The New Audiovisual Media Services Directive and the Promotion of European Works by On-Demand Media Service Providers * ** ***

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Abstract

The 2018 revision to the Audiovisual Media Services Directive has reshaped the framework regulating European quotas for on-demand services in light of the significant development of the video on demand market. Considering the asymmetries between linear and on demand services, The European legislature had several options before it, and eventually opted to afford considerable scope for the same regulatory framework as applies to the former to be extended to latter. The newly drafted Article 13 of the AVMS Directive requires Member States to ensure that providers of on-demand services secure at least 30% of their catalogue for European works and afford them prominence. Such provision also notes that where a Member State requires financial contributions of AVMS providers (both linear and on-demand), such financial contributions may also be required of providers from other Member States which are targeting audiences in that Member State. The authors thoroughly discuss the implications deriving from the new Article 13 and the issues that Member States will be confronted with in the implementation of the new legal framework.

Summary

1. Introduction: The Audiovisual Media Services Directive and the new Article 13. – 2. The share of catalogue. – 2.1. A comparative overview of the mandatory share of catalogue for on-demand services and the programming obligations of broadcasters. – 2.2. The share of catalogue: from the Commission's proposal to the final text. – 2.3. The calculation basis for the share of catalogue. – 2.4. The methods used to calculate the share of catalogue. – 2.5. The classification of content. – 3. The prominence of European works. – 4. The (direct and indirect) financial contribution. – 4.1. The sub-

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*** The opinions outlined in this work are entirely personal and in no way relate to the body to which the authors belong.

jective scope of application of the rules on financial contributions: on-demand and linear services. – 4.2. The content of the contribution obligation: direct investment and contribution to national funds. – 4.3. Financial contribution and derogation from the country of origin principle. – 4.4. The German levy: an *ante litteram* application of the country of destination principle. – 4.5. Media service providers "targeting" audiences in other Member States. – 4.6. The calculation basis for financial contribution. – 4.7. Enforcement issues. – 5. Exemptions. – 6. Concluding remarks.

Keywords

Audiovisual media services, Promotion of European works, AVMS Directive, AVMS REFIT, Video on-demand

1. Introduction: The Audiovisual Media Services Directive and the new Article 13

In 2007, the framework regulating the promotion of European works was extended to on-demand audiovisual media services (AVMS) through the approval of Directive 2007/65/EU[1]. The Directive coined the expression "audiovisual media services" and applied this to both traditional television broadcasting and on-demand or "non-linear"[2] services.

The framework introduced for on-demand services was more lenient than that for traditional linear services[3]. This regulatory approach was justified by what, at the time,

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[1] Directive 2007/65/EU of the European Parliament and of the Council, of December 11, 2007, amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, in OJEU L 332 of December 18, 2007, 27–45. An essential bibliography is provided here on the subject matter: R. Mastroianni, *La direttiva sui servizi di media audiovisivi,* Torino, 2011; O. Castendyk-E. Dommering-A. Scheuer, *European Media Law*, Kluwer Law International, Alphen a/d Rijn, 2008; P. Valcke-D. Stevens-E. Lievens-E. Werkers, *Audiovisual Media Services in the EU. Next Generation Approach or Old Wine in New Barrels?* in *Communications & Strategies*, IDATE, Com&Strat Dept., vol. 1(71), 2008, 103 ss.; M. Burri-Nenova, *The new Audiovisual Media Services Directive: Television Without Frontiers, Television Without Cultural Diversity*, in *Common Market Law Review*, 2007, 1689 ss.

[2] On the distinction between linear and on-demand services and the related implications from a constitutional law perspective, please refer to the synthesis proposed in E. Apa, voce *Radiotelevisione (dir. cost.)*, in *Treccani Diritto on line*, Roma, 2014.

[3] For a review of the Italian regulatory framework on audiovisual media services, see E. Apa-O. Pollicino (eds.), *La regolamentazione dei contenuti digitali. Studi per i primi quindici anni dell'Autorità per le garanzie nelle comunicazioni (1998-2013)*, Roma, 2014; F. Bassan-E. Tosi (eds.), *Diritto degli audiovisivi. Commento al nuovo Testo Unico dei Servizi di Media Audiovisivi e Radiofonici come modificato dal D.Lgs. 15 marzo 2010 n. 44*, Milano, 2012; V. Zeno-Zencovich (ed.), *La nuova televisione europea. Commento al "Decreto Romani"*, Santarcangelo di Romagna (RN), 2010. Refer also to the manuals on information and communications law: G.E. Vigevani-O. Pollicino-C. Melzi d'Eril-M. Cuniberti-M. Bassini, *Diritto dell'informazione e dei media*, Torino, 2019; R. Zaccaria-A. Valastro-E. Albanesi, *Diritto dell'informazione e della comunicazione*, Padova, 2018; R. Razzante, *Manuale di diritto dell'informazione e della comunicazione*, Padova, 2016; S. Sica-V. Zeno-Zencovich, *Manuale di diritto dell'informazione e della comunicazione*, Padova, 2015; P. Caretti, *Diritto dell'informazione e della comunicazione*, Bologna, 2013.

was the modest development of the video on demand (VoD) market, on both the supply and demand sides. In the 2007 Directive – which was superseded by a consolidated version in the form of Directive 2010/13/EU (hereinafter also referred to as the "AVMS Directive"[4]) – the European legislature adopted a cautious approach, given its concern to avoid overregulation in a nascent sector. The 2018 revision to the Directive – Directive 2018/1808/EU[5] – thus has established a framework regulating European quotas for on-demand services in response to the sizeable and advanced market which has developed since[6].

As a result of the asymmetric regulatory framework adopted in 2007, the European legislature had three options before it when reforming the Directive. The first stemmed from the extent to which on-demand services had developed in the meantime – in particular, subscription VoD (SVoD) services, through which users pay a fee (generally monthly) to the service provider for unlimited access to its catalogue. This development may have justified the general deregulation of both linear and on-demand services, given the expansion of this market and the choice available to consumers – especially if one considers the strong degree of interactivity of such services and the autonomy involved in engaging with them. This approach was warmly supported by some commentators, who suggested that the quota system was destined to be replaced, due to the emergence of new types of services and the increasing possibilities for consumers to choose content according to their individual preferences[7]. Howev-

[4] Directive 2010/13/EU of the European Parliament and of the Council of March 10, 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States regarding the provision of audiovisual media services (Audiovisual Media Services Directive), in OJEU L 95 of April 15, 2010, 1–24.

[5] Directive (EU) 2018/1808 of the European Parliament and of the Council of November 14, 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States, relating to the provision of audiovisual media services (the Audiovisual Media Services Directive) that result from changing market realities, in OJEU L 303 of November 28, 2018, 69 ss. For an analysis of the process that led to the new Directive, see the following papers from the European Commission: Commission Staff Working Document – Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU (SWD(2016) 171 final), 2016; and 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 relating to the provision of audiovisual media services in view of changing market realities (COM(2016) 287 final) – (SWD(2016) 169 final), 2016; Synopsis of the Public Consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) – A media framework for the 21st century, 2015.

[6] On the growth of on-demand audiovisual media services and for a broader perspective on video-streaming services, please refer to G.B. Abbamonte, *Le nuove piattaforme internet*, in G. Abbamonte-E. Apa-O. Pollicino (eds.), *La riforma del mercato audiovisivo europeo*, Torino, 2019.

[7] Please see, in this regard: G. Guglielminetti, *La promozione delle opere europee*, in *AIDA. Annali Italiani del Diritto d'Autore, della Cultura e dello Spettacolo*, XVII, Milano, 2009, 93 ss. The thesis in this piece echoes the argument put forward by the Motion Picture Association of America (MPAA) before the United States Congress on May 22, 2001: «Many countries around the world have a reasonable desire to ensure that their citizens can see films and TV programs that reflect their history, their cultures, and their languages. In the past, when their towns might have had only one local cinema and received only one or two TV broadcast signals, the motivation for foreign governments to set aside some time for local entertainment products was understandable. In today's world, with multiplex cinemas and multi-channel television, the justification for local content quotas is much diminished. And, in the e-commerce

er, this approach seems to consider the function of quotas from a one-dimensional perspective, associating them purely with the need to satisfy consumer demand for European content. This view is less persuasive if one considers that quotas are aimed not at indulging consumers' preferences, but rather at pursuing cultural policy objectives. Quotas thus have a value that is, in a sense, "educational"; they are not limited to "proposing" European works, but also relate to their "promotion."[8]

Alternatively, given the development of on-demand services and their increasing competition with linear services, the second option might have led to the adoption of more stringent rules for on-demand services, in order to reduce the regulatory asymmetry between the two service categories.

The third option might have envisaged a compromise that reduced this regulatory asymmetry by relaxing the regulation of linear services while increasing the regulation of on-demand services.

Ultimately, the second option prevailed. Although the new AVMS Directive does not provide for full regulatory alignment, it affords considerable scope for the same regulatory framework as applies to linear services to be extended to on-demand services – without, however, reducing the regulatory burden of the former in any way.

During the public consultation undertaken by the European Commission in 2015, discussions on the promotion of European works highlighted contrasting – in some cases, polarized – positions on the matter. Eleven Member States and twelve regulatory authorities were in favor of maintaining the status quo; while six Member States and three national authorities favored increasing the regulatory burden for on-demand services to avoid a distortion of competition among providers[9].

This debate reflects an approach that is clearly based on a radical distinction between linear and on-demand AVMS. In 2007, however, the European legislature felt the need to consider potential hybrid services that, while offering the possibility to view programs «at the time chosen by the user and at his request», also offered content through linear programming (Catch-up TV). In such cases, as was clearly stated in Recital 27 of the AVMS Directive, given the overlap between on-demand and linear services, the

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world, the scarcity problem has completely disappeared. There is room on the Internet for films and video from every country on the globe in every genre imaginable. There is no "shelf-space" problem on the net».

Please see also Bonnie J.K. Richardson, Vice President, Trade & Federal Affairs of the MPAA at the hearing held at the House Commerce Committee Subcommittee on Commerce, Trade & Consumer Protection.

[8] I. Bernier, *Local content requirements for film, radio, and television as a means of protecting cultural diversity: theory and reality (Section II)*, 19, concludes that: «it has become clear to us that the observed effects were often contrary to the theorists' negative predictions and that a sweeping condemnation of local content requirements was not in order. This does not signify that the quotas in question are a panacea, but it does mean that under the appropriate conditions and, subject to monitoring of their actual effectiveness, they may play a deciding role in the preservation and promotion of threatened cultural expression. Regarding the impact of new technology on quotas, there again, it appears that the heralding of their disappearance was exaggerated, to say the least, and that, if and when they disappear, local content requirements will necessarily be replaced by new approaches capable of offering similar guarantees. Because in the end, if there is one thing that is certain, it is that the concern for the preservation of the diversity of cultural expression is not soon to disappear».

[9] See European Commission, *Synopsis Report,* cit., 7.

obligations relevant to the promotion of European works «should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e., linear transmission». The evolution of the market in the decade that followed saw the emergence of different types of on-demand providers: some concentrate exclusively on on-demand content, while others have added on-demand services to their linear offering. This is particularly true of certain broadcasters, which use online platforms as an additional channel through which to distribute their content, offering a combination of linear programming simulcasts, catch-up TV (with scheduling repeated over subsequent days and sometimes even preceding the broadcast) and an on-demand offer which is unrelated to their schedules. More recently, new services have been introduced that offer a mix of live streaming and on-demand content. For example, some sports-related services offer consumers the possibility to view live events, sometimes even in "near-live" mode (i.e., slightly later than the scheduled broadcast); viewers can also view such content on subsequent days and access a catalogue of on-demand content. This would seem to confirm that technological and commercial developments have blurred the boundaries between linear and on-demand services and made the distinction between these two categories increasingly complex. This process, which is closely associated with the proliferation of digital and network technologies, is reflected within a broader framework which confirms that – as in the delivery of linear services – traditional networks/platforms (terrestrial frequencies, cable and satellite) are losing their central role to networks based on IP protocols[10]. The continuation of this process will only encourage greater hybridization between linear and on-demand services, and a growing trend toward customized offerings[11].

In fact, the legislature seems to have questioned its original position through Directive 2018/1808/EU, which takes the first steps toward moving beyond a clear distinction between the two types of services. The newly drafted Article 13 of the AVMS Directive has completely repealed and revised its predecessor. The extension of the scope of application of Article 13, para. 2 to encompass all AVMS providers, not just on-demand providers, resulted in the deletion of the title of Chapter IV.

Article 13 is now structured in seven paragraphs. Article 13, para. 1, requires Member States to ensure that providers of on-demand services secure at least 30% of their catalogue for European works and afford them prominence. Article 13, para. 2, notes that where a Member State requires financial contributions of AVMS providers (both

[10] On the circulation of audiovisual content on the Web, see E. Apa-M. Dolores, *Distribuzione di contenuti audiovisivi in Internet e libertà di manifestazione del pensiero*, in T.E. Frosini-O. Pollicino-E. Apa-M. Bassini (eds.), *Diritti e libertà in Internet*, Firenze, 2017.

[11] On on-demand services, with a particular reference to the framework regulating the promotion of European works, the European Audiovisual Observatory of the Council of Europe has provided several publications, including: S. Nikoltchev (ed.), *The Regulation of On-demand Audiovisual Services: Chaos or Coherence?*, IRIS Special, European Audiovisual Observatory (Council of Europe), Strasbourg, 2011; S. Nikoltchev (ed.), *What Is an On-demand Service?*, European Audiovisual Observatory (Council of Europe), Strasbourg, 2013; F.J. Cabrera Blázquez-M. Cappello-G. Fontaine-S. Valais, *On-demand services and the material scope of the AVMSD*, IRIS Plus, European Audiovisual Observatory (Council of Europe), Strasbourg, 2016; F.J. Cabrera Blàzquez-M. Cappello-C. Grece-S. Valais, *VOD, platforms and OTT: which promotion obligations for European works?*, IRIS Special, European Audiovisual Observatory (Council of Europe), Strasbourg, 2016; *Mapping of national rules for the promotion of European works in Europe*, European Audiovisual Observatory (Council of Europe), Strasbourg, 2019.

linear and on-demand), such financial contributions may also be required of providers from other Member States which are targeting audiences in that Member State. In such case, under Article 13, para. 3, account must be taken of contributions that have already been paid in other States, in order to avoid a double financial imposition. Article 13, para. 4, requires Member States to report to the Commission by December 19, 2021, and every two years thereafter, on their implementation of the first two paragraphs. Para. 5 provides that, based on these reports, the Commission shall report to the European Parliament and the Council on the Directive's implementation and application, «taking into account the market and technological developments and the objective of cultural diversity». Paragraph 6 states that providers with a low turnover or low audience shall be exempt from the obligations relating to the share of catalogue, the prominence afforded to such works and, where relevant, financial contributions (in this case, the exemption is limited to providers that target audiences in other Member States). Member States also retain the discretionary power to «waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services». Finally, para. 7 calls upon the European Commission, after consulting with the Contact Committee, to issue guidelines relating to the definition of both the share of catalogue referred to in para. 1 and the concepts of "low turnover" and "low audience" outlined in para. 6.

2. The share of catalogue

2.1. A comparative overview of the mandatory share of catalogue for on-demand services and the programming obligations of broadcasters

As observed, the first paragraph of the newly drafted Article 13 of the AVMS Directive requires Member States to ensure that on-demand providers reserve at least 30% of their catalogue for European works. This provision applies exclusively to providers established in the relevant Member State (i.e., the State to whose jurisdiction they are subject).

Compared to the 2010 version, the new Article 13 has introduced two fundamental novelties.

First, under the previous version, securing a share of the catalogue for European works was merely one suggested option among a wider range of possibilities, including financial contributions and the adoption of measures to ensure the prominence of such works. Under the new version, this is now a mandatory obligation. In this sense, therefore, the provision is in line with the requirements set out in Article 16 for television broadcasters[12], as both linear and on-demand providers must now reserve a

[12] S. Gambuto, *La produzione audiovisiva europea*, in A. Frignani-E. Poddighe-V. Zeno-Zencovich (eds.), *La televisione digitale: temi e problemi*, Milano, 2006, 363 ss., doubts the effectiveness and efficiency of the European quota system.

share of their catalogue for European works.

However, fulfillment of this obligation is inevitably conditioned by the linear or non-linear nature of the service provided. From the supply perspective, it may be argued that compliance with programming quotas has a greater impact on broadcasters, since they have limited time at their disposal, so allocating an hour to European works requires them to relinquish the prospect of any alternative programming in that time slot. By contrast, on-demand providers can adopt an incremental procedure since they have no temporal limitations, and the inclusion of one or more European works in their catalogues may be counterbalanced by the inclusion of non-European works; albeit that they must always maintain the *ratio* of programming above the permitted threshold. For on-demand providers, the nature of this constraint is essentially economic, as the provider must observe an expenditure limit in order to maintain profitability.

On the other hand, from the demand side, it appears that – unlike television broadcasters – on-demand providers suffer no loss of opportunity in this regard. If viewers so desire, they can still access non-European content at any time of their choosing, without any of the implications that result from the availability of content in a more or less favorable time slot in the programme scheduling.

From another perspective, it may be noted that while broadcasters may rely on repeats in satisfying this obligation, on-demand providers may not. In fact, as the catalogue hours for on-demand services are "exclusive," providers can meet the 30% minimum threshold through the selection of individual content only, without any reliance on repeats. However, the substitutability of European and non-European works is far from perfect. Broadcasters must consider a fundamental issue associated with the performance of a work: the number of viewers that it will manage to attract. They must thus proceed cautiously, so that the inclusion of European works in order to meet their quota obligations does not affect the size of their audiences. This factor is less relevant for on-demand providers: even if a European work attracts a smaller audience than a non-European work, this will have no direct impact on the economic viability of the service – although the provider must still maintain a balance between the cost of its product and the audience's appreciation of the content offered.

2.2. The share of catalogue: from the Commission's proposal to the final text

Second, the new Directive sets the minimum share of the catalogue that must be reserved for European works at 30%. In the European Commission's[13] proposed Directive, this threshold was set at 20%, but during the legislative process it was increased to 30% – an amendment that was clearly also supported by the Council[14]. This threshold

[13] Proposal of May 25, 2016, COM(2016) 287/4, presented within the wider framework of the digital single market strategy.

[14] See *Amendments by the European Parliament to the Commission proposal*, www.europarl.europa.eu/sides/getDoc.do?type=AMD&format=PDF&reference=A8-0192/2017&secondRef=083-083&lan-

was increased to bring it closer into line with the obligation laid down in Article 16 for broadcasters (linear services), which must reserve «the majority proportion of their transmission time» (i.e., more than 50%) for European works. Of those countries that supported this increase in the quota, France was one of the most vociferous advocates.[15]

To date, those Member States that have introduced a share of catalogue for European works have applied divergent percentages, ranging from 10% in the Czech Republic and Slovenia to 60% in France[16]. Certain countries have also introduced sub-quotas for national works[17].

The *Impact Assessment* analysis undertaken by the European Commission in the process of updating the AVMS Directive revealed that in 2015, European films accounted for an estimated 27% of the primary VoD catalogues available in Member States, increasing to 30% in the 16 major catalogues offered through subscription[18]. More recently, the Council of Europe's European Audiovisual Observatory undertook two studies based on about 90 catalogues – both transactional video on-demand (TVoD) services, which allow users to purchase individual content, and SVoD services. The first study, which focused on serial content, revealed that European works accounted for 38% of SVoD catalogues and 58% of TVoD catalogues, when calculated based on titles; measured in terms of number of episodes, this percentage dropped to 21% for SVoD services and 24% for TVoD services. The second study, which focused exclusively on cinematographic works, revealed that European films accounted for between 17% and 30% of TVoD catalogues and about 20% of SVoD catalogues [19].

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guage=EN. The Council's amendments are contained in the document dated May 24, 2017, available at www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN; in particular, please refer to Article 13, 32. In its advisory opinion, dated October 19, 2016, the European Economic and Social Committee proposed «*that the minimum 20% quota imposed on major video-on-demand (VOD) providers be increased to 50%, in line with the minimum quota set for television broadcasting*»; whereas the European Committee of Regions, in its advisory opinion adopted on December 7, 2016, proposed the confirmation of the 20% share of catalogue, specifying that it should be calculated on an hourly basis. For an overall framework of the legislative process that led to the approval of Directive 2018/1808, and for the amendments proposed by the various institutions involved, which also refer to the share of catalogue, see below, section 4.1, in particular footnotes 42, 43 and 44.

[15] France supported increasing the share of catalogue to 40%. See the document of the European Affairs Committee of the French Senate of November 9, 2016, which was drafted as a commentary on the proposal for a Directive of the European Commission.

[16] For France, please refer to *Décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande*, Article 12.

[17] In particular, France (40%), Spain (15%), Hungary (10%) and Italy (15%). At the time of writing, Italy foresees that from July 1, 2019, 15% of the catalogue must be reserved for works demonstrating "Italian original expression," wherever they are produced.

[18] European Commission, *Commission Staff Working Document – Impact Assessment*, cit., 24 ss.

[19] Please refer to *The Origin of TV Content in VOD Catalogues – 2017 edition*, European Audiovisual Observatory (Council of Europe), Strasbourg, December 2017. See also *The Origin of Films in VOD Catalogues – 2017 edition*, European Audiovisual Observatory (Council of Europe), Strasbourg, December 2017. On the circulation of works, reference should also be made to C. Grece, *How do films circulate on VOD services and in cinemas in the European Union? A comparative analysis*, European Audiovisual Observatory (Council of Europe), May 2016.

2.3. The calculation basis for the share of catalogue

It is interesting to consider the basis on which the share of catalogue is calculated. For linear services, "transmission time" as defined in Article 16 does not correspond to total broadcast time, but is rather determined «excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping». This restricts the calculation basis and could potentially increase the percentage share above the 50% threshold for the total broadcast offering (e.g., if a channel devotes a significant amount of time per hour to information programs, these are generally self-produced and are therefore considered to be European works).
This provision is clearly impracticable for on-demand services, since the very concept of "transmission time" is inapplicable to on-demand catalogues; nor does the Directive exclude certain genres of programs from the calculation basis. Member States are thus left to decide whether to adopt a similar approach to that applicable to linear services. Even before the new Directive was introduced, some regulatory frameworks excluded certain genres from the calculation basis when determining the quota for on-demand catalogues[20]: in particular, in certain countries, genres such as news and adult content are not taken into account. To continue the parallel with linear services, it might be argued that – as with on-demand catalogues – the need to exclude certain genres has hitherto been less pressing, given their nature and structure. In fact – especially in the market development phase – on-demand catalogues tended to focus on specific genres (e.g., films, series), rather than adopting a generalist approach, and primarily comprised scripted works (e.g., films, dramas, documentaries or animation), which are very different than the "flow" programming (e.g., sports events and news programmes) that is excluded when calculating transmission time for linear services. However, it is also true that the nature of the latest offerings, as outlined above (e.g., new services based on sports content), suggests that closer attention should be paid to the question of whether certain genres that have historically been held to fall outside the "eligible hours" of linear services should now be considered to fall within them[21].

2.4. The methods used to calculate the share of catalogue

If, in relation to linear services, the reference to «greater proportion of transmission time» in Article 16 presents no issues in relation to its application, there are several methods for calculating share of catalogue for on-demand services. Thus far, different practices are evident in those Member States that have introduced such measures. In some Member States, for example in Italy, the method adopted bases this calculation on the total number of hours in the catalogue. However, several other States (e.g., Austria, the Czech Republic, Denmark, Croatia and Slovenia) base the calculation on

[20] See ERGA, *ERGA Analysis & Discussion Paper to Contribute to the Consistent Implementation of the Revised Audiovisual Media Services (AVMS) Directive*, 2018, 43.

[21] As an example, in France, sports events are also excluded from the quota in relation to on-demand services.

the number of titles or the number of episodes in the catalogue. Still others base the calculation on the level of access to the works or the percentage of works featured on the home page of the service[22].
The application of a method based on the number of hours or the number of titles in the catalogue may have significant repercussions, especially for catalogues that offer both cinematographic works and series. Series – in particular, medium and long-term series – obviously have a greater impact on hourly volume. For example, a series with 12 one-hour episodes in each season represents a single title, but will have an overall airing time of 12 hours, which corresponds to approximately six to eight film titles. On the other hand, the number of episodes may in turn constitute a relevant multiplier and be a partially "disruptive" factor – especially when both series and other works must be considered. Nevertheless, this solution is adopted in some Scandinavian countries, as episodes are regarded as independent editorial and productive units; it is not by chance that in the Anglo-Saxon world, they constitute the parameter on which the cast's pay is based. However, it is also true that none of these proposed criteria takes account of differences in production values.
In any case, the method based on number of hours in the catalogue incorporates an objective parameter which is difficult to manipulate and which also makes it possible to compare works of different types and sizes (it is no coincidence that the industry uses the hourly criterion to compare the production costs of serial works). On the other hand, the method based on number of titles is aligned with traditional methods of content presentation (each title is provided with its own "box," whether it is a film or a series that consists of many seasons).
In light of these considerations, and as noted in the introduction, the Directive identifies the method for calculating the 30% quota as one of three topics on which the European Commission has been called upon to issue guidelines, «after consulting the Contact Committee». At the time of writing, the Commission's work on this issue is ongoing; its outcome should afford greater certainty as to the criteria to be adopted in this regard.
Another important aspect relating to the method for calculating the share of catalogue concerns the temporal framework within which this calculation must be carried out. In establishing the 30% quota, the Directive sets out a generic provision without specifying whether this condition must be satisfied within a precise timeframe. While it is true that the same issue arises in relation to programming quotas for linear services, it is also true that the concept of transmission time makes the provision of timely interpretations easier; it is no coincidence that television channels' total annual broadcast time is generally used as the basis for such calculations. For on-demand services, however, the timeframe for calculation may become more important. For example, where the calculation method is based on the total number of hours in the catalogue over a year or the total number of titles in the catalogue over a year, this takes no account of the length of time for which these works remain available in the catalogue. In fact, a specific work may be available in the catalogue for just a few weeks or for the whole year, with obvious repercussions for viewers. The calculation method should

[22] See ERGA, *ERGA Analysis*, cit., 42.

thus take account of the timeframe for which the work is available in the catalogue. This factor is strictly tied to market dynamics, being influenced by distribution windows on the one hand and the duration of the rights to the works that the provider has acquired on the other.

2.5. The classification of content

Another issue relating to the method for calculating the share of catalogue concerns the need to classify content in order to determine which works fall within the accepted understanding of "European works." While an exhaustive analysis of this issue is beyond the scope of this study, a brief overview is useful here. This need can be traced back to the origins of the Directive and obviously relates not only to on-demand services, but to all AVMS. The starting point therefore remains the definition set out in the first version of the 1989 Television Without Frontiers Directive[23] and reiterated in Article 1, para. 1(n) of Directive 2010/13/EU, which identifies three types of works that may be understood as constituting European works: i) works originating in Member States; ii) works originating in European third States that are party to the European Convention on Transfrontier Television[24]; and iii) works that are co-produced within the framework of agreements relating to the audiovisual sector that have been agreed between the European Union and third countries, and that fulfill the conditions set out in such agreements. Furthermore, the works must be made by authors and workers who reside in one or more relevant States (i.e., Member States of the EU and States that have signed the Convention), provided that the work is made by, or under the supervision of, a producer which is established in a Member State; or, in the case of co-productions, that co-producers from such States make the most significant contribution to the total co-production costs[25].

However, it seems to have become more difficult to determine the origin of works according to this definition. The number of audiovisual works currently available to AVMS providers has dramatically increased since the definition was introduced, whether due to the proliferation of transmission modes (e.g., digital multi-channels, thematic channels, on-demand platforms) or, more simply, to the incremental effect of the accumulation of works over time. From a purely quantitative perspective, on-demand catalogues offer a significantly broader range of works than linear services[26]. Changing needs thus seem to require the adoption of instruments and methodologies that

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[23] Council Directive of October 3, 1989, on the coordination of certain provisions that are laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

[24] European Convention on Transfrontier Television of May 5, 1989, European Treaty Series, No. 132.

[25] In the Italian framework, the definition is provided by the Legislative Decree of July 31, 2005, no. 177, Article 1, para. 2, lit. *cc)*.

[26] According to data provided by the European Audiovisual Observatory of the Council of Europe in 2017, if, for example, one considers the number of titles in a catalogue that Netflix has presented, the total amount of items on offer amounts to about 7,000 single film titles (excluding television series,

can assist both providers and the regulatory authorities in determining which content falls within the boundaries of a European work and which should be excluded.
Recital 35 of Directive 2018/1808/EU should be read through this lens, since it stresses that «the labelling in metadata of audiovisual content that qualifies as a European work should be encouraged so that such metadata are available to media service providers». However, the Directive does not provide further clarification in this respect, and the meaning of the term "metadata" may be overly vague and lend itself to a variety of interpretations. Efforts should be made in this direction – potentially with the help of third parties such as the European Audiovisual Observatory of the Council of Europe and the Joint Industry Committee – to undertake the necessary "labelling" that is referred to in the Recital.

3. The prominence of European works

Article 13, para. 1, combines a quantitative obligation for on-demand providers to reserve a 30% share of their catalogues for European works with an obligation to give such works prominence.
As with the share of catalogue, the greatest novelty introduced by the new Directive, as compared to its predecessor, is that this prominence obligation has now become mandatory. Initially, this constituted an optional choice for Member States, and could be introduced as an alternative or an additional measure to the financial contribution obligation and the share of catalogue.
Recital 35 provides some insights on the interpretation of the term "prominence." First, it specifies that «prominence involves promoting European works through facilitating access to such works» – in other words, affording such works greater visibility so that viewers can easily access and select them. An important distinction may be made here with regard to linear services. Article 16 provides no indication of how linear providers should ensure that a share corresponding to the «majority proportion of their transmission time» is reserved for European works; nor does it specify measures that should be adopted so as to enable viewers to access them. It follows that certain works can be broadcast in time slots with smaller audiences – for example, late at night; and that there is no requirement to consider audience habits in relation to the use of such content. Where fulfillment of this obligation is to be measured by considering all television channels operated by the same broadcaster[27], the latter

documentaries and non-movie animated works), with national averages ranging between 2,000 and 2,500 titles, and peaks at higher than 3,000 titles in Ireland, Romania and the United Kingdom. As for television series, in 2017, Netflix presented between 500 and 1,000 titles in each market (with a peak of approximately 1,300 titles in the United Kingdom) and a number of episodes ranging from between 13,000 in Italy and 34,000 in the United Kingdom. On iTunes, the number of single titles surveyed in the different catalogues distributed in the Member States amounted to 32,000, with a median value for every market that ranges between 4,000 and 5,000 titles (with peaks of over 9,000 titles in Austria and the United Kingdom, and of over 10,000 in Ireland). These values are clearly much higher than those that could be reached by broadcasters. See *The Origin of Films in VOD Catalogues,* cit., and *The Origin of TV Content in VOD Catalogues*, cit.

[27] The Italian text of the AVMS Directive, in imposing the obligation, refers to "*emittente*;" the English

could concentrate all European works in certain services only, regardless of their level of visibility (i.e., their performance in terms of audience numbers), as long as the transmission time threshold was met as a percentage of total content broadcast[28]. The prominence obligation therefore seems rooted in an assumption that the architecture of on-demand catalogues is more complex than linear programming schedules. Notwithstanding that on-demand services allow for greater viewer engagement and greater autonomy in selecting content, the European legislature seems to have felt the need to impose a stricter definition of the methods that are required in order to fulfill the quota obligation. This was not felt to be necessary for linear services; or alternatively, the European legislature may have believed that in the case of scheduled services, such a measure would constitute excessive intrusion into the editorial decisions of broadcasters.

In recent years, this concept of prominence has been at the center of a robust debate at the European level. In the absence of a clear definition of "prominence" – and in the lack of criteria to be applied in this regard in the previous text of the Directive – the concept of prominence (which, according to the previous text of Article 13, should have been implemented «where practicable and by appropriate means», like all other measures in that provision) gave rise to diverse interpretations by Member States. Only a limited number of Member States transposed the concept of prominence into their national legal frameworks; and in many cases such transposition assumed the form of a general recommendation borrowed directly from the text of the Directive, which does not necessarily correspond to actual implementation[29]. Only in two cases – in Italy and in the Belgian French-speaking community – were detailed mechanisms introduced to define the fulfillment of the prominence requirement. Furthermore, only two Member States – France and, more recently, Italy (through approval of Decree No. 204 of December 7, 2017) – made this mandatory[30].

Italy introduced provisions on the prominence of European works in on-demand catalogues through Resolution 149/15/CONS, which was adopted by the Italian Communications Authority (*Autorità per le garanzie nelle comunicazioni*). Annex A of this resolution identifies 14 technical and editorial criteria through which to afford prominence to European works that are available through on-demand providers. Some of these relate to the "visibility" of the works in the catalogue as a whole or in main sections thereof; while others link the promotion of works to the dissemination of

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version of the Directive refers to "broadcasters;" the French to "*orgamisme de radiodiffusion télévisuel*." The transposition within national legal frameworks has given rise to several interpretations, which vary depending on whether all channels (or catalogues, in the case of on-demand services) belonging to the same operator are considered separately or whether cumulative mechanisms are allowed, as happens in Italy.

[28] R. Mastroianni, *Riforma del sistema radiotelevisivo italiano e diritto europeo,* Torino, 2004, 154 ss., expresses doubt as to whether the cumulative calculation criterion is aligned with EU law where several schedules are controlled by the same owner.

[29] In fact, a consultation of the database on the AVMS Directive, which is provided by the European Audiovisual Observatory, demonstrates that prominence measures have presently been adopted only in Austria, Belgium (both Flemish and Walloon communities), Greece, Croatia, Ireland, Italy, Malta and Romania.

[30] See ERGA, *ERGA Analysis*, cit., 44.

promotional clips or trailers, or the use of social media. Still others concern the inclusion of European works in «suggestions proposed to users, based on their previous viewer experience» and «in the communications sent to users containing information/ promotions on the programs of the on-demand audiovisual media service».[31] The Italian Communications Authority confirmed these criteria in the regulation that was introduced through Resolution 595/18/CONS[32].

The Belgian French-speaking community also adopted a co-regulatory approach, drafting a recommendation together with market operators to identify the most effective measures to ensure the prominence of European works in on-demand catalogues[33].

Recital 35 of the new Directive sets out a list of possible measures through which prominence can be achieved:

«Prominence can be ensured through various means such as a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example, by using banners or similar tools».

[31] On the European quota regime that previously applied to providers of VoD services, please see: E. Apa, *The Italian Perspective*, in S. Nikoltchev (ed.), *Video on Demand and the Promotion of European Works*, IRIS Special, European Audiovisual Observatory (Council of Europe), Strasbourg, 2013, 11 ss.; G. Rossi, *Produzione audiovisiva europea ed indipendente*, in F. Bassan-E. Tosi (eds.), *Diritto*, cit., 294 ss.; F. Pellicanò, *La tutela delle opere europee e della produzione indipendente*, in E. Apa-O. Pollicino (eds.), *La regolamentazione dei contenuti digitali*, cit., 365 ss..; A. Contaldo, *Lineamenti di legislazione cineaudiovisiva*, Aracne, Roma, 2016, 142 ss.

[32] Regulation on programming and investment obligations in favor of European works and works by independent producers, approved by Resolution 595/18/CONS of December 12, 2018, and amended by Resolution 24/19/CONS of January 22, 2019. The new regulation considers that the prominence of European works in catalogues has become an obligation for on-demand providers. This has entailed a modification of the mechanisms connected to the use of the prominence criteria, although the criteria and the scores that are attributed for their adoption remain unchanged. The previous regulation outlined a reward mechanism, which granted a 20% discount on the chosen quota, thus permitting a reduction of the quota from 20% to 16% of the total number of hours in the catalogue, and of the investment obligation from 5% to 4% of the net annual revenues. The new regulation divides the 14 criteria into two types: Type A, «*predisposizione nei propri cataloghi di una sezione dedicata nella pagina principale di accesso o una specifica categoria per la ricerca delle opere europee*» («an arrangement in their catalogues for a dedicated section on thehome page, or a specific category with which to search for European works»); and Type B, «*riserva di una quota alle opere europee nelle campagne pubblicitarie o di promozione dei servizi forniti*» («the reservation of a share for European works in advertising campaigns or in the promotion of the services provided»). Providers must achieve a minimum score for each (10 points for Type A, from a total of 27, and 15 points for Type B, from a total of 37).

[33] The instruments range from advertisements included on the home page of the service to the creation of specific dedicated categories, and the inclusion of European works in advertising campaigns and in the most attractive categories (i.e., "new", "last chance", "preferred"). On-demand providers must communicate the measures they have adopted to the relevant authorities and provide information relating to consumption of the works, with the aim of assessing their impact on use of the content. On the Belgian experience, please see the documents published by the Belgian regulator (the CSA), available at www.csa.be/breves/689.

The Directive thus identifies several solutions for ensuring the prominence of European works, encompassing "quantitative" solutions (a dedicated section accessible from the home page), research solutions (the possibility to search for European works) and marketing solutions (the use of European works in campaigns; the use of banners or similar tools to promote a minimum percentage of European works). It is interesting to note that none of the suggestions indicated in Recital 35 directly considers the number of European works that are included on the service home page. One possible explanation may be that users often access the catalogue through different routes that may "bypass" the home page – for example, through a search engine[34]. It should also be noted that the solutions advanced in the Recital are of limited value in the case of customization methods: in the case of many on-demand services, viewer recommendations are tailored to personal consumption habits, which are typically determined by the service's algorithm[35].

Despite the suggestions set out in Recital 35, the spectrum of measures to ensure the prominence of European works remains sufficiently broad; as does the discretionary power granted to Member States and their respective regulatory authorities in relation to the adoption of such measures. Beyond the fact that the suggestions provided in the Recital are not binding, it should be noted that – unlike in the case of the 30% quota – the Directive does not task the European Commission with elaborating guidelines to arrive at a more detailed definition of the prominence criteria. While this affords greater flexibility to on-demand providers, it also means that in the absence of uniformity, each country will be characterized by competition between services that adhere to different criteria as they relate to different jurisdictions: services offered in the country in which the provider is established will be competing against services offered in that same country by providers that are established in, and subject to the jurisdiction of, another State. While this is a normal consequence of the country of origin principle, it means that in this instance, the three primary obligations for the promotion of European works – that is, the share of catalogue, prominence and the financial contribution – will be differently reflected from a level playing field perspective. With regard to the share of catalogue, without prejudice to the country of origin principle, a certain degree of harmonization is guaranteed by the minimum compulsory threshold (30%) and by the guidelines that the Commission has been called upon to adopt. However, no such provisions are laid down on prominence: without prejudice to the mandatory nature of this requirement, there is no minimum general rule beyond the suggestions listed in Recital 35, and Member States thus enjoy broad discretion in interpreting the concept of prominence in the transposition phase. As far as the financial contribution is concerned, finally, Article 13, para. 2, provides for a derogation from the country of origin principle, allowing Member States to collect

[34] See *CSA-Conseil supérieur de l'audiovisuel*, *Effets économiques du décret n° 2010-1379 du 12 novembre 2010 relatif aux services des médias audiovisuels à la demande*, 2016, 12. The research was commissioned by the CSA from IDATE and the IFOP Institute.

[35] *CSA-Conseil supérieur de l'audiovisuel*, *Effet*, cit., 13, shows that, according to a survey conducted by IFOP on a representative sample of the Belgian population (over 15 years old), 79% of users interviewed on the use of 137 subscription-based VoD services claimed that they often or sometimes followed the proposed recommendations.

financial contributions from providers that are established in other countries (cf. section 4.3 below for a detailed analysis).

It may be interesting, in this regard, to consider a proposal formulated by the European Regulators Group of Audiovisual Media Regulators (ERGA), which seeks to set out internal guidance, based on actual examples, in order to facilitate a practical understanding of the term "prominence" based on input from industry experts, with the aim of identifying the most effective measures to give prominence to European works[36].

Another question that is relevant is whether greater visibility of European works corresponds to greater consumption of such works. In the French-speaking Belgian community, for instance, the Belgian media regulator, in the process of monitoring on-demand catalogues, compared the number of available European titles with their presence in the "Top 50" list of most popular titles[37]. Obviously, for the purposes of hypothetical evaluation and on a confidential basis, the possibility for supervisory bodies to obtain information relating to the levels and modes of consumption of different works from providers is a decisive factor in this regard.

Finally, thought should be given to how compliance with the prominence obligation is monitored. The nature of on-demand services renders verification of the actual adoption of such measures particularly complex, both for the supervisory authorities and for providers. As an example, where quantitative solutions are adopted, one must remember that on-demand catalogues are extremely open and are constantly changing and evolving, which may complicate an assessment of whether a certain number of European works are available in the catalogue. Measurement difficulties may also be encountered with regard to the evaluation of the search tool, or the quantification of European works included in advertising campaigns or other marketing initiatives.

4. The (direct and indirect) financial contribution

4.1. The subjective scope of application of the rules on financial contribution: on-demand and linear services

The second paragraph of the newly drafted Article 13 of the AVMS Directive states that:

«Where Member States require media service providers under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds, they may also require media service providers targeting audiences in their territories, but established in other

[36] See ERGA, *ERGA Analysis*, cit., 15.

[37] These results are discussed by Jean-François Fournemont in *Promotion of EUR works on line. Why prominence matters and what is at stake*, www.csa.be/system/documents_files/2159/original/JFF_20131118_presentation_Hearing_Brussels.pdf?1384786651.

Member States to make such financial contributions, which shall be proportionate and non-discriminatory».

While the previous Article 13, para. 1, set out a non-mandatory list of measures (share of catalogue, prominence, financial contributions) from which Member States could choose in order to ensure that on-demand AVMS providers promoted the production of, and access to, European works, paras. 2 and 3 of the new Article 13 deal exclusively with financial contributions.
Unlike the mandatory provisions that are laid down in Article 13, para. 1 in relation to the share of catalogue and prominence measures, the provision on financial contributions is left to Member States' discretion[38].
The paragraphs also differ in terms of their scope of application. Article 13, para. 2, refers to all AVMS providers, both linear and non-linear, and thus undermines the organizational structure of the previous iteration of the Directive[39], which dealt with linear services in Articles 16 and 17[40] and on-demand services in Article 13. The wording initially proposed by the Commission[41] also reflected the "traditional" approach, separating the provisions aimed at different types of providers into different Articles;

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[38] The provision's formulation is unusual, as it does not directly say that States may impose an obligation for a financial contribution to the production of European works: this possibility must be inferred, whereas the focus of the provision is represented by the derogation from the country of origin principle. This is confirmed by para. 6, which describes the provision currently being commented upon as «the requirement on media service providers targeting audiences in other Member States». The text originally proposed by the Commission was more linear: after having established that «Member States may request» a financial contribution from AVMS providers, it introduced the derogation from the country of origin principle. The structure of the provision was twofold: the first part expressly granted Member States an opportunity, and the second part shaped its scope, extending it also to AVMS providers which are established abroad. The final text of the Directive, however, adopted the wording proposed by the Council; it is unclear from this wording whether the provision grants Member States an opportunity, the basis of which can be traced to Article 13, or whether the first part is merely characterized by its reconnaissance nature and is limited to acknowledging a prerogative that is derived *aliunde* from Member States. Compared to television broadcasters, the source of this prerogative can be found in Article 17 of the AVMS Directive, relating to European works made by independent producers; however, there is no other regulatory coverage for on-demand services. The interpretation according to which States could already impose similar obligations was put forward by the Commission in proceedings relating to the German levy, but – as will be discussed later – the authors do not share this opinion (see *infra*, § 4.4). One can also refer to a different thesis, which envisages the reformulation of the provision by the Council as merely a stylistic choice intended to afford the text greater fluidity (even if this does not appear to have been a solid choice from a drafting standpoint). It should be highlighted that Recital 36, unaltered on this point, as compared to the version proposed by the Commission, establishes that «Member States should be able to impose financial obligations on media service providers established on their territory». The Recital is therefore coherent with a thesis that envisages the text proposed by the Council as being substantially equivalent to that proposed by the Commission, and as a text that was not intended to disregard the provision's innovative nature which grants Member States the possibility of introducing a financial contribution.

[39] As a consequence, the title of Chapter IV («Provision applicable only to on-demand audiovisual media services») has been deleted.

[40] For shares applicable to linear services, see M. Dolores, *La promozione delle opere audiovisive europee e la libertà di iniziativa economica – gli obblighi applicabili ai canali lineari*, in G. Abbamonte-E. Apa-O. Pollicino (eds.), *La riforma del mercato audiovisivo europeo*, Torino, 2019.

[41] On the Commission's proposal, see section 2.2 above, footnote 13.

but in its General Approach, adopted on May 23, 2017[42], the Council called for an extension of the scope of application of rules on financial contributions to television broadcasters. In a plenary session on May 18, 2017[43], the European Parliament voted in favor of maintaining the approach that had originally been proposed by the Commission. However, a compromise reached between the negotiators of the Parliament and the Bulgarian Presidency on June 6, 2018, at the end of the ninth trilogue[44], outlined the final structure of such rules, which would apply to all AVMS providers, both linear and on-demand. While Article 17 provides that Member States may impose investment obligations on broadcasters (as an alternative to programming quotas) in order to support European works by independent producers, it relates only to a specific type of European works; whereas Article 13, para. 2, refers to all European works without any further qualification.

4.2. The content of the contribution obligation: direct investment and contribution to national funds

As already noted, the introduction of an obligation for AVMS providers to contribute financially to the production of European works is left to Member States' discretion. In line with this approach, the rule makes no mention of the quantum of this contri-

[42] Doc. 9691/17. The agreement was reached based on the compromise text that was proposed by the Maltese Presidency; the Czech Republic, Denmark, Finland, Ireland, Luxembourg, the Netherlands, Sweden and the United Kingdom voted against the text, while Hungary abstained.

[43] On April 27, 2017, the Committee on Culture and Education approved, with 17 favorable votes, nine contrary and four abstaining, the report presented by the rapporteurs Sabine Verheyen, Christian-Democrat, and Petra Kammerevert, Social-Democrat, both from Germany. The proposal of the European Parliament's Committee on Culture and Education was published on June 9, 2016, and a draft version of the report of the two German rapporteurs was presented on May 10, 2016. Its final version was presented on May 10, 2017. The final report also incorporates amendments proposed by four other committees: The Committee on the Environment, Public Health and Food Safety (rapporteur Herbert Dorfmann, from Italy); the Committee on the Internal Market and Consumer Protection (rapporteur Emma McClarkin, from the United Kingdom); the Committee on Legal Affairs (rapporteur Daniel Buda, from Romania); and the Committee on Civil Liberties, Justice and Home Affairs (rapporteur Angelika Mlinar, from Austria). The amendments proposed by the Parliament called for an increase in the share of catalogue from the original 20% proposed by the Commission to 30% (as, when the report was published, the European average was already 27%), and the inclusion, within this quota, of works in the official language of the territory in which the service is provided. As for financial contributions, the Parliament envisaged the same approach as that adopted by the Commission, which limited their scope of application to on-demand services; but it also proposed adding a reference to «cultural and linguistic diversity». In its opinion of October 19, 2016, Raymond Hencks from Luxembourg, rapporteur of the European Economic and Social Committee, declared that he was: «opposed to the option granted to Member States to impose on on-demand services in their jurisdictions, as well as those established in a different Member State but targeting their national audiences, financial contributions in the form of direct investments in works or levies allocated to national film funds. This could distort competition, depending on whether or not a Member State introduces such contributions, and could penalize the audiovisual services of a Member State intended for its citizens established in another Member State». The European Committee of Regions' rapporteur, Jácint Horváth, in his opinion of December 7, 2016, focused on the share of catalogue, without expressing any position on the financial contributions.

[44] The agreement was confirmed, on behalf of the Council, by the ambassadors to the European Union on June 13, 2018; and this was followed by the position of the European Parliament on October 2, 2018. It was then sent for a Council Decision of November 6, 2018, for formal deliberation.

bution.
This obligation can take one of two different forms: Member States can opt for either an investment in content (a direct contribution) or a levy to allocate national funds (an indirect contribution). Both of these solutions were adopted by several Member States[45] under the previous text of the Directive. The difference in form should not be underestimated. In the case of direct contributions, the expenditure of AVMS providers constitutes an investment, from which they can expect a return. Providers are required to allocate certain amounts to the production of, or the acquisition of rights to, audiovisual works that they will exploit within the framework of their service offering.

[45] France, Italy, Spain and Portugal provide for direct investment in European works. In Italy, the framework that was in force until June 30, 2019 for on-demand media services allows providers to opt for a 5% (revenue) investment quota as an alternative to the 20% share of catalogue. However, as of July 1, 2019, the direct financial contribution is mandatory for these providers, as was already the case for linear providers. In Portugal, the obligation to invest in European works exclusively relates to the purchase of television rights, whereas the investment obligation in the production of content is limited to national works. A direct contribution is also required by the Walloon community of Belgium and by Hungary (although this is limited to broadcasters and only to national cinematographic works), as an alternative to the indirect contribution to the national fund and with the same percentages provided for the latter. In Greece, the contribution is limited to national cinematographic works. The Czech Republic and Slovenia are special cases, given that the direct financial contribution is a complementary measure to the share of catalogue. In the Czech Republic in particular, the obligation primarily concerns the programming quota for European works of independent producers, or the share of catalogue. However, if a broadcaster or on-demand provider does not reach the quota, the obligation is nonetheless deemed to have been fulfilled by the investment of 10% of the programming budget for linear providers, and 1% of the revenues for on-demand providers, in the production or purchase of European works. In Slovenia, if the 10% share of catalogue is not achieved, on-demand providers are required to invest 1% of their revenues in the production of, or purchase of rights to, European works. Other States currently provide an indirect contribution through the financing of a national fund: other than the above-mentioned cases of Belgium's Walloon community and Hungary, this is also provided for in Croatia, France, Germany, Portugal, the Czech Republic, Romania, Slovakia and Hungary (for broadcasters only); it is also provided for in Austria, although here the contribution is allocated to general taxation and not to a special fund. Austria, Germany, Poland, Romania and Slovakia exclusively provide for this form of contribution. In Portugal, it complements the direct contribution to achieve the quota. In France and the Czech Republic, both direct and indirect contributions are provided for; but only in France are both mandatory. Lastly, a limited number of States – the Belgian French-speaking community, Denmark, the Netherlands and Slovenia – oblige their public service providers to produce national works. Comprehensively, it is possible to state that, in its various forms, a direct or indirect contribution obligation has been introduced in about two-thirds of all EU Member States. However, only in certain instances does the contribution target European audiovisual productions; in many other cases, it appears more oriented toward promoting national cinematographic productions, whether through a fund or in some other way; and in some cases, this is limited to public service broadcasters. The investment quotas for both linear and non-linear services vary considerably across Member States, from Portugal's 1% of annual revenues to France's 26% of annual revenues, with Italy currently at 10% for private broadcasters, 15% for public entities and 5% for on-demand providers. However, the Italian law provides for incremental increases, the amounts of which are still under discussion at the time of writing (the law currently provides for a gradual increase, as from July 1, 2019, reaching a cap of 15% in subsequent years for private broadcasters, 20% for the public service broadcaster, and 20% for on-demand services). The percentages for indirect contributions are significantly lower: for linear services, they range between 1% and 2%, with the exception of France, which reaches 5.5%; for non-linear services, they range from Slovakia's 0.5% to Germany's 2.5%, which targets on-demand providers with an annual turnover exceeding €20 million. See the paper *Country of Origin Principle and financial contributions, EFADs – European Film Agency Directors*, available at www.efads.eu/wp-content/uploads/EFADs-AVMSD-FAQ-Country-of-Origin-and-financial-contributions-3.pdf; and especially the broad comparative study *Mapping of National Rules for the Promotion of European Works in Europe*, European Audiovisual Observatory (Council of Europe), Strasbourg, 2019.

If they choose wisely, such works may prove to be a judicious use of financial resources. This obligation limits providers' freedom of choice and their economic behaviour; but it nonetheless embodies an entrepreneurial logic, insofar as providers are free to choose which content to invest in – albeit within certain boundaries fixed by law. They can therefore profit from the capital they have invested – something which may also be relevant for the purposes of granting possible exemptions[46]. On the other hand, indirect contributions generate a fund from which the obligated party might benefit or not.

4.3. Financial contribution and derogation from the country of origin principle

Article 13, para. 2, introduces a significant novelty of the Directive: the possibility for Member States to «require media service providers targeting audiences in their territories, but established in other Member States, to make such financial contributions, which shall be proportionate and non-discriminatory». Recital 36 of Directive 2018/1808 justifies this provision by acknowledging the «direct link between financial obligations and Member States' different cultural policies».
This provision has significant practical and theoretical implications. The first is easily understandable if one considers the high number of AVMS providers targeting audiences in States other than those in which they are established[47]. Theoretically, this provision allows for derogation from the principle that the cross-border provision of services is exclusively regulated by the law of the country where the provider is established (i.e., the "country of origin" principle[48]), and not by the law of the State, or States, in which the services are provided (the so-called "country of reception" or "country of destination"). Therefore, even where AVMS are delivered in all Member States, the provider need only comply with the legislation in the State in which it is

[46] Italian administrative case law has rejected the position adopted by certain producers' associations which required thematic channel broadcasters to respect the obligations to invest in cinematographic works, even if their editorial line did not include the broadcasting of such works. In more general terms, it was argued that investment obligations could not be derogated from, for reasons relating to the editorial sphere; thus, the practice adopted by the Italian Communications Authority of granting derogations where works falling within the theme of the channel were not available on the market was unlawful. The case law has established that: «[l]*a tematicità del canale e la coerenza tra tale tematicità e i programmi da trasmettere è* […] *considerata sia rispetto agli obblighi di programmazione, che in relazione agli obblighi di investimento*» («the thematic nature of the channel and the consistency between this thematic nature and the programs to be broadcast is […] taken into account, both in regard to the programming obligations and to investment obligations») (TAR Lazio, sez. III (Third Section), May 23, 2018 (July 19, 2018), no. 8149, in particular § 6.1; see also TAR Lazio, sez. III (Third Section), May 23, 2018 (July 19, 2018), no. 8169 and Council of State, sez. VI (Sixth Section), 12 May 2009 (July 20, 2009), no. 4509).

[47] In 2016, about one-third of on-demand services in the European Union were specifically directed at a different Member State than that in which the providers were established: see *Audiovisual services in Europe – Focus on services targeting other countries*, European Audiovisual Observatory (Council of Europe), Strasbourg, December 2017, 22 ss.

[48] On the country of origin principle and the AVMS regulatory framework, see R. Craufurd Smith, *Determining Regulatory Competence for Audiovisual Media Services in the European Union*, in *The Journal of Media Law*, 2011, 263 ss.

established, in accordance with the conditions outlined in the Directive[49]. Following the reasoning of the Court of Justice, this principle also applies where a broadcaster is established in one Member State and broadcasts a channel that is exclusively directed at an audience in another Member State[50].

The review of the AVMS Directive presented an opportunity to debate critical issues relating to the application of the country of origin principle in the audiovisual sector which have emerged over the last 15 years in particular, following the advent of digital satellite transmissions and, more recently, over-the-top (OTT) services. These issues are strictly related to the practice of jurisdiction shopping, which is facilitated by the ease with which the AVMS Directive allows providers to circumvent the different laws of EU Member States and, regardless of the States they wish to target with their services, to establish themselves in the State which is most convenient[51] in terms of the regulatory burden and supervisory control (this latter point is often given less emphasis). In line with the case law of the Court of Justice, the Directive aims to combat the practice of establishing a company in one Member State in order to unlawfully avoid the application of rules in another. However, in light of the evidence, the existing rules have been shown to have little effect[52], given the vagueness of the criteria to as-

[49] Please refer to Article 3, para. 1 («Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive») and Recital 36 of the AVMS Directive («The requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Union law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States»).

[50] The Court of Justice outlined this reasoning in the case of VT4, which involved a company incorporated under the law of the United Kingdom and established in London whose primary activity was the broadcasting of radio and television programs in the Flemish language, recorded or subtitled in Dutch, and exclusively directed at the Flemish audience in Belgium. This company had a "branch" in Belgium, which aimed to maintain business relationships with advertisers and production companies, as well as programming the information for the news (ECJ, C-56/96, *VT4* (1997)). It should also be noted that the same Court of Justice also expressed the following rule of law: «the Treaty provisions on freedom to provide services are to be interpreted as not precluding a Member State from treating as a domestic broadcaster a broadcasting body constituted under the law of another Member State and established in that State, but whose activities are wholly or principally directed towards the territory of the first Member State, if that broadcasting body was established there in order to enable it to avoid the rules which would be applicable to it if it were established within the first State» (ECJ, C-23/93, *TV10 SA* (1994), § 26).
Although TV10 SA was established in Luxembourg and operated under Luxembourg law, it was mainly directed at a Dutch audience and it employed Dutch workers; advertising messages were also produced in the Netherlands. The Dutch authorities regarded TV10's office transfer to Luxembourg as a measure adopted exclusively with the intent of avoiding obligations relating to the pluralist and non-commercial content of programs imposed by Dutch law on national broadcasting operators (*Mediawet*), and concluded that the broadcaster in question could not be considered a foreign broadcasting operator; it should thus be subject to the same regulatory regime as that outlined for Dutch national broadcasters.

[51] See M.A. Wagner, *Revisiting the Country-of-Origin Principle in the AVMS Directive*, in *The Journal of Media Law*, 2014, 286 ss. The introductory paragraph very clearly demonstrates the thesis expressed in the work: «Recently, there have been calls to reconsider the country-of-origin principle in the Audiovisual Media Services (AVMS) Directive, prompted by the (re)location of major US audiovisual companies in 'regulatory havens' within the European union (EU), enabling them to take advantage of the country-of-origin principle and to avoid the heavier regulatory burdens of the countries to which they target their services».

[52] See L. Volman, *Is the cornerstone loose? Critical analysis of the functioning of the 'country of origin' principle in*

certain such avoidance, the probationary challenges[53] (although the Directive clarifies that there is no need to provide proof of the subjective element – that is, fraudulent intent[54]) and the difficulties presented by the procedure that must be undergone in order to ascertain and respond to the "circumvention"[55].
These implementation difficulties were also highlighted during a workshop arranged by the European Audiovisual Observatory of the Council of Europe:

«It may be argued that it is relatively easy to circumvent general Treaty criteria on establishment and that doubt remains in the case law as to precisely what might be involved in certain practical circumstances. The relativity of freedom of establishment and the circumvention clause ought to be underscored, as well as their apparent incompatibility. […] The circumvention principle still applies, notwithstanding sizeable difficulties concerning the burden of proof».[56]

The European Commission tackled the country of origin issue, along with many others, in its Green Paper entitled *Preparing for a fully converged audiovisual world: growth, creation and values.*[57] A public consultation was carried out in which the views of governments, national regulatory authorities, companies and other stakeholders were collected. There was widespread support for the country of origin principle: most stakeholders, including those companies operating in this sector, expressed their appreciation of the opportunities it provides. The Commission's investigation confirmed that the country of origin principle is considered necessary to ensure the functioning of the single

the Audiovisual Media Services Directive, taking into account the rapid changes in the audiovisual industry and the recent challenges brought by Brexit, passim. This work eloquently outlines the thesis supported and proposed in the present paragraph.

53 One could say that it is a *probatio diabolica*, given that even the fact that a provider provides no services in the State in which it is established is not, as such, considered proof of the abuse of rights («the mere fact that a service provider does not offer services in the Member State in which it is established cannot in itself be considered an abuse of this principle»); thus, with an implicit reference to the already cited case-law in relation to VT4, the European Commission in its document, *The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions*, MEMO/06/208, May 18, 2006).

54 On the role played by "intent" in the case law of the Court of Justice on circumvention, please see A. Herold, *Country of origin principle in the EU market for audiovisual media services: consumer's friend or foe?*, in *The Journal of Consumer Policy*, 2008, 31, 1, 21 ss.

55 See R. Mastroianni, *La direttiva,* cit., 85: *«appare evidente il favor del legislatore non sia affatto rivolto verso gli interessi dello Stato di ricezione, i cui poteri di reazione sono subordinati all'espletamento di un procedimento lungo e dall'esito incerto»* («it is clear that the legislator's favor is in no way directed towards the interests of the State of reception, whose powers of reaction are subject to the completion of a lengthy procedure with an uncertain result»).

56 See T. McGonagle–A. van Loon, *Jurisdiction over Broadcasters in Europe: Report on a Round-table Discussion of Background Materials*, European Audiovisual Observatory, Strasbourg, 2002, 10. This opinion is based on a different regulatory context than the current one: in fact, the authors state that «[t]he express intention to avoid jurisdiction must be proven», whereas the new Article 4, para. 3, lit. *b),* of the AVMS Directive excludes the need to demonstrate the fraudulent intent of the AVMS provider to avoid more rigorous rules».

57 The public consultation was carried out between April 24, and September 30, 2013, and 236 contributions were received and published. On September 12, 2014, the Commission published a 10-page Executive Summary and a 112-page Feedback Paper.

market, while the introduction of the country of destination principle is supported by a limited number of governments and national authorities (France, in particular, has taken a firm stand in its favor). The results of the consultation reaffirmed the cornerstone role that is played by the country of origin principle in the European audiovisual framework, a pillar upon which the single market was built[58].
Nevertheless, the issues highlighted above have encouraged the European legislature to introduce certain mitigating measures – for example, modification of the rule on the circumvention of more stringent national laws[59] (circumvention with respect to which, in the authors' opinion, the ability of Member States to respond has been – and still is, even after the introduction of the mitigation measures in the new Directive – very modest). From a practical standpoint, the so-called "carve-out" – which has the greatest repercussions for the country of origin principle – is represented by Article 13, para. 2, which incorporates within the AVMS Directive a rule reflecting the country of destination principle. Pursuant to the country of origin principle, an AVMS provider should comply only with the rules of the Member State in which it is established, given the irrelevance of the fact that the services of which it is editor have a cross-border nature and are distributed in other EU countries. Instead, the new Article 13 of the AVMS Directive, by derogating from the country of origin principle, grants the target State the possibility to require from a provider a financial contribution for the production of European works, even if that provider is not subject to its jurisdiction. A very limited exception[60] has thus been introduced – one that partially responds to the need for cultural diversity[61] and that partially takes into consideration the requests of those countries that fear they are becoming passive markets. It must be acknowledged that the concept of cultural diversity is somewhat vague[62]; and where there is no clarity on the objective pursued, uncertainties concerning the suitability of the instruments devised to pursue it[63] will increase, just as there is a greater risk of the

58 See R. Viola, *La riforma del quadro normativo dell'audiovisivo tra mercato unico digitale e valori fondamentali*, in G. Abbamonte-E. Apa-O. Pollicino (eds.), *La riforma del mercato audiovisivo europeo*, Torino, 2019.

59 On the country of origin principle, and with specific reference to the new text of the AVMS Directive, please refer to R. Mastroianni, *Country of Origin e principio di territorialità*, in G. Abbamonte-E. Apa-O. Pollicino (eds.), *La riforma del mercato audiovisivo europeo*, Torino, 2019.

60 W. Schulz–T. Grothe, *Caution, Loose Cornerstone; the Country of Origin Principle under Pressure*, 2016, on the Media Policy Project Blog of the London School of Economics and Political Science, according to which «specific cultural needs of member states […] justify setting limits to the application of the country of origin principle. This category should be a narrow one».

61 The following thesis is quite widespread: P. Sammarco, *La produzione audiovisiva europea*, in V. Zeno-Zencovich (ed.), *La nuova televisione*, cit., 70, pursuant to whom the cultural diversity objectives «*sembrano più affermazioni di principio (non prive di retorica) dirette a proteggere il mercato europeo dell'audiovisivo che effettivamente il comune patrimonio culturale*» («appear to more closely resemble statements of principle (which are not without rhetoric) that are aimed at protecting the European audiovisual market, rather than the actual common cultural heritage»).

62 E. Psychogiopoulou, *The Cultural Facet of the EU Media Policy: Matching Rhetoric to Reality?*, in K. Donders-C. Pauwels-J. Loisen (eds.), *The Palgrave Handbook of European Media Policy*, Basingstoke, 2014, 198, underlines that «the European institutions have no clear or widely shared ideas concerning the concept of cultural diversity as such. In developing action addressing the audiovisual sector in particular, the absence of clear parameters regarding how the notions of culture and cultural diversity should be understood has produced conflicting results».

63 *Ibid*.

"heterogony of ends". This is not the place for a discussion on such complex subject matter; but this risk may be feared as much for its implications for the *exception culturelle*[64] as for the audiovisual single market. The latter may have different outcomes than those envisaged, leading to cultural homogenization in terms of both content and expressive styles, in favor of a dominant model (perhaps similar to the non-European paradigms[65]).

4.4. The German levy: an *ante litteram* application of the country of destination principle

Article 13, para. 2, of the Directive is the result of both a policy debate and actual initiatives undertaken by Member States which, under the previous AVMS Directive, began imposing a so-called "levy" on providers established abroad. In so doing, they prepared the field for a "mitigation" of the country of origin principle.

Reference must be made in this regard to the law regulating the measures adopted to promote German cinema (*FFG in der Fassung des Siebten Änderungsgesetzes*)[66]. In Germany, at a federal level, the audiovisual sector is financed by a levy (*Sonderabgabe*) to which a number of operators are subject; these contributors range from television broadcasters to cinema exhibitors, from producers to on-demand providers. In light of technological innovations, the increase in on-demand audiovisual media services and the ease with which providers established in one State can offer services in other States without incurring additional costs[67], Article 66 of the FFG was modified to also encompass on-demand media service providers that are established in other States within the scope of the levy's application, and has consequently extended to those providers access to the benefits provided by the fund financed by that same levy[68]. The taxable base was identified as the turnover from services that meet the criteria for accessing

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[64] See J. Harrison, *French Cultural Protectionism*, in *The Orator*, vol. 2, 2017, 104: «Some people, including the French government, argue that cultural protectionism makes sense and maintains cultural diversity. These people argue that by protecting individual cultures and not allowing them to blend together or influence one another, we end up with a greater cultural plurality. The opposite argument has also been made, however, stating that the French policy of cultural protectionism decreases its competitive edge in the international market. Those who oppose cultural protectionism also claim that by limiting the flow of ideas, you create a nearly static culture, which is not a true national culture at all».

[65] As noted by I. Katsirea, *The Television Without Frontiers Directive*, in K. Donders-C. Pauwels-J. Loisen (eds.), *The Palgrave Handbook*, cit., 303: «[t]he assumption that European cultures share greater affinity is questionable. Europe embraces a multiplicity of very different cultures, which often display stronger ties with their non-European counterparts».

[66] The FFG was submitted to the European Commission twice: after the first approval of the measure, which occurred through the Commission's decision on December 3, 2013 in the SA. 36753 case on state aid – *Germany, Filmförderungsgesetz*, on May 4, 2014, Germany notified a new version of the law, described in the text.

[67] See para. 10 of Decision (EU) 2016/2042, adopted by the Commission on September 1, 2016, on state aid SA.38418 – 2014/C (ex 2014/N), which Germany is planning to use in favor of financing for cinematographic production and distribution.

[68] The actual possibility for foreign providers to benefit from the public funding provided by the levy has been a decisive factor in excluding the infringement of Article 110 of the Treaty on the Functioning of the European Union.

those benefits that are financed by the levy – that is, the online supply of audiovisual content in the German language and the addressing of viewers residing in Germany – with the additional condition that the turnover must not have previously been subject to a similar levy in the State in which the provider is established.
Following the Commission's reasoning, Article 66 of the FFG is compliant with the AVMS Directive (previous text), given that:

«An interpretation according to which the country of origin principle, as laid down in Article 2(1) of Directive 2010/13/EU, applies to a tax such as the one in question, leads to situations in which providers active on the same market are not subject to the same obligations. In fact, an interpretation which would require a Member State to exempt VoD providers specifically targeting its audience but being established in another Member State from a contribution to the promotion of European works would discriminate against providers established in the former Member State which are subjected to a tax, while they are competing on the same market»[69].

It should be noted that the framework envisaged by the Commission – in which providers that are active in the same market are subject to different rules, with repercussions in terms of market distortions – is a normal consequence of the application of the country of origin principle within a minimum harmonization system (e.g., pay-television channels in Italy are subject to stricter advertising limits than competitors which, although also active in Italy, are subject to another State's jurisdiction). The *Sonderabgabe*'s conformity with the AVMS Directive was acknowledged when the previous text was valid; since the decision follows the proposal to revise the Directive, the Commission was able to take it into account and «consider[ed] the proposed wording of Article 13 of Directive 2010/13/EU as a clarification of what could already be possible under the Directive […] in force [in 2016]».[70] This latest conclusion seems to have been reached due to the fiscal or para-fiscal nature of the imposition, which as such seems to fall outside the scope of application of the AVMS Directive. In the authors' opinion, a similar conclusion could not have been reached based on the old text of the Directive if the object of the imposition was a direct contribution, which should have been subject to the country of origin principle. A different reasoning would deny the innovative nature of Article 13 and would also be incongruous with the focus dedicated to the provision in the development phase of Directive 2018/1808.
The German initiative, perhaps even more than the concurrent French initiative[71], has

[69] Paragraph 60 of Commission Decision (EU) 2016/2042 of on the state aid framework SA.38418, cit.

[70] Paragraph 59 of the Commission Decision (EU) 2016/2042 of September 1, 2016 on the state aid framework SA.38418, cit., reads as follows: «this article, also when applied for the purpose of this Decision, could not be considered as attributing an exclusive competence to the Member State where the provider is established for the taxation of on-demand media service providers so as to contribute to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service».

[71] Reference is made to the levy collected by the *Centre National du Cinéma et de l'Image Animée*, which finances the French fund for the production of new audiovisual works. The levy dates back to 1993 and was initially directed at home video, but since 2004 has also applied to on-demand services. Law No.

made a significant impact and helped to push the European legislature toward introducing mechanisms to derogate from the country of origin principle: the new Article 13, para. 2, of the AVMS Directive has been shaped, or at least inspired, by the example of the levy envisaged in the FFG.

4.5. Media service providers "targeting" audiences in other Member States

As previously stated, by derogating from the country of origin principle, a Member State that requires a financial contribution to European works from AVMS providers that fall under its jurisdiction may also require this from providers established in other Member States that are "targeting" audiences in its territory.
The scope of this requirement that an audience be "targeted" is open to several interpretations. Recital 38 of Directive 2018/1808 offers guidance by outlining some indicators:

«A Member State, when assessing, on a case-by-case basis, whether an on-demand audiovisual media service established in another Member State is targeting audiences in its territory, should refer to indicators such as advertisements or other promotions specifically aiming at customers in its territory, the main language of the service or the existence of content or commercial communications aiming specifically at the audience in the Member State of reception».

The indicators set out in this Recital are advertising and, generally speaking, commercial communications (to assess the targeted State, one must consider language and other circumstances – e.g., the advertising of a national telephone operator whose services are available only in a certain State); the main language of the services (including media services that present content in several languages, as is often the case with on-demand services, which almost always also offer content in their original language); and other content that specifically targets the audience of a certain State.
Recital 38 almost entirely copies the text of Recital 42 of Directive 2010/13/EU[72],

2013-1279 of December 29, 2013 has further expanded the levy to encompass pay-VoD services that are established abroad, although this levy is limited to turnover that is made in France. Finally, Law No. 2016-1918 of December 29, 2016, has also extended this levy to platforms that freely provide audiovisual content. However, the laws of 2013 and 2016 were subject to notification to the European Commission; thus, their validity remained suspended. The European Commission approved such measures through decisions dated July 7 and 18, 2017 ; shortly afterwards, on September 21, 2017, Decree No. 2017-1364 of September 20, 2017, *fixant l'entrée en vigueur des dispositions du III de l'article 30 de la loi n° 2013-1279 du 29 décembre 2013 de finances rectificative pour 2013 et des I à III de l'article 56 de la loi n° 2016-1918 du 29 décembre 2016 de finances rectificative pour 2016, JORF N°0221 du 21 septembre 2017* was issued and published in the *Journal Officiel*. This Decree amended Article 1609 *sexdecies* B of the *Code général des impôts,* whose provision, beginning from September 22, 2017 – the day after its publication – also applies to platforms freely providing audiovisual content and providers of pay-VoD services that are established abroad. See A. Blocman, *"YouTube tax" comes into force*, *IRIS*, 2017-9:1/12, newsletter of the European Audiovisual Observatory of the Council of Europe, available at merlin.obs.coe.int/iris/2017/9/article12.en.html.

[72] «A Member State, when assessing on a case-by-case basis whether a broadcast by a media service

with a few exceptions: the latter, by referring to advertising, considers its origin rather than the audience it aims to reach. It also includes in the list revenues generated by subscriptions; and above all, it aims to assess whether a service «is wholly or mostly directed» to the «territory» of a State. By contrast, the new Recital addresses the question of whether a service is «targeting» (without further specifications) [73] «audiences in [the] territory» of a Member State.

As regards the two parameters – that is, the origin of the advertisement versus the audience to which it is directed – the latter, as proposed in the new Directive, appears more pertinent. For instance, consider a case in which a media service that is established in the Netherlands shows an Italian language advertisement for a Dutch beer by sponsoring a special deal that is offered in the Italian territory. If one considers the origin of the advertisement, this element points to the Netherlands. However, for the purposes of determining the territory to which the service is directed, it seems more appropriate to highlight those elements that identify the viewers to whom the promotional message is addressed.

The second indicator, relating to revenues generated by subscriptions, has been deleted. However, this has had no practical repercussions, given that the list provided is merely illustrative and not exhaustive. In the authors' opinion, however, revenue streams – especially today – are a valid and significant indicator (albeit one excluded from the text of the Recital that focuses on on-demand services), particularly in light of the European framework on value added tax, which facilitates the identification of the State in which revenues deriving from «services provided through electronic means» are generated.

Finally, one must address the most relevant hermeneutical question to hand: the difference between a service that is «wholly or mostly directed» toward the territory a State and one that is «targeting» audiences in a territory. Several discussions have arisen concerning whether these concepts overlap or diverge. It should be noted that the concept of a «service wholly or mostly directed at the audience of another Member State» is also referenced in Directive 2018/1808, albeit in a different context – that is, by Article 4 and the newly coined Article 30a of the AVMS Directive, in the context of combating or preventing abuses of the country of origin principle. In the authors' opinion, in light of this circumstance, and by comparing Recital 42 of the previous Directive and Recital 38 of Directive 2018/1808, it is possible to conclude that "targeting" the audience in a certain territory cannot be considered synonymous to being "wholly or mostly directed" at a territory, but rather refers to something narrower. The new Directive links the financial obligations imposed on providers established abroad

provider established in another Member State is wholly or mostly directed towards its territory, may refer to indicators such as the origin of the television advertising and/or subscription revenues, the main language of the service».

[73] On the interpretation problems posed by the two concepts, please refer to ERGA, *ERGA Analysis*, cit., 48. P. 59 reports the difficulties encountered by various national authorities in applying the criteria of Recital 42 of the AVMS Directive. A footnote on p. 71 reports the experience gained by the Italian Communications Authority in the suppression of copyright infringements on the Internet (Resolution 680/13/CONS), which is indicated as best practice to draw on in the identification of services that, although established elsewhere, "address" the audience of a State.

to less stringent criteria than those required to respond to circumvention of national laws. Articles 4 and 30a of the new Directive are directed at resolving "pathological" cases which may lead to derogations from the country of origin principle, exceptionally and following particularly onerous proceedings; while derogation from the country of origin principle in Article 13, as a normal, "physiological" aspect of the system, is possible if more "lenient" parameters are satisfied.
For a service to be qualified as "targeting" a State, and therefore as potentially being subject to the financial contribution imposed by that State, it is not required to be "wholly or partly directed at" that State. Moreover, the same media service can "target" a plurality of countries (and thus be subject to contribution obligations in favor of European works in any of those countries – always, of course, within the limits of the revenues earned there), while it can be "wholly or partly directed at" only one country (according to the law, each service is subject to the laws of a single jurisdiction only, so it would be incongruous to claim that a service can escape the laws of more than one jurisdiction). The question surrounding the minimum requirements for a service to be considered to be "targeting" a State remains unanswered: is a certain degree of customization of the service required in respect of the audience in the State that intends to impose the financial contribution? And is the implementation of certain measures to efficiently reach the audience in a certain State, or the mere accessibility of a service by users in a certain State, sufficient grounds to impose the financial contribution?

4.6. The calculation basis for financial contribution

Pursuant to Article 13, para. 3, of the AVMS Directive, where a Member State, in exercising its prerogative under para. 2, imposes a financial contribution on a provider targeting audiences in its territory, this contribution shall be based exclusively on the revenues earned in the targeted State. Furthermore, «if the Member State where the provider is established imposes such a financial contribution, it shall take into account any financial contributions imposed by targeted Member States».
Both of these parameters reflect a precise *ratio*. On the country of destination side, this is rooted in the new regulatory framework, which limits itself to revenues generated exclusively in the distribution market; any other claim made by a country other than the country of origin would be devoid of legal, political or economic justification. On the contrary, the country of origin may impose obligations that affect all the activities of providers under its jurisdiction; but this power is now limited by new prerogatives of the country of destination, which the country of origin must take into consideration to avoid double taxation of the same revenues. In the event that a financial contribution was imposed both by the country of origin (on the total turnover) and by a country of destination (for the share of turnover generated in its territory), a portion of that turnover would clearly be burdened twice – which is exactly what the legislature wants to avoid, as expressly stated in Recital 39 of Directive 2018/1808[74]. The solution identified in the new Directive is that the contribution in the country of origin should be

[74] Recital 37 also tackles the imposition on the same provider of several contribution obligations by

recessive, compared to that of the country (or countries) of destination. This solution takes the opposite approach to the German levy, as discussed above: as the levy was unilaterally adopted by Germany, without any coordination with other Member States, the German law itself had to specify remedial measures through which to counteract possible "double-dip" situations. Deducting amounts paid by providers in the country of origin was therefore a mandatory move. By contrast, the Directive obliges the country of origin to shape its regulatory framework in such a way as gives priority to the countries of destination for taxing revenues generated in the targeted State.

4.7 Enforcement issues

The reporting obligations under the new Article 13 are substantially modelled on the existing obligations, with two major differences: i) Member States are now required to report to the Commission once every two years, instead of four; and ii) the report will also encompass information on the financial contributions of linear providers.
This section will briefly attempt to highlight the problems that may arise in relation to the uniformity of the controls relating to financial contributions when applying the Directive[75]. The key issue is the dichotomy between the country of origin and the country of destination, which also applies in respect of enforcement. For example, although Italy also imposes investment obligations on AVMS providers which are established abroad, the Italian Communications Authority, adopting a self-restrained approach in its implementing regulation[76], has established that it will acquire turnover data indirectly, «*per il tramite dell'organismo di vigilanza preposto presente nello Stato membro dove*

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different Member States at the same time; however, it does so from a different perspective. To address the double imposition, Recital 39 requires a calculation to differentiate, from those obligations imposed by the State of establishment, the percentages of investment or tax levied by the State of destination. Furthermore, it refers indiscriminately to both linear and on-demand services. On the other hand, Recital 37 focuses only on television broadcasters and, instead of moving within the boundaries of the arithmetical logic of tax mechanisms, requires a more flexible assessment that is aimed at achieving a structure which is in line with the principle of proportionality. By emphasizing the circumstance that broadcasters (currently) invest more than on-demand providers in European works, this seems to act as a partial counterweight to the extension of the carve-out principle to linear service providers, when it was initially intended for on-demand services.

[75] One should remember that the country of origin already has data relating to the revenues generated by AVMS which are distributed online and that constitute the tax base for the imposition of value added tax, given that this tax for such services, as defined in Directive 2008/8/EC as «electronically supplied services» is applied according to the country of destination principle.

[76] The framework introduced in Italy by the so-called "Franceschini Decree" (Legislative Decree of December 7, 2017, no. 204) pre-emptively solves the problems stemming from coordination with other Member States, as it provides that all on-demand AVMS providers – whether established in Italy or in other Member States – are subject to the investment obligations in proportion to their turnover earned in Italy only. While, pursuant to the Directive, this limitation is necessary for services that are established abroad and are also distributed in Italy, the same cannot be said for services that fall within the Italian jurisdiction, whose revenues could be considered in total, applying *ad hoc* corrective measures in specific cases of services distributed in other EU Member States that impose contribution obligations. Italian law waives the right to calculate the contribution on the non-Italian turnover of on-demand providers established in Italy, so there is no need to make adjustments where financial contributions are imposed in the country of destination of such services.

il servizio è stabilito, ovvero anche per il tramite dello European Regulators Group for Audiovisual Media Services (ERGA)» («through the supervisory body of the Member State where the service is established, or also through the European Regulators Group for Audiovisual Media Services (ERGA)») (Article 6, para. 5)[77].

It is therefore possible to understand the reasons for favoring mechanisms which are similar to international letters rogatory: respecting those authorities with jurisdiction over services that are established abroad; simplifying communications with foreign providers that might not have personnel in Italy; avoiding the challenge for providers of entertaining relationships with a variety of national authorities and so on. However, it is also possible to argue in favor of solutions requiring that the country of destination manage directly both investigations and sanctions relating to compliance with the obligations. This is a situation in which the country of origin principle is derogated from, and as a general rule, the power to impose obligations is necessarily related to the power to undertake the related supervisory activities and to impose sanctions in case of non-compliance[78].

5. Exemptions

Article 13, para. 6, provides that the obligations laid down in the first two paragraphs of Article 13 do not apply to AVMS providers with either a low turnover or low audience. Member States will therefore have to introduce exemptions that are based on quantitative criteria. They can also grant qualitative exemptions where compliance with the obligations «would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services».

In the previous version of the AVMS Directive, the programming/catalogue and investment obligations were presented in extremely flexible wording. In relation to on-demand providers, Member States were given an extremely generic objective in this regard (see sections 1 and 2.1 above); while for television broadcasters, the expression «*where practicable*»[79] offered (and continues to offer) a legal basis for derogations from national frameworks[80].

Derogations in favor of all providers are also allowed under the new Directive. Der-

[77] On the other hand, the Italian Authority considers that AVMS providers established in other EU Member States are also subject to the obligation to communicate their "*Informativa Economica di Sistema*" – an annual declaration relating to their economic data, which is collected for various purposes (e.g., the protection of media pluralism, updating the statistical base, carrying out market analysis).

[78] ERGA, *ERGA Analysis*, cit., 81, outlines the thesis supported in the text and the counterargument, pursuant to which: «one may argue that the COO Principle should in any case apply to enforcement procedures, despite the fact that this specific area is not covered by the Directive, for reasons that include consistency and legal certainty for media service providers (considering that the latter otherwise would be subject to potential sanctions by more than one NRA, and they may have to plead their cases before several judicial authorities that are located in more than one Member State)».

[79] O. Castendyk, *Promotion of Distribution and Production of Television Programmes*, in O. Castendyk-E. Dommering-A. Scheuer, *European Media Law*, cit., 452.

[80] Before the implementation of the new Directive into national legal frameworks, about a dozen Mem-

ogations for linear providers are still covered by the expression «where practicable» which is included in Articles 16 and 17, whose obligations need be met only «where practicable and by appropriate means». These are now complemented by Article 13, para. 6, which allows for derogation from the share of catalogue and prominence obligations; since these obligations apply only to on-demand services, derogation will inevitably benefit on-demand providers only. Moreover, since the investment obligations that are referred to in Article 13, para. 2 (and applicable to both linear and on-demand services) are left to Member States' discretion, the latter may decide whether to introduce them and, therefore, whether to provide for derogation. More precisely, although the wording of the provision is rather convoluted, it indicates that where a State imposes an investment obligation on cross-border services, that same State will also be obliged to provide for derogations therefrom in the case of services with a low turnover or low audience[81]; while the introduction of such "quantitative" derogations for domestic services on the one hand, and "qualitative" derogations for domestic and cross-border services on the other, remains optional.

The reasons for this legislative policy are stipulated in Recital 40 of Directive 2018/1808 as the need to avoid jeopardizing the development of the market or the entry of new players. The same recital specifies that, depending on the nature of the service, the concept of «*low audience*»[82] may refer to either viewing time or sales. It may be inferred that the viewing time criterion can be applied to all services – both paid-for and free,

ber States exempted on-demand providers from the obligations based on the thematic nature of the catalogue or the size of the provider, or both. Fewer than ten States (including the Belgian French-speaking community, Croatia, Finland, France, Poland, the United Kingdom, the Czech Republic and Spain) provided an exemption from the calculation of the share of catalogue for certain genres – essentially, those excluded from transmission time (i.e., news, sport events, games, adult content) – pursuant to Article 16 of the Directive. Consequently, a catalogue consisting exclusively of one (or more) of these genres should be exempt from the obligations. In France, as for linear services, thresholds apply that are linked to the number of works of the genre included in the catalogue: in the case of fewer than 10 audiovisual or cinematographic works, the catalogue is exempt, respectively, from the obligations relating to one or other genre. Interestingly, Poland exempts catalogues that are dedicated to particular non-European productions, such as Asian or Latin-American works. In Italy and Slovakia, the thematic nature of the catalogue may represent a reason for granting a derogation by the regulatory Authority. Other States provide exemptions relating to the economic size of the provider or the service. In Italy, services with a turnover of under €100,000 are not required to obtain authorization and are therefore exempt from the obligations on the promotion of European works; furthermore, providers may seek an exemption from the Authority if their market share is lower than 1%. In Belgium, the threshold under which an exemption is available is €300,000; whereas in Germany, providers with a turnover under €750,000 are not obliged to invest in the national cinematographic fund. Greece provides an exemption for small providers.

[81] See ERGA, *ERGA Analysis*, cit., 82: «[i]t is also worth noting that the revised Directive limits the possibility of exemptions from financial contribution obligations exclusively to those media providers targeting audiences in other Member States»; in line with this thought, 8, footnote 9. The referenced text, however, rather than referring to «the possibility of exemptions», should refer to an exemption "obligation". The exemption "obligation" is, in fact, limited by Article 13, para. 6 to cross-border services; whereas the "possibility" to obtain an exemption is also open to domestic services due to the reasons illustrated, albeit briefly, in the text.

[82] The aforementioned paper presented by ERGA, *ERGA Analysis*, cit., 82, suggests that the Commission's guidelines on monitoring the application of Articles 16 and 17 of the AVMS Directive, issued in 2011 and referred only to linear services, may constitute a reference point for the definition of a low audience. Pursuant to such guidelines, broadcasters with an audience share lower than 0.3% may be exempt from the reporting obligations, as these would be disproportionately burdensome as compared

linear and non-linear (although the thresholds should differ, given that audience surveys have resulted in highly uneven data being available in relation to free services – which are financed exclusively by advertising revenues – and paid services). The sales criterion is suitable for both pay-per-view and TVoD services.

Meanwhile, the concept of «*low turnover*» (which is applicable to both free and paid services) should consider the different dimensions of national audiovisual markets in Member States. The turnover thresholds should be proportionate to the market to which they refer: if they are calculated on an absolute value, lower thresholds should be specified for services offered in small markets. Article 13, para. 7, calls upon the European Commission – after consultation with Member States through the Contact Committee – to publish guidelines on the definitions of «low audience» and «low turnover».

To this end, the European Commission is now consulting with Member States and service providers in order to identify the most appropriate indicators for these definitions – considering also that the list of criteria set forth in the Directive, as well as being somewhat generic, is not exhaustive and other criteria may thus also be envisaged. In principle, low turnover may be inferred by looking at the provider's market share – which would be better than a revenue limit set in absolute terms, because market share implies that the size of the market is taken into account. In the authors' view, national measures that exempt providers which are considered, under indicators other than those listed above, to be small providers or to be temporarily in a position of weakness (e.g., providers which have reported losses[83] or which are in the start-up phase[84]) may be considered to be compatible with para. 6.

The exemptions that depend on the nature or theme of the service aim to respect the editorial freedom of AVMS providers, which is the most important aspect to be protected by this provision. Services dedicated to a specific programming genre (e.g., sitcoms), theme (e.g., country music) or targeted audience (e.g., pre-school children) may therefore be exempt if this editorial stance is incompatible with compliance with the obligations set out in Article 13. There may be diverse reasons for such incompatibility – for example, because a certain genre is not a focus of European producers, or because the volume of works of a certain genre available on the European market is insufficient to allow all providers to comply with their obligations. The incompatibility may also result from a combination of factors, such as genre and theme (e.g., services focused exclusively on baseball documentaries), or language and target (e.g., cartoons directed at an adult audience). Services might further be exempted from these obligations because compliance, although not impossible, would be unjustified – this might be the case, for example, for news services, services dedicated to home shopping, services directed at specific ethnic communities and providers that produce programs

to their size.

[83] For example, Italian law provides that derogations may be granted to AVMS providers that did not make a profit in each of the last two years of activity.

[84] For example, in France, Article 6 of Decree No. 2010-1379 provides that on-demand providers reach the investment threshold gradually over their first three years of operation, as provided for in Articles 4 and 5, with lower percentages applicable in the first and second years.

themselves.
In the authors' opinion, exemptions may be provided *ex lege* as *de minimis* thresholds, below which the obligations shall not be applied; or may take the form of derogations granted by the competent authorities under specific procedures. In the case of quantitative parameters, it will be possible to determine thresholds, as these are measurable: for example, the French legislation exempts services with catalogues that include, on an annual basis, fewer than 10 cinematographic works from compliance with the obligations relating to films. In the case of qualitative parameters, such as those relating to the type of programming, services dedicated to certain genres may be excluded (e.g., services dedicated to sports); but since the variety of editorial choices available is limited only by the imagination and cannot be locked into a predefined taxonomy, the impracticability of certain obligations will necessarily have to be assessed by the Authority that is responsible for granting derogations.
Programming and investment obligations that are imposed indiscriminately on all providers, without due consideration of the different approaches that they must adopt in order to compete in a market that is characterized by an abundance of content, risk missing the central objective of the Directive – that is, to encourage the development of the sector – or even becoming dysfunctional[85]. Instead, appropriately calibrated quotas and provisions for derogation that are anchored to reasonable prerequisites afford the necessary flexibility[86] to a system of obligations that otherwise would be too burdensome for the editorial freedom of private companies[87].

6. Concluding remarks

[85] As highlighted by the Italian Communications Authority in its survey on the audiovisual production sector, which was approved by Resolution 582/15/CONS: «*l'articolato sistema di sotto-quote a favore delle opere cinematografiche di espressione originale italiana* […] *ha dato luogo, non a caso, a un ampio ricorso a istanze di deroga. Si pensi, a questo proposito, alla posizione dei canali televisivi tematici che - pur non essendo soggetti, data la loro natura, a obblighi di programmazione – sono tuttavia gravati da obblighi di investimento*» (at 167) («the articulated system of sub-quotas in favor of cinematographic works of Italian original expression […] has given rise to an ample recourse to derogation appeals. In this context, for example, one must consider the position of thematic television channels which, given their nature, while not being subject, to programming obligations are any way, burdened by investment obligations»).

[86] The importance of derogations as a key element of flexibility has been acknowledged by the Italian Council of State which, in its advisory opinion on the Italian framework on the promotion of European works, expressed the following position: «*[n]é sembra potersi lamentare la mancanza di flessibilità nella fissazione degli obblighi, atteso che* […] *resta la possibilità di conseguire deroghe in relazione a specifiche situazioni*» («one cannot contest the lack of flexibility in imposing the obligations, given that […] one can always pursue derogations in relation to a specific situation») (Council of State, Advisory Section for Normative Acts, Opinion no. 2287/2017 dated October 30, 2017 and published on November 6, 2017, § 6.2).

[87] Italian case law has acknowledged that: «*imporre all'emittente investimenti in opere che non sono coerenti con la propria linea editoriale* […] [ne] *comprime*[rebbe] *la libertà editoriale*» («imposing investment obligations on broadcasters that are not coherent with their editorial guidelines […] would restrict their editorial freedom»), and this is covered by the Italian Constitution, under the umbrella of freedom of expression and freedom to conduct business. So, TAR Lazio, sez. III (Third Section), May 23, 2018 (July 19, 2018), no. 8149, § 6.4; see also TAR Lazio, sez. III (Third Section), May 23, 2018 (July 19, 2018), no. 8169.

The newly drafted Article 13 of the AVMS Directive will have a significant impact on the regulatory frameworks of EU Member States, given that it introduces innovative rules relating to some of the most sensitive aspects of the audiovisual industry. Furthermore, its relevance stretches beyond the economic sphere, as the derogation from the country of origin principle provided for in para. 2 also[88] has cultural objectives.
From the legal perspective, Article 13 offers several insights in relation to both the various interpretative questions it poses (some of which have been discussed in the present work) and the wide range of applied solutions to which it lends itself. When implementing this provision in their national frameworks, Member States will have several options available to them and the rules that ensue may differ greatly from one State to another.
This circumstance highlights the fact that, in a context that is fundamentally characterized by national providers – such as that which prevailed in the 1990s and the early 2000s – the country of origin principle has significant, yet limited effects. By contrast, the development of the on-demand services market has involved the progressive consolidation of internet-based (OTT) platforms that can target several markets simultaneously and enjoy reduced distribution costs, as well as significant flexibility in their approach and business models. These providers are the real testing ground for the solidity of the Directive. On the one hand, the supranational nature of the new services should help providers to appreciate the advantages of the Directive's strong affirmation of the country of origin principle, which is considered a central pillar of the digital single market. On the other hand, however, technological advancements have left the country of origin[89] principle more exposed to instrumental uses. Furthermore, the Directive itself allows Member States to derogate from this principle, in a clearly delimited but significant way, in an effort to counter potential asymmetries between providers that address the same audience.
On the one hand, therefore, the unprecedented "carve-out" of the country of origin principle is thus an antidote to the "seduction" of certain States that attract AVMS providers through their more lenient regulatory frameworks[90] (although it is questionable whether this measure alone is sufficient to combat certain established mechanisms). On the other, the implementation of Article 13 will accentuate the differences

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[88] As I. Ibrus-U. Rohn observe, in *Sharing killed the AVMSD star: the impossibility of European audiovisual media regulation in the era of the sharing economy*, in *Internet Policy Review*, 5(2), 2016, «the AVMSD (and its predecessors) have over time evolved towards economic rationales rather than cultural goals».

[89] See L. Volman, *Is the cornerstone loose*, cit., 21.

[90] According to the most recent data published by the European Audiovisual Observatory of the Council of Europe, «[o]ver two-thirds of linear and pay-on-demand media services established in the EU by 2017, and targeting foreign markets, were concentrated in just three countries: the cumulated numbers of pay-on-demand media services, based in the United Kingdom, the Netherlands and Ireland, accounted for 67% of all services targeting foreign markets» (A. Schneeberger, *Audiovisual Media in Europe: Localised, targeting and language offers*, European Audiovisual Observatory (Council of Europe), Strasbourg, 2018, 3; and, most recently, *Yearbook 2018/2019 – Key Trends*, European Audiovisual Observatory (Council of Europe), Strasbourg, 2019, 36). Clearly, the motif underlying this preference is not based exclusively on regulatory reasons, but also relates to other factors (e.g., language, fiscal pressure, labor legislation).

between national regulatory frameworks, thus fragmenting the landscape even further (it is already very fragmented, as described by the Council of Europe's European Audiovisual Observatory[91]).

The audiovisual landscape is therefore also a battleground between those pursuing greater cohesion between Member States in the name of European ideals and those pushing for a looser alliance. However, as is often the case when the acceptance of rules is demanded based on dogma – even if such dogma has its origin in noble principles – this instrument will not serve the European cause well. To reinforce the European ideal, rules are needed that are perceived by all to be fair, that strike the right balance[92] and that are not vulnerable to speculation from competition between States based on a regulatory race to the bottom[93] (fair competition should rather be based on bureaucratic efficiency, ease of access to a skilled workforce, ability to meet business needs and other virtuous parameters).

Unfortunately, the tools for combating avoidance practices have thus far appeared ineffective[94]. In the authors' opinion, a framework is needed that will discourage the selfishness of individual States and prevent the creation of "regulatory havens" that focus cunningly on deregulation and relaxed enforcement in order to make themselves more attractive targets of jurisdiction shopping. Only a regulatory framework that does not benefit certain States, and thus penalize others[95], can safeguard the painstaking process of promoting the digital single market from the trends of nationalism that have emerged across the Union.

[91] See *Mapping*, cit. and previously F.J. Cabrera Blàzquez-M. Cappello-C. Grece-S. Valais, *VOD, platforms and OTT*, cit., 58 ss.

[92] W. Schulz–T. Grothe, *Caution, Loose Cornerstone*, cit., advance a very convincing argument that the centrality of the country of origin principle must necessarily entail the recognition of specific needs in order to serve as a basis for derogations from the same principle.

[93] M. Holoubek-D. Damjanovic, *Evaluation and Conclusion: Basic Principles and Structural Elements of European Content Regulation*, in M. Holoubek-D. Damjanovic-M. Traimer, *Regulating Content – European Regulatory Framework for the Media and Related Creative sectors*, Kluwer Law International, Alphen a/d Rijn, 2007, 241, highlight how: «due to the country-of-origin principle governing large parts of the market structure regulations embodied in Community law, regulations laid down by the Member States give rise to competition within the single market. The consequence may be that uncoordinated structural regulations on the part of Member States and the relevant political decisions will finally either have no effect at all or may become subject to such pressure that any such attempt at regulation loses its persuasiveness».

[94] *Contra*, A. Herold, *Country of origin*, cit., 23, writing in 2008; however, she has limited her argument to an assessment of the abstract suitability of the remedies that are provided for by the regulatory framework: «The practice to come will show whether these mechanisms […] are apt to fulfil their role. Here it is submitted that at least they have the potential to do so».

[95] A. Scheuer-T. Ader, *Article 3 TWFD*, in O. Castendyk-E. Dommering-A. Scheuer, *European Media Law*, cit., 373.