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COMMENTARIES

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The European Audiovisual Media Services Directive: Normative precursor in the global governance towards VoD platforms?

ABSTRACT

The commentary emphasizes the potential diffusion of the Audiovisual Media Services Directive (AVMSD) provisions in Australia, Mexico, South Africa and Canada. It argues that the revision of the AVMSD has changed the framework of possibilities for several public authorities in the audio-visual media sector and that today a dynamic wave of new provisions towards Video-on-Demand (VoD) streamers is taking place across several liberal democratic regimes. However, the commentary shows that even though transnational VoD services represent disruptive new actors, creating industrial, technological and institutional shock, the latter does not lead to the same political issue cross-nationally.

KEYWORDS

VoD streamers
Netflix
Canada
Australia
regulation
investment obligations
audio-visual
governance
content quotas

INTRODUCTION

The revision of the Audiovisual Media Services Directive (AVMSD), adopted in November 2018, is seen as a unique policy process (García Leiva and Alborno 2021; Farchy et al. 2022; Iordache et al. 2022), seeking to legitimate public intervention on global Video-on-Demand (VoD) platforms and to generate new regulations, such as content quotas and investment obligations, towards streaming services across the European Union. Two key goals of the AVMSD are to create a level playing field for emerging audio-visual media, such as VoD platforms, and promote cultural diversity in the European audio-visual sector (Alborno and García Leiva 2019). The commentary argues that the AVMSD should be analysed not only as a European response to the disruptive action of global VoD streamers in the audio-visual market, but also as a policy process integrated in a broader and overall cross-national debate regarding the governance of audio-visual streaming services. Thus, it is crucial to investigate the policy developments following the adoption of the AVMSD's revision in 2018 in order to assess the normative importance of AVMSD's provisions, such as content quotas and investment obligations. The commentary highlights in which ways the AVMSD can be seen as a normative landmark in the audio-visual governance for affirming the public intervention towards VoD streamers and modelling new regulations in other countries. Firstly, the commentary emphasizes the potential diffusion of AVMSD provisions in Australia, Mexico, South Africa and Canada. Secondly, it deals with why the policy initiatives beyond the EU receive strong concerns, showing that the diffusion of AVMSD's provisions in other national contexts can be a contested process.

INVESTMENT OBLIGATIONS AND CONTENT QUOTAS: A CROSS-NATIONAL DEBATE

After the AVMSD's adoption in 2018, several countries started discussing the perspective to establish measures related to investment obligations and content quotas towards transnational online streamers.

Firstly, in 2022, the Australian Government introduced a Streaming Services Reporting and Investment Scheme (hereafter 'the scheme') in order to incentivize investment in Australian content by large streaming services. The scheme explicitly referred to the policy process of AVMSD's implementation, by mentioning that:

Australia is not alone in grappling with the challenge of safeguarding access to content with local cultural relevance in an increasingly globalized marketplace. A number of countries – Belgium, Croatia, Denmark, France, Germany, Italy, Spain, Switzerland, Portugal and Poland – have implemented regulations on streaming services to incentivize or require the provision of local programming.

(Australian Government 2022: 9)

The scheme recommended that a streaming service should invest 5 per cent of its gross Australian revenue on new Australian content. However, the Australian Screen Industry Group (ASIG) considered the proposition of 5 per cent as 'weak', falling far short of what is required. It also warned of damage to the industry from delayed regulation and it called for a 20 per cent Australian content expenditure requirement, closer to the rate of investment obligation proposed by some EU countries, such as France (Financial Review

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2022). In January 2023, the Australian government unveiled ‘Revive National Cultural Policy’, a five-year plan to renew the wider cultural landscape, including investment quotas towards the VoD streamers. Public consultation with broadcasters and streamers will take place over the next six months to shape legislation.

Secondly, Mexico and South Africa also started debating the perspective to adopt content quotas towards VoD platforms. Both countries suggested a 30 per cent quota of national content in the catalogues of streaming platforms, following the rate already included in the AVMSD. In South Africa, the publication of the 2020 white paper on audio and audio-visual content services policy framework proposed the introduction of local content quota on streaming services. Public hearings (2021) on the white paper were held between 10 May and 14 June 2021. During the hearings, the National Association of Broadcasters promoted the level-playing field argument, which was also strongly defended during the public consultation on the AVMSD draft (Vlassis 2017), stressing that ‘the proliferation of online content services has undermined the principle of regulatory parity and fair competition which is vital for economic growth and viability of the sector’ and adding that ‘support for local content and content diversity remains a key consideration and will remain relevant in the new regulatory framework’. On its side, during the public hearings, Netflix focused on the incompatibility to transpose the AVMSD’s provisions in other national contexts, by mentioning that:

quotas imposed in regions like the EU may be wholly inappropriate for the South African context. The EU 30% local content quota for example is fulfilled by content from across Europe as a whole (serving 450 million people) rather than local content of only one member state.

(Public hearings 2021: n.pag.)

The propositions from the white paper are still under discussion.

Likewise, in early 2021, the Mexican government announced its intention to promote a new federal cinematography and audiovisual law, which would impose at least a 30 per cent quota of national content on the catalogues of streaming platforms. At the end of March 2021, while the Mexican senate was set to vote on this proposal drafted by Senator Ricardo Monreal – the leader of the ruling National Regeneration Movement (MORENA) in the upper house of Mexican legislature – the ruling party decided to postpone the senate’s discussions on the project following criticisms by various stakeholders (see below).

Finally, in Canada, the discussions on the regulation towards VoD platforms started at the same time as the negotiating process on the AVMSD’s revision. However, in Canada, the issue of regulation has been highly confrontational among actors involved. The policy debate started during the 2015 legislative elections, when Stephen Harper, Conservative leader and Canadian prime minister from 2008 to 2015, expressed his explicit opposition to a so-called ‘Netflix tax’, by generating, since then, a strong political confrontation over the regulation of VoD streamers. In March 2023, Canada adopted the Online Streaming Act – known as Bill C-11 – which aims to bring online audio-visual streamers under the same regulatory framework as traditional broadcasters in Canada and to give powers to Canada’s broadcasting regulator – the Canadian Radio-television and Telecommunications Commission (CRTC) – towards online streaming. Unlike the AVMSD, the Online Streaming Act does not

define the precise rate of investment obligations and content quotas applied to streaming platforms. Instead, the CRTC is expected to initiate a wide-ranging consultation in the coming months to establish the new regulatory framework. It is worth noting that the bill was first introduced in November 2020 in order to integrate global platforms into the existing Broadcasting Act.

BEYOND THE EU CONTEXT: CONSTRAINTS TO IMPLEMENT REGULATION TOWARDS STREAMING PLATFORMS

Even though in several EU member states a wide political consensus has been established regarding the adoption and implementation of AVMSD's revision (Vlassis 2023; Ranaivoson et al. 2023), the new regulations towards streaming platforms received wide concerns in other national contexts.

First, from 2020 to present, the process of passing the Canadian Online Streaming Act has been significantly slowed down by the Conservative opposition and by several associations, which have pointed out the pending Act will undermine the rights and freedoms of Canadian users on social media (Vlassis 2021a). At the same time, in South Africa, the governmental white paper received strong criticisms by various stakeholders, such as Netflix, AT&T, Walt Disney and the US Chamber of Commerce (Public hearings 2021), whereas in Mexico, audio-visual professionals opposed to a 30 per cent content quota because the latter would not have the expected outcome but it could generate a reverse result that would benefit the distributor Videocine rather than the independent producers and filmmakers (Alfaro 2021).

Second, whereas in the European Union the capacity of public authorities to intervene in the digital audio-visual market, through content quotas and investment obligations included in the AVMSD, is strongly protected and not threatened by EU trade commitments, the regional commitments of other national governments – such as the United States–Mexico–Canada Agreement (USMCA) or the Australia–United States Free Trade Agreement (AUSFTA) – are expected to generate constraints for the development of new regulations towards VoD streamers. In a white paper released in mid-January 2023, the US-based Computer & Communications Industry Association stated that the Canadian broadcasting legislation dealing with VoD platforms is 'explicitly discriminatory' (CCIA 2023) and, if enacted, will violate the country's commitments under the USMCA. In a similar vein, the same kind of concerns has been expressed by the Latin American Internet Association, because the introduction of quotas in the Mexican online audio-visual market would 'violate the Telecommunications and Digital Trade chapters of the USMCA' and tech companies could 'initiate arbitrations arguing discriminatory treatment' (El Heraldo de México 2021: n.pag.). Finally, in 2021, during the public consultation on the Australian Green Paper 'Modernising Television Regulation in Australia', the Motion Picture Association – bringing together the Hollywood studios and VoD streamers – stressed that 'in considering whether to impose burdensome regulation on VoD services, the Australian Government must consider its international obligations, particularly the AUSFTA' (Vlassis 2021b: n.pag.).

CONCLUSION

The cross-national debate regarding the governance of audio-visual streaming services focuses on a level-playing field in the audio-visual sector, as large

VoD platforms have increasingly disrupted the established equilibrium among the different actors involved in the value chains (producers, broadcasters, etc.). The adoption and implementation of the AVMSD's revision have changed the framework of possibilities for several public authorities across the globe and a dynamic wave of new provisions towards VoD streamers in the audio-visual media sector is taking place across several liberal democratic regimes. Thus, the level-playing field is ensured by a transfer of policy instruments, such as investment obligations and/or quotas, from the analogue-broadcast age to the digital one. However, the above analysis showed that even though transnational VoD services represent disruptive new actors, creating industrial, technological and institutional shock, the latter does not lead to the same political issue cross-nationally. Political struggles over VoD platforms are expected to be framed and fought by two crucial variables related to the relationships between state and interest groups and to the international commitments of national governments.

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