

THE REVIEW OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

Many political voices for one digital Europe?

Antonios Vlassis

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The review of the Audiovisual Media Services Directive: many political voices for one digital Europe?

Today's European Union (EU) agenda on audiovisual goods and services is dominated by the review of the Audiovisual Media Services Directive (AVMSD). The new AVMSD - proposed by the European Commission in May 2016 - aims at setting governance norms for the audiovisual media services in the profoundly changing digital context. The article's scope is, hence, to analyze why and how non-state actors such as digital and communication companies and associations, as well as organizations of culture professionals, deal with the governance of the audiovisual media sector and with the appropriate mechanisms regulating the sector in the digital context.

La révision de la directive « Services de médias audiovisuels » : des voix politiques multiples pour une seule Europe numérique ?

L'agenda de l'Union européenne (UE) sur les biens et services audiovisuels est actuellement dominé par la révision de la directive « Services Médias Audiovisuels » (SMA). La nouvelle directive - proposée par la Commission européenne en mai 2016 - vise à établir des nouvelles normes de gouvernance pour le secteur audiovisuel dans un contexte numérique changeant. La portée de l'article est de mettre en lumière pourquoi et comment des acteurs non-étatiques, tels que des sociétés du numérique, des associations et des organisations de professionnels de la culture, abordent la gouvernance de l'audiovisuel et les mécanismes appropriés pour réguler le secteur dans le contexte de la transformation numérique.

The review of the Audiovisual Media Services Directive

*Many political voices for one digital Europe?*¹

Antonios Vlassis

Université de Liège²

In May 2016, the European Commission (hereafter ‘Commission’) proposed an update of EU audiovisual media rules, through the review of the Audiovisual Media Services Directive (hereafter ‘the AVMSD’). In the words of Andrus Ansip, the European Commissioner for Digital Single Market and vice-president of the Commission who promoted the review, the goal is to make “online platforms and audiovisual and creative sectors powerhouses in the digital economy and to not weigh them down with unnecessary rules” (European Commission, 2016). Clearly, in multiple national and regional contexts, the Internet and media convergence have been key drivers of the need to rethink cultural policies and audiovisual media regulation (Flew, 2016, 220).

Since the adoption of the Television Without Frontiers Directive (hereafter ‘the TVWFD’) in 1989 focusing on broadcasting and film, the audiovisual media landscape has significantly been transformed due to digital technologies. Accordingly, the transversality of audiovisual and media industries is supposed to raise normative conflicts, insofar as audiovisual goods and services are located at the junction of several sectors (Vlassis, 2015). As Sarikakis (2007, 14) stressed, “not only media and cultural industries become increasingly central in the economies of European countries, they have also become the terrain of contestation and consensus regarding self-governance and cultural identity”.

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- 1 The title makes reference to the MacBride report entitled “Many Voices One World”, written by the International Commission for the Study of Communication Problems, and published by UNESCO in 1981.
 - 2 I am grateful to Chrysoula Lentzou, Oriane Calligaro and to the anonymous reviewers for their valuable comments and suggestions. An earlier version of this article was presented at the IAMCR 2017 International Conference, Cartagena de Indias, at the panel “Digitalisation policies across national spaces”.

In recent years, the audiovisual sector has moved close to the center of EU policy preoccupations through the priority to establish the Digital Agenda for Europe and to put in place a Digital Single Market (DSM). The aim is to modernize several EU's policy instruments in order to pay close attention to the rapid transformations of the digital economy and to take into account the new economic and industrial environment resulting from the arrival of digital technologies. Following the Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values" adopted by the Commission in 2013, the latter identified several issues to be considered on the review of the AVMSD. A consultation process involving public and private stakeholders – which took place from July to September 2015 – inquired whether the stakeholders felt about the review of the AVMSD (European Commission, 2015). The consultation drew a total of 434 replies³. More than 40% of the replies came from European-level representative platforms or associations, as well as companies (public service broadcasters, free and pay video-on-demand operators, cable operators).

Over the last twenty years, an academic research has offered useful and global insights on the transformations of the EU audiovisual policy. It deals with key issues: the legal, economic and cultural implications of the EU intervention in the audiovisual sector (Burri Nenova, 2007; Donders, Pauwels and Loisen, 2014); the power relationships at the EU level with respect to the emergence of EU audiovisual policy (Collins, 1994; Littoz-Monnet, 2007); the role of the Commission in the policy-making process (Polo, 2003; Brevini, 2013); and the international aspects of the EU audiovisual policy (Vlassis, 2016a; Pauwels and Loisen, 2016). However, whereas scholarship has sufficiently explored the interplay between national governments/Commission and EU media audiovisual policy, the interests of non-state actors, such as media companies or organizations of culture professionals, increasingly mobilized at the EU level, remain a poorly explored topic. Recently, the acceptance or rejection of community intervention *via* the AVMSD in the digital audiovisual services is accompanied by different arguments of non-state actors involved in the process.

In this regard, the article's scope is to analyze how digital and communication companies, associations as well as organizations of culture professionals deal with the governance of the audiovisual media sector in the digital context and with the appropriate mechanisms regulating the sector. Which approach to

3 372 respondents replied as organizations and 62 as individuals.

audiovisual sector do these actors propose in the context of digital convergence? Which goals do they assign to audiovisual goods and services in this context and which modes of governance do they propose for culture?

The aim is to understand the positions and interests of the actors, who are either the driving forces of the digital transformation or deeply impacted by the economic, social and cultural effects of this transformation. Creators, culture professionals and cultural industries are increasingly dependent on digital technologies, while the EU audiovisual cultural landscape is turned upside down by the emergence of global operators in the digital field. In this view, the article is based on qualitative document analysis of contributions by Netflix International⁴ and by ten European-level representative associations, powerful in terms of resources/membership and highly involved in the policy-making process and in the recent transformations of the sector: Association of Commercial Television in Europe (ACT)⁵, DIGITALEUROPE⁶, European Association of Communication Agencies (EACA)⁷, European Broadcasting Union⁸, European Coalitions for Cultural Diversity⁹, European digital media

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- 4 Netflix is a US entertainment company providing streaming media and video-on-demand online services, as well as film and television production. In April 2017, Netflix has around 100 million subscribers worldwide. The article analyses Netflix's contribution for two main reasons: first, since 2014, Netflix expansion in Europe has worried national authorities and European audiovisual industry about the scope of public policies in audiovisual sector; second, among several companies such as NBCUniversal International, BBC, RTL Group etc., which participated in the consultation process, Netflix is not part of the major European associations studied in this article.
 - 5 Set up in 1989, the ACT represents the interests of leading commercial broadcasters in 37 European countries and it counts SKY, Viacom, Fox, NBC Universal as members.
 - 6 DIGITALEUROPE represents broadly the digital technology industry (IT, telecoms and electronics companies) in Europe and includes in total 61 corporate members such as Dell, Nokia, Sony, IBM, Oracle, Samsung, etc. and 37 national trade associations.
 - 7 The EACA represents more than 2 500 communications agencies and agency associations from 30 European countries.
 - 8 The European Broadcasting Union is the world alliance of public service media. It includes 73 Members in 56 countries in Europe and an additional 34 Associates in Asia, Africa and the Americas. It brings together almost 2 000 television and radio channels with numerous online platforms.
 - 9 Established in the context of the 2005 Convention on Diversity of Cultural Expressions' adoption, the European Coalitions for Cultural Diversity represent a large number of national associations of culture professionals from 14 European countries: Austria, Belgium, France, Germany, Hungary, Italy, Ireland, Portugal, Slovakia, Spain, Switzerland, UK and Turkey. The Coalitions bring

association¹⁰, European Internet Services Providers Association¹¹, EURO-CINEMA¹², Federation of Screenwriters in Europe¹³, and Federation of European Film Directors¹⁴.

The article consists of four main parts. First, it provides a short overview of the EU audiovisual media policy and its major transformations since late 1980s. Second, it focuses on three main issues of the AVMSD's review: the scope of the new AVMSD, the issue of the promotion of European works in the digital context, and the relevance of the country of origin principle in this context. Focusing on these issues, the article seeks to understand the diverging visions and main tensions related to the goals of EU audiovisual policy and how key non-state actors involved in the EU policy-making process define and seek to regulate audiovisual matters in the digital era.

Overview of the EU audiovisual media policy: *Un long dimanche de fiançailles*

In order to understand the recent developments of EU audiovisual media policy leading to the review of the AVMSD, it is important to provide an overview of the EU decisions towards the audiovisual goods and services.

together national professional associations of the cultural milieu representing creators, artists, independent producers, distributors working in various fields, such as film, television, music, performing arts, etc.

- 10 The European Digital Media Association (EDiMA), created in 2003, is a trade association that represents in total 17 online platforms and counts Amazon, Apple, eBay, Facebook, Twitter, Expedia, Google as members. It is worth underlying that Google, Apple and Amazon are members both in EDiMA and in DIGITALEUROPE.
- 11 Established in 1997, the association is the world's largest association of Internet Services Providers (ISPs), representing more than 2 300 ISPs across European countries.
- 12 EUROCINEMA is the European association of cinema and TV producers. It was created in 1991 in the context of the TVWFD's adoption at the initiative of organizations of professionals in France.
- 13 Set up in 2001, the Federation is a network of national and regional associations, guilds and unions of writers for the screen in Europe. In 2015, it comprised 24 members from 19 countries representing more than 6 000 writers in Europe.
- 14 Founded in 1980, the FERA is the only organization representing film directors at the European level. It comprised 36 directors associations from 29 countries,.

Until the early 1980s, cultural, technical and political issues related to the production, distribution and consumption of audiovisual goods and services have been widely absent within European community discourses, even though several voices from the *Centre national du cinéma* (France), organizations of culture professionals as well as from academic milieu started calling for the establishment of European public measures for the film industry (Depetris, 2008, 126-168). However, in late 1980s, the attempts to build audiovisual policy tools at European level were triggered by several factors: the development of satellite broadcasting; the end of State monopole in the broadcasting sector; the proliferation of TV private broadcasters; the economic crisis in the European film industry; and the increasing trade deficit in relation with the US in terms of audiovisual goods and services. Over the last three decades, several EU policy tools have been designed in order to accompany the economic, social and cultural transformations of the audiovisual sector. The TVWFD, based on the logic of the ‘mandatory liberalization, optional interventionism’ (Littoz-Monnet, 2007, 84) was issued in 1989 and amended in 1997. It established the free flow for television programs and it provided the introduction – only ‘where practicable’ – of quotas for encouraging the production and distribution of European works. In other terms, the TVWFD seen as the first and main EU regulatory instrument specific to audiovisual sector has been about the establishment of some minimum common rules and liberalization (Michalis, 2014).

In addition, in 1992, Article 128 of the Treaty of Maastricht (which became Article 151 in the 1997 Treaty of Amsterdam and consolidated as Article 151 of the Treaty of the EU) was the first formal legal instrument acknowledging EU-level competency in culture: “the Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures”. Furthermore, the EU played a critical role in the negotiation leading to the adoption by UNESCO of the Convention on diversity of cultural expressions (CDCE) in 2005, insofar as the EU participated as a single entity within the UNESCO arena, speaking with two voices during the negotiations, that of the Commission and that of the Presidency of the Council (Vlassis, 2016b). In this sense, ratified by the EU in 2007, the CDCE explicitly recognizes the importance of cultural public policies for the diversity of cultural expressions, as well as the specificity of cultural goods and services (Vlassis, 2011).

At the same time, in 1997, the publication of the Green Paper on the *Convergence of the Telecommunications, Media and Information technology and the*

implications for regulation established the concept of convergence in the core of the EU policy agenda (European Commission, 1997) and led to the 2002 ‘regulatory framework for electronic communications and services’ (Harcourt, 2005). In this context, since late 1990s, convergence – namely the delivery of media, telephony and Internet services via the same transmission platform – has become a ubiquitous buzzword in the discourse of key actors involved in the regulation of audiovisual media sector at EU level. Often seen as a driving force of digitization, liberalization and globalization (Latzer, 2014, 37), convergence has represented challenges as regards the scope and objectives of the regulatory audiovisual framework in the digital universe. As argued by several scholars (Iosifidis, 2002; Latzer, 2014), convergence has four main aspects: the technological aspect, which means the digitization of broadcasting, Information Technology and telecommunications networks; the economic aspect including market convergence referring to the emergence of multi-media services; the industrial aspect related to corporate alliances across different sectors; and the regulatory one leading towards integrated regulatory agencies and laws in order to accompany the evolutions due to digital technologies.

In 2007, the revision of the TVWFD into the AVMSD encompassed issues of technological convergence and exemplified the transversal aspects of the audiovisual media goods and services. As a result, it covered all content services, irrespective of the technology that delivers them and it recognized that non-linear audiovisual services¹⁵, such as web television or video on demand, could no longer be neatly separated from their analog and linear services (Erickson and Dewey, 2011, 491). Yet, as stressed by Iosifidis (2011, 163), the AVMSD was notably ‘a victory for liberal economic forces but it contains cultural considerations’. In addition, even though the AVMSD dealt with the new digital services, it affirmed the ‘doubtful’ regulatory distinction between ‘new and older modes’ of culture service delivery, which provoked diverse criticisms (Pauwels and Donders, 2014, 531-540).

Today’s EU agenda on audiovisual services is dominated by the 2007 AVMSD’s review. The new AVMSD - elaborated by the DG for Communications

15 The television broadcast or linear service covers audiovisual media services provided by an operator for simultaneous viewing of programs on the basis of a program schedule. The on-demand or non-linear services are offers of content for the viewing of programs at the moment chosen by the user and at an individual request on the basis of a catalogue of programs selected by the provider.

Networks, Content and Technology (DG Connect)¹⁶ and proposed by the Commission on 25 May 2016 - aims to update the existing governance norms for the audiovisual media services in the profoundly changing digital context. Moreover, the AVMSD's review is seen as a key component of the Digital Agenda for Europe being one of the seven flagship initiatives under the Europe 2020 strategy.

Yet, even though the digital shift blurs the boundaries between several sectors (IT, e-commerce, audiovisual and telecommunication), the establishment of a common and integrated approach is an intricate process due to the different and long-established paths of regulation followed by these sectors. Overall, one of the main issues is related to the similarities and differences between physical and online cultural worlds, as well as to the appropriate regulatory framework for the audiovisual goods and services in the context of digital transition. The question arises whether the new AVMSD deals with Internet services hosting user-generated content (such as YouTube, Vimeo) and on-demand services (such as Netflix), treating them as all other cultural services or whether the E-commerce directive adopted in 2000 remains the relevant framework for this type of services. It is worth underlying that in 2014, the Council of EU Ministers of Education and Culture adopted conclusions on the European audiovisual policy in the digital era, inviting the Commission to “assess whether the current regulatory distinction between non-linear and linear audiovisual media services is still appropriate in the context of digital era” (Council of the European Union, 2014).

The scope of the new AVMSD: *Requiem for a Dream*

“Digital is the engine driving Europe’s booming creative sector”,
European Digital Media Association.

The revolution in the information and communications technologies raises questions and doubts on the nature of audiovisual media policies, on the ways to implement them and on their effectiveness (Simon, 2014, 70). In other terms, digital globalization has put the national and regional cultural

16 Previously, the DG X (Media) was in charge of the TVWFD. In 2004, the DG X and DG XIII (Telecommunications, Information Market and Exploitation of Research) were united in the DG for Information Society and Media and in 2010 the latter was renamed DG Connect.

regulation under significant pressure. Despite the wide agreement on the need for a change, the revision of the AVMSD gives rise to divergent approaches regarding the place of the digital content platforms - lacking a clear territorial basis - in the new regulatory basis. The exact scope of application of the new directive has been one of its most intensely discussed items.

Rules for the digital services: *Run Lola Run*

For European associations and companies of the digital and communication sectors, their big fear consists of Internet regulation. In this policy debate about the AVMSD's review, several stakeholders from communication and digital sectors embrace a technological determinist position. They favor, hence, convergence and its innovation potentialities, usually with economic growth as the ultimate goal (Puppis, Simpson and Van den Bulck, 2016, 5). Interestingly, promoting innovation has become one of the flagship goals of the AVMSD's review in the context of electronic service convergence and universal accessibility of digital information on any device (European Commission, 2010, 26). In doing so, commercial broadcasters, digital operators and Internet-related associations see regulation of the online audiovisual media environment as hampering EU's economic prosperity, competitiveness and innovation. "Imposing legislation in a fast changing and technologically innovative environment would be counterproductive and not conducive to encouraging further innovation" (European Association of Communication Agencies, 2015, 9). In fact, the approach of regulatory intervention thought appropriate in late 1980s is "neither relevant nor helpful" (Association of Commercial Television in Europe, 2015, 16) for the economy of audiovisual industries in the digital context.

Overall, given that the production, distribution and consumption of audiovisual goods and services depend on technological developments, the latter define the effectiveness of the regulation and its relevance. As stressed by the European association of Internet Service Providers (2015, 7), "a key driver for regulating the broadcast sector was the limited availability of spectrum¹⁷. Spectrum is a limited national resource and it is reasonable for the State place conditions on access. This does not apply to online services". Clearly, according to this position, many of the obligations placed on linear media by the AVMSD has become obsolete or at least impossible to impose effectively and should be repealed.

17 Spectrum management is the process of regulating the use of TV frequencies.

In turn, for the European associations and companies of the digital and communication sectors, the distinction between linear and non-linear services is completely relevant due to the different temporality of linear and non-linear content: when it comes to non-linear content, the user does proactively decide what content when to watch. On the one hand, defining norms for this type of content falls outside the scope of the AVMSD. On the other hand, regulating platforms, online and sharing services, with concepts designed for traditional audiovisual goods and services, ignores the nature of the Internet. As a result, for these stakeholders, the E-commerce directive remains the relevant and legitimated normative instrument for the online platforms, whereas the AVMSD is intended to cover traditional television broadcasting.

For the associations of public broadcasters, cinema producers, actors, screenwriters, though, the aim of the review is to define a new regulatory baseline for all significant audiovisual media services, including online services. They acknowledge that the economic development of online platforms and services generated conditions of unfair competition. With that said, in the converging digital media environment, the audiovisual value chain is changing and major online providers are emerging. Audiovisual content is increasingly accessed and consumed via online platforms. However, whereas convergence and digitization of cultural content intend to increase competition between broadcasters and online players, between old and new providers of audiovisual content, “the difference of policy treatment between the two categories of players may result in serious distortions with respect to the promotion of cultural diversity and media pluralism” (Eurocinema, 2015, 3). In view of this new development, placing obligations and responsibilities exclusively on old providers of audiovisual content, such as television broadcasters is “neither effective nor fair” (European Broadcasting Union, 2015, 8). To wit, managing online platforms, which play a role in citizens’ access to audiovisual media services, is related “to the cultural and media policy objectives underlying the AVMSD” (*Ibid.*).

Geographical scope: *The Great Escape*

The question arises whether the AVMSD applies to operators established outside the EU but targeting EU audiences with their audiovisual media services. For the associations of the digital and communication sectors, online services have created a more open field. Firstly, creators and traditional creative industries can reach a global audience, on multiple devices, in a much easier way that it was possible with limited analogue channels. Secondly,

consumers and content producers are the beneficiaries of these developments. “The market provides users a wealth of choice” (DIGITALEUROPE, 2015, 7) and any legislative change is likely to be confronted with the nature of the open Internet. Here, it is worth adding that “historically dominated by the minimalist governance origins of its global policy-making environment, EU Internet policy had developed in a largely uncoordinated fashion, underpinned by the fear of untimely or inappropriate intervention” (Puppis, Simpson and Van den Bulck, 2016, 14). In this respect, the associations of the digital and communication sectors state that an extension of the geographical scope of the AVMSD is deemed to endanger not only the economic model of the digital economy, but also major sociocultural aims. “Changing the geographical scope could have a negative impact upon the availability of content in the EU, media pluralism, innovation and the development of new products” (European Digital Media Association, 2015, 11). To this it should be added that extra-territorial EU rules are difficult to enforce and therefore this could undermine the overall effectiveness of the new AVMSD.

Yet, there are other voices. According to several stakeholders, audiovisual media services distributed via online platforms can easily escape the EU and member states rules since online services can be set up outside the EU. Most notably, associations of public broadcasters and of culture professionals made reference to a report elaborated by the European Audiovisual Observatory¹⁸ (Grece *et al.*, 2015), which pointed out that more than 200 video-on-demand services available in the EU came from providers established outside the EU. In doing so, these services are supposed to by-pass EU and national rules, undermining their effectiveness and benefiting from a competitive advantage. Indeed, for these associations, the issue of the AVMSD’s geographical scope combines both economic viewpoints and sociocultural aims. Clearly, the associations of public broadcasters and of culture professionals see the online players as a threat of established relationships, undermining the core principles of national audiovisual media policies. In this sense, public intervention is needed in order to face market failures and to ensure rights and responsibilities with regard to cultural diversity and values of EU democracies, as the online players generate further externalities for society at large (cultural, societal, etc.). As argued by European Broadcasting Union (2015, 16), “the fact that such services fall outside the geographical scope

18 This report was prepared in the framework of a contract between the Commission (DG Connect) and the European Audiovisual Observatory. The latter, created in 1992, is part of the Council of Europe and its aim is to collect and distribute information on the audiovisual industries in Europe.

of European rules has consequences for the respect of European values and cultural diversity in Europe undermines and puts European media service providers at a competitive disadvantage”.

Promotion of European works: *the Good, the Bad and the Ugly*

“Netflix supports the aim to promote the visibility and discoverability of European works”, *Netflix*.

The promotion of European content constantly triggers hot debates, since it implies the potential extension of the quota mechanisms imposed to the online services on one side, and on the other side the potential financial contributions of online providers to production and rights acquisition of European works. It goes without saying that the digital shift has put the arguments for public policies in promoting local cultural content under increasing scrutiny and strain. The application of quotas to the new services and the obligation for financial contribution to local content are strongly opposed by Internet service providers and associations of the digital and communication sectors, which advance a twofold argument: a. the rationality of consumers; b. the digital technologies as valuable tool for promoting cultural diversity.

First, the mixture of foreign and local cultural content is driven by competition to deliver the best service possible, rather than by public regulation. In a world of increasing choice, the services best positioned to respond to consumer demand will continue to distribute a certain amount of local cultural content. Put differently, unlike the State sovereignty in cultural affairs, these associations argue in favor of the sovereignty of consumers. Digital services mean more choice for consumers, who have multiple platforms for consumption of audiovisual content and more control for viewers who can decide when specific content is transmitted (Herold, 2009, 103). As stressed by the Association of Commercial Television in Europe (2015, 17-19), “if our consumers feel we are offering the wrong mix of content, they will migrate to another platform or service with a different content offer. If there were such evidence, it would be for the market, not the regulator, to correct the market failure”. In this respect, quotas for national cultural content are inadmissible and the EU has “neither the legal competence nor the administrative capacity to seek to harmonize the daily operational practices of broadcasters to this

extent”. In addition, quotas are detrimental to the personalization of digital services. When watching content via an online service, subscribers already control their own viewing experience and the titles surfaced to them are highly personalized. “There is no need of any regulatory measure that would interfere with a Video on Demand (VoD) company’s personalized approach to providing their services” (European Digital Media Association, 2015, 21).

Second, digital technology is profoundly changing the way content is produced, distributed, made available and marketed. Accordingly, rules and regulations that have suited the analogue era may not be suitable today, insofar as “digital services and devices have contributed to drive cultural diversity by making European content widely available and discoverable” (DIGITALEUROPE, 2015, 18)¹⁹. Besides, for associations of digital sector and VoD companies, such as Netflix, the current digital landscape has strongly supported the creation of European works²⁰. European culture is exported and viewed outside Europe thanks to new ways digital content can be disseminated and monetized. As a result, regulation would have the opposite effect. The introduction of prescriptive quotas would endanger a sustaining business model, which achieves major goals of the EU audiovisual policy, “allowing European consumers to access a wide variety of European and international content” (Netflix, 2015, 16). Consequently, the consumer personalization approach taken by several VoD services allows more European works to be available in Europe and helps consumers find European works. Interestingly, the online players have moved at the forefront of economic growth and even of the promotion of cultural diversity and European cultural content.

19 DIGITALEUROPE explicitly suggested that European audiovisual policy should imitate successful practices in audiovisual sector such as those of South Korea. Making reference to a study entitled “The Effect of Screen Quotas and Subsidy Regime on Cultural Industry” and elaborated by Patrick Messerlin, economist at Sciences Po Paris, DIGITALEUROPE recommended that European and national film policies have to make the system more flexible and to embrace the opportunities of Internet technology to disseminate European works. In this sense, “Korean has done what France failed to do: promote the country’s film industry at a low cost and encourage efficiency. Whereas the French cinema industry is subsidized at 30%, the Korean cinema reaches 3% at best. Creating a dependence on public subsidies such as those generated by copyright levies hinders, rather than helps European culture” (DIGITALEUROPE, 2015, 20).

20 During a press conference in Berlin film festival in March 2017, Netflix’s CEO Reed Hastings explicitly mentioned that Netflix has invested more than 1.75 billion USD on European productions, including original productions, licensed films, series and coproduction (Hollywood Reporter, 2017).

According to their position, in the digital age, more than ever, the market will take care of itself, generally seen as valuable to ensure socially agreed values. Indeed, beyond the contestation between economic and non-economic values pursued, the promotion of cultural diversity in the audiovisual sector is not seen in contradiction with the free market and free trade logic.

However, “by not having to abide by the same rules, newcomers can benefit from asymmetries of regulation in various fields” (Busson *et al.*, 2016, 23). For the associations of culture professionals, the main issue relates to the lack of contribution to the production and distribution of European works by certain online players, which either fall outside the current scope of the AVMSD or try to avoid stricter national rules through jurisdiction shopping within the EU. Making reference to the normative framework of CDCE, these associations stressed that the online players undermine the effectiveness of European and national rules and distort competition among operators. Historically, the approach of culture professionals and public broadcasters rests on the principle of cultural exception, which recognizes the specificity of audiovisual goods and services irrespective of the technology or distribution platform used, their twofold economic and cultural nature, and the importance of public intervention in the sector. Thus, in the light of the growing number of global players, it is necessary to ensure that each relevant player in the value chain invests a share of the turnover of the service concerned in the production and rights acquisition of European works. In a similar vein, the report elaborated in 2013 by Pierre Lescure – President of Cannes Festival – explicitly stated, “the distinction between ‘traditional services’ and ‘new services’ is artificial and its use would mean the death sentence of EU cultural and audiovisual policies, which would be confined only to traditional cultural services. It is, hence, crucial to maintain a sole treatment to audiovisual services, in accordance with the principle of technological neutrality” (Lescure, 2013, 170).

Accordingly, financial contribution from both on-demand services and broadcasting services should be applied at European level and not as an option at national level for countries, which want to have stricter rules. In this respect, the country of origin principle²¹ has become one of the most controversial issues within the public consultation and a large number of stakeholders have complained about the problem of forum shopping.

21 The country of origin is the core single-market principle of the EU audiovisual media policy. It concerns all content services, linear and non-linear services. The principle guarantees a minimum of policy coordination among EU member states.

Country of origin principle: *Rear Window*

“Current rules are detrimental to countries with more ambitious and protective rules for creation”, *European Coalitions for Cultural Diversity*.

It is a truism to say that a common market for audiovisual media services is achieved through the application of the so-called “country of origin” principle. Yet, the asymmetry of regulation in various fields triggers controversial debates regarding the role of the EU and national rules within the audiovisual sector. Several stakeholders, hence, ask for regulatory rebalancing (Busson *et al.*, 2016, 23).

The associations of digital and communication sector stress that the country of origin principle is the cornerstone of the AVMSD and that it is fundamental to remain at the heart of the new AVMSD and of the DSM. Any consideration to water down the principle would move the EU backwards. As argued by Netflix (2015, 21), “bringing down barriers to unlock online opportunities and creating a true Digital Single Market is one of the Commission top priorities”. As a result, the principle ensures that audiovisual media content that does fulfill the legal requirements of the country of origin cannot be ‘stopped’ at the borders of the member state that imports the service (Herold, 2008). The country of origin principle allows audiovisual media service providers to operate under one and predictable regulatory scheme and under legal certainty. In addition, “the country of origin principle underpins the successful functioning of the fields coordinated by the AVMSD, such as the promotion of European works” (European Digital Media Association, 2015, 23). Interestingly, the belief that online players can drive not only economic growth and innovations, but also the vital values of the EU cultural policies has been persistent for the stakeholders of the digital sector. In this sense, weakening the country of origin principle would lead to a re-fragmentation of the European audiovisual market and therefore, broadcasters and other audiovisual service providers would limit distribution within national borders to the detriment of European citizens.

Instead, for the associations of public broadcasters and culture professionals, the country of origin principle is seen as further enhancing the power of transnational multimedia groups and undermining future developments of local cultural players that provide cultural content and opportunities for local producers (Puppis, Simpson and Van den Bulck, 2016, 5). Hence, the principle enables “forum shopping” from online players, who can decide on

the location of their EU headquarters according to the level of protection of regulations. This situation puts under high pressure the whole audiovisual sector in countries with more protective policies, as online players can settle in countries with the least stringent rules on promotion of European works. In other terms, they can use the country of origin principle to cherry pick the location of their European headquarters (Valcke and Lievens, 2009, 138). Consequently, taking this principle as the leitmotiv of the AVMSD creates unfair competition between services and a race to the bottom for audiovisual policies of member states. For these associations, the main issue is that the application of the country of origin principle is not combined with a harmonization of national media policies. Therefore, the need for more regulatory intervention is relevant, since digitalization makes national and EU audiovisual policy necessary. It is worth underlying that the European Coalitions for Cultural Diversity²² recommended a new approach based on the principle of country of destination. It means that due to absence of harmonization of rules across Europe, the EU legislation should give the country of destination the possibility to apply its policy on the promotion of European works²³.

Concluding remarks

The AVMSD's review proves to be a relevant case to examine the way in which techno-economic forces and culture professionals see the EU audio-

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- 22 In November 2016, the European Coalitions organized a conference at the European Parliament entitled "Digital World: an opportunity for creation?" with the participation of Günther Oettinger European Commissioner for Digital Economy and Society, Viviane Reding, Former Vice-President of the Commission and Former European Commissioner for Education and Culture (1999-2004) and for Information, Society and Media (2004-2010), as well as Jean-Marie Cavada Member of European Parliament.
- 23 Even if the article identifies two divergent positions regarding the AVMSD between the associations and companies of communication and digital sector on one side, and on the other side, the associations of culture professionals and public broadcasters, these actors often attend the same EU public forums in order to express their positions. For instance, among the speakers in the "AVMSD Refit or Reform? Audiovisual Media Services in the Digital Age" conference hosted by the Institute for Competitiveness at the European Parliament in September 2016, it is worth mentioning Damir Filipovic, Director-Digital Enterprise and Consumer Policy, DIGITALEUROPE; Nicola Frank, Director-European Affairs, European Broadcasting Union; Marco Pancini, Public Policy Counsel, Google; and Cécile Despringre, Executive Director, Society of Audiovisual Authors.

visual cultural policy in the digital context. The new AVMSD seeks to find a balance between competition and public interest, between the circulation without frontiers of the audiovisual media services and the principles of cultural diversity and cultural identity. In fact, one question arises in the audiovisual media policy-making: whether the absence of rules imposed on the new online players is beneficial or obstructing for the achievement of the EU economic and sociocultural aims (Kalimo and Pauwels, 2009, 353). By analyzing the positions of key non-state actors, it becomes clear that the digital shift is a converging reality, insofar as the unprecedented transformation of the audiovisual production, distribution and consumption turns the effectiveness and the goals of audiovisual policies upside down. Simply put, the digital context has a decisive impact on key non-state actors whose interests can be understood as responses to this context. However, the majority of these actors have divergent approaches on the economic, social and cultural effects of the digital shift to the audiovisual sector and how they are managed by the EU and national authorities.

The rhetorical strategies of the European associations of digital-communication sectors are based on a key question: in these changing conditions, is public intervention needed? Their answer is negative and the reasons are multiple. First and foremost, the regulation of the online audiovisual environment is an economic issue. The absence of regulation addressing online audiovisual services has the role to protect the wealth of choice for EU consumers and to foster EU competitiveness and economic growth. Second and perhaps most surprisingly, the digital technologies are also assigned the role of promoting European identity, cultural diversity and European works, as well as of strengthening European integration. In this respect, the positions of these actors go beyond the dichotomy between free trade vs. cultural concerns and the dominant orthodoxy of competitiveness. For companies and associations of digital and communication sector, the digital technologies secure economic aims and help generate new ways of promoting highly legitimate policy goals. To wit, the digitalized culture should be subjected to the rules of market and competition, insofar as these rules pursue public aims of cultural policies, such as promotion of cultural diversity and EU cultural identity. Third, on the one hand, the regulatory intervention in the online services endangers not only EU competitiveness and economic growth, but also sociocultural aims, such as the promotion of cultural diversity. On the other hand, the digital technologies make the majority of public measures obsolete and difficult to enforce, undermining their overall effectiveness. Obviously, in this context, the country of origin principle is strongly favored

by these European associations, which consider that the principle is essential for the future of a digital single market of audiovisual services.

On the contrary, the starting point of the public broadcasters and associations of culture professionals is that whereas public intervention and specific public policies are fairly common in the audiovisual sphere, the existing measures enhance the power of the new digital players, generating conditions of unfair competition. Their discourse focuses on the fact that the new online players are a threat to the main principles of the EU and national media audiovisual policies and to the carefully established equilibrium among the different actors involved in the value chains (producers, distributors, etc.). Arguments based on homogenization and commodification of culture due to technological convergence are no longer prominent in the rhetorical strategies of these actors. By contrast, the relevance of the EU intervention in a digital dominated audiovisual environment relies upon societal criteria – and especially upon the protection and promotion of some professional groups of the cultural sector, whose business model is put under high pressure by convergence and by several non-EU global operators. In this context, taking into account the arrival of transnational online players as providers of cultural services, as well as their capacity to benefit from jurisdiction shopping, culture professionals and public broadcasters indicate a path dependency from analogue to digital era. In spite of enforceability issues, they also advocate the need for more intensive supranational policy apparatus, provided that it helps to maintain ‘old’ boundaries and it seeks a stronger harmonization of national audiovisual policies.

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Antonios Vlassis

Chargé de recherches et maître de conférences, Center for International Relations Studies (CEFIR), Fonds national de la Recherche Scientifique (FNRS), Université de Liège.

antonios.vlassis@gmail.com