with the imperatives of the single market are especially complex. Indeed, from a European policymaker's perspective, cultural diversity simultaneously constitutes a fundamental value to be protected against the perceived risk of colonisation by the American model and one of the principal structural sources of fragmentation within the European market.

In this context, cultural interests have traditionally been invoked as an exception to the rules of free trade and have proven to be an effective vehicle for regulatory interventions aimed at advancing protectionist policies. In this respect, notwithstanding the gradual semantic shift from the language of cultural exception to that of cultural diversity, the protectionist orientation of the AVMSD remains largely intact.⁷⁹ Yet what was originally conceived as a toolkit to shield the European audiovisual market from U.S. cultural influence has evolved into a protectionist instrument deployed against the internal market itself. Indeed, if fragmentation continues to create significant obstacles to the success of European works, the AVMSD has done little to address the structural sources of this fragmentation or to facilitate a genuinely integrated European audiovisual market. On the contrary, its regulatory architecture has arguably reinforced such fragmentation rather than alleviating it.

After all, as the literature has observed, it was ultimately certain American market players who succeeded in developing services capable of enhancing the pan-European circulation of audiovisual content providing European audiences with unprecedented access to non-national EU works in a manner that was both accessible and user-friendly.⁸⁰

Therefore, if policymaking is fundamentally an exercise in managing trade-offs, the analysis presented in this paper demonstrates that the AVMSD has failed to strike an appropriate balance between cultural objectives and the goals of internal market harmonisation.

The AVMSD financial obligations appear to exemplify a classic case of a harmful solution in search of a largely hypothetical problem.

⁷⁸ Belgian Constitutional Court, 26 March 2026, no. 36, ECLI:BE:GHCC:2026:ARR.036.

⁷⁹ Farchy and M'Barki, *supra* note 11.

⁸⁰ Iordache, Raats and Donders, *supra* note 14, 557.

First, rather than grounding their approach in a demonstrable market-failure justification, the underlying rationale relies predominantly on the success and increasing market penetration of foreign VOD providers. Yet no empirical evidence is provided to show that this development has generated, or could reasonably be expected to generate, any adverse effects on the production or availability of European works. Second, the policymakers fail to clarify why catalogue quotas and prominence requirements would be insufficient to achieve the policy objective of promoting European works and, therefore, to what extent investment obligations constitute an appropriate and necessary supplementary instrument. Finally, the national transposition of the investment obligations has generated such significant unintended consequences that it risks undermining the coherence of the entire AVMSD framework, definitively and irreversibly jeopardising the fragile equilibrium between internal market objectives and cultural interests.

Against this background, the recent Walloon case provides a valuable opportunity to reveal both the potential strategic use of cultural considerations and the inadequacies of the current AVMSD framework in ensuring an effective and proportionate balance between internal market objectives and cultural interests.

For all these reasons, while awaiting the intervention by the ECJ, the ongoing review of the AVMSD represents a timely and unavoidable opportunity to undertake a comprehensive assessment of the design and implications of financial obligations in the EU.

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