Cultural Diversity and the EC Audiovisual Media Services Directive: Beyond the Handsome Rhetoric

Mira Burri-Nenova

1. Introduction

Audiovisual media are presently perhaps the most fluid field of regulation. Not only because due to the advent and widespread of digital technologies, the media landscape has been profoundly changed but also because these changes are by default spilling over to other spheres of life (and of regulation). The numerous, unevenly distributed and often unanticipated effects of digital media, some of which will be dealt with in this article, inevitably make the quest for appropriate regulatory design exigent. In the nexus between media and cultural policy-making, which set our analytical backdrop here, these difficulties are augmented by national sovereignty susceptibilities and strong globalisation pressures that often cut in divergent directions.

The purpose of the present article is however not to explore these complex and dynamic linkages in the abstract but rather in a pragmatic manner, by looking at the recent European Community (EC) Audiovisual Media Services Directive (AVMS), which Member States are to transpose into their national laws by 19 December 2009. The AVMS makes a particularly good study because it is the very response of the Community in the field of content regulation to the changed (and changing) media environment. By amending the Television without Frontiers Directive (TVWF), the AVMS is meant to sustain the balance

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between the free circulation of audiovisual media and the preservation of values of cultural identity and diversity in the new digital setting, while respecting the principles of subsidiarity and proportionality inherent to the Community.\(^5\)

It is precisely this striven for balance that forms the heart of our enquiry. We examine in particular whether and how the modifications to the EC audiovisual media regime may influence cultural diversity in European media and contemplate whether in this regard the AVMS appropriately safeguards the balance between economic and other public interests. Cultural diversity is singled out as a regulatory objective because of its recent prominence in policy discussions at national, regional and international levels and its legal emancipation through the UNESCO Convention on the protection and promotion of the diversity of cultural expressions.\(^6\)

To befit this goal, the article is structured in five sections. The first sets the scene by outlining with a few broad brushstrokes the development of the EC audiovisual media regulation and its main tenets. Drawing upon this, the second section discusses the changes that the AVMS brings about and their real and potential impact on cultural diversity. The question that section three asks is whether the cultural diversity rhetoric of the AVMS reflects the concrete measures put in place and the reality of contemporary media. Section four looks at the concept of cultural diversity applied and its possible flaws. Section five concludes critically and offers a few thoughts on the implications of sustaining the current EC audiovisual media policy in cultural matters.

2. The evolutionary path of EC audiovisual media regulation: an overview

Broadcasting was not one of the original regulatory domains of the EC and was not covered by the Treaty of Rome establishing the European Economic Community in 1957. It was only with the Maastricht Treaty,\(^7\) which entered into force on 1 November 1993 that the audiovisual sector was referred to explicitly, although arguably different rules of the emerging body of Community law touched upon diverse aspects of media regulation even before the change took place.\(^8\) The attempts to shape a distinct EC audiovisual policy began before the

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\(^5\) See Article 5(3) of the EC Treaty and the Protocol on the application of the principles of subsidiarity and proportionality attached to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, OJ C 340/1, 10 November 1997.


\(^7\) Treaty on European Union, adopted in Maastricht, OJ C 191/1, 29 July 1992. The Maastricht Treaty inserted a new Title IX into the structure of the Treaty of Rome. It bore the broad rubric of “Culture” and included one article – Article 128, which is now, since the Amsterdam renumbering, Article 151 EC. Article 151 entails an obligation for the Community to “contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity”. Following the principle of subsidiarity, the Community is to encourage co-operation between Member States but could, if necessary, supplement their action in certain fields, notably, “artistic and literary creation, including in the audiovisual sector”. Article 151(4) EC specifies further that the Community must take cultural aspects into account in its action under other provisions of the Treaty. For a comprehensive analysis of Article 151 EC, see Rachael Craufurd Smith (ed.), *Culture and European Union Law*, Oxford: Oxford University Press, 2004. On the duties of the EC institutions in the field of culture, see Bruno de Witte, “Trade in Culture: International Legal Regimes and EU Constitutional Values” in Gráinne de Búrca and Joanne Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues*, Oxford: Hart, 2003, pp. 237-255.

\(^8\) The European Court of Justice played an important role in expanding the scope of activities falling under the Community’s prerogative. Since Sacchi, it is clear that the broadcasting of televised messages falls
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Maastricht Treaty, however. They were triggered mostly by exogenous factors, which were epitomised by the development of satellite broadcasting, the proliferation of TV broadcasters and the rapidly increasing deficit with the US in audiovisual trade. The Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable of 19849 marked the beginning of the Community’s audiovisual media policy. The latter advanced in parallel to but independently10 of the undertakings of the Council of Europe (CoE), which had indeed a longer established stance on media matters.11 The CoE was also the first to adopt a regulatory act to that effect with the Convention on Transfrontier Television (CTT).12 The Community decided to follow the blueprint of the CTT.13 Consequently, the EC Television without Frontiers Directive14 of 1989 mirrors to a great extent the structure and the basic provisions of the CTT.15

The TVWF can be best described as a liberalisation measure. It is in essence a concretisation of the freedom to provide services under the specific conditions of television, including some partial harmonisation,16 which ensures the conditions necessary and sufficient for the consolidation of the single market for media services.17 As a piece of secondary law, the Directive follows the basic principles of the freedom to provide services and the freedom of establishment.18 Article 2(a) TVWF explicitly guarantees these freedoms and provides that no


11 The endeavours of the CoE to adopt a binding legal instrument covering certain cultural aspects of transfrontier broadcasting began in the early 1980s. Various steps followed, which found expression in a number of recommendations. For an account, see Explanatory Report to the European Convention on Transfrontier Television (ETS No 132), Strasbourg, 5 May 1989, as amended by the provisions of the Protocol (ETS No 171), which entered into force on 1 March 2002.

12 Council of Europe, European Convention on Transfrontier Television (ETS No 132), Strasbourg, 5 May 1989. The CTT was opened for signature by the CoE Member States and other States Party to the European Cultural Convention (ETS No 018), Paris, 19 December 1954.


14 See supra note 4.

15 The CTT provides a minimum of common rules in fields such as programming, advertising and the protection of certain individual rights. It entrusts the transmitting States with the task of ensuring that the TV programme services transmitted comply with its provisions. In return, freedom of reception of programme services is guaranteed, as well as the retransmission of the programmes, which comply with the minimum rules of the Convention.


18 See Articles 43 and 49 EC Treaty. See also the case law, supra note 8.
Member State can restrict reception or retransmission of a broadcast from another Member State for reasons falling within the areas coordinated by the Directive. The TVWF regulates four major areas that cover: (i) the promotion of European works and works by independent producers; (ii) advertising, teleshopping and sponsoring; (iii) the protection of minors and public order; and (iv) the right of reply. The TVWF, in the amended version of 1997, ensures further that events, which are regarded by a Member State as being of major importance to society (such as, most manifestly, the Football World Cup), may not be broadcast in such a way (e.g. on pay-TV only), as to deprive a substantial part of the population of that Member State of the opportunity to watch them.

The core principle of application of the lex specialis TVWF rules is the so-called “country of origin” rule (also referred to as “home State” or “sending State” rule), whereby each Member State must ensure that all television broadcasters under its jurisdiction comply. Member State’s jurisdiction is defined through the principle of country of establishment with specific practical criteria applying to its precise determination (e.g. head office of the service provider; place where programming policy decisions are taken). Each broadcaster falls under the jurisdiction of one Member State only and it is sufficient that the broadcasters comply with the law of the Member State from which they emanate. The receiving State cannot exercise secondary control except under special, restrictively interpreted, derogations (such as the protection of minors or prevention of incitement to hatred). It should not however be forgotten that the TVWF defines only a minimum set of common rules and Member States are free to impose more detailed or stricter rules upon broadcasters under their jurisdiction.

With the benefit of the hindsight and summarising the 18 years of application of the TVWF, one can argue that the TVWF has clearly been a success. It has contributed to overcoming the existing fragmentation of national laws and, by facilitating the free circulation of television broadcasts, has fostered the European audiovisual media industry. The numbers contained in the recent

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29 Articles 4 and 6 TVWF.
30 Article 5 TVWF.
31 Articles 10-20 TVWF.
32 Articles 22, 22(a) and 22(b) TVWF.
33 Article 23 TVWF. Teleshopping rules were added by the 1997 amendment of the TVWF.
34 See supra note 4.
35 Article 3(a) TVWF.
36 Article 2 TVWF.
37 See Article 2(3)-(5) TVWF. For the relevant case law, see Drijber, supra note 16, at pp. 92-97.
39 C-34/95, C-35/95 and C-36/95 De Agostini, ibid.
41 See Article 2(a)(2) TVWF.
42 See Article 3(1) TVWF.
43 Pursuant to Article 25 TVWF, Member States were obliged to bring their laws, regulations and administrative provisions into conformity with the Directive by 3 October 1991.
Commission reports on the implementation of the TVWF\textsuperscript{34} are unambiguous evidence in this regard: whereas, at the beginning of 2001, over 660 channels with potential national coverage were broadcast via terrestrial transmitters, satellite or cable,\textsuperscript{35} five years later in addition to the 122 analogue nationwide channels, some 1335 digital channels were available over multiple platforms (cable, satellite, terrestrial, IPTV).\textsuperscript{36} This should be compared to the fewer than 90(!) channels existing in 1989.\textsuperscript{37} As the number of channels has grown, so have the revenues of broadcasters, which now make a substantial contribution to overall economic growth.\textsuperscript{38}

Yet, although these data show what the European Commission likes to describe as a flourishing content industry,\textsuperscript{39} there is a flipside to the coin. Deregulation of TV markets has had multiple, less glamorous, effects.\textsuperscript{40} The quantity of imported programmes and their costs have soared.\textsuperscript{41} Much more importantly, the quality and the range of programmes on offer have deteriorated.\textsuperscript{42} The pursuit of a maximisation of profits and a minimisation of financial risks has resulted in much “imitation, blandness and the recycling of those genres, themes and approaches regarded as profitable”.\textsuperscript{43} The formats and contents of TV programmes, films and shows have become increasingly homogeneous.\textsuperscript{44} The traditional function of television, to inform, has been

\begin{itemize}
\item \textsuperscript{36} European Commission, supra note 34, referring to European Audiovisual Observatory, 2006 Yearbook. In addition to channels available nationally or transnationally, the number of regional channels is estimated at around 3000.
\item \textsuperscript{38} Public service broadcasters in the EU25 zone had total revenues of €29.1 billion in 2003, whereas private broadcasters recorded revenues totalling €18.3 billion. Pay-TV and package subscriptions increased their revenues to an overall amount of €13.6 billion in 2003. See European Commission, supra note 35, referring to the European Audiovisual Observatory, 2005 Yearbook.
\item \textsuperscript{40} For an overview, see Papathanassopoulos, supra note 37, pp. 9-32.
\item \textsuperscript{41} Papathanassopoulos, ibid. at pp. 17-18.
\end{itemize}
twisted and has led to a “tabloidization of news”\(^{45}\) and infotainment.\(^{46}\) The competitive pressure has also changed the position of public service broadcasters and initiated a process of convergence of the public and the commercial systems, in particular with respect to their programming output.\(^{47}\)

Against this counterfactual, one could suggest that whilst the TVWF has been a “victory for commercial forces”,\(^{48}\) it has done little for the achievement of cultural goals. Although, as mentioned above, the TVWF followed the CTT,\(^{49}\) the two acts had essentially different bases. While the latter initiative of the CoE had as its underlying rationale the freedom of expression, enshrined in Article 10 of the European Convention of Human Rights (ECHR),\(^{50}\) the act of the Community has been primarily a single market measure.\(^{51}\) It is based upon Articles 47(2) and 55 EC (previously Articles 57(2) and 66) and is a harmonisation instrument meant to ensure that the free movements of establishment and services are not unduly restricted, as already noted above.

The intrinsic duality of audiovisual services as having both an economic and a cultural nature, albeit repeatedly stated by the Community institutions,\(^{52}\) could not be properly reflected at the EC level. The conflicting values and objectives belonging to distinct differentiated societal spheres\(^{53}\) could not be appropriately resolved through the chosen legal model. This became apparent not only in the provisions of the TVWF, but was also later revealed by the failed attempt to adopt a Directive regulating media ownership.\(^{54}\) The “[t]ensions between ‘the economic aims of completing the single market [and] […] the concern to protect cultural identity and a pluralist media’ further complicate the more conventional EU conflicts between interventionists and liberalisers, and between integrationalist and intergovernmental approaches”\(^{55}\) and render a coherent media regulation at the Community level unattainable. Paradoxically, it has been the EC competition rules (in the sense of economic regulation), applying


\(^{49}\) The European Court of Justice has even held that the CTT and its explanatory memorandum can be used to clarify the interpretation of the TVWF. See Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94, C-339/94 Reti Televisive Italiane SpA (RTI), Radio Torre, Rete A Srl, Vallau Italiana Promomarket Srl, Radio Italia Solo Musica Srl and Others, and GETE Srl v. Ministero delle Poste e Telecomunicazioni [1996] ECR I-6471, at para 33.

\(^{50}\) Council of Europe, Convention for the protection of human rights and fundamental freedoms, Rome, 4 November 1950, as amended by Protocol No 11, ETS No 155.

\(^{51}\) Graber, supra note 10, at pp. 996-998.

\(^{52}\) See infra section 4.


both in the fields of media and telecommunications, that by fighting the concentration in these markets, safeguarded a certain level of content diversity. In the next sections, we test whether the new EC act regulating audiovisual media, the AVMS, reflects better the objective of protecting and promoting the diversity of cultural expressions, in particular under the conditions of the digital ecology, and whether the Community has indeed properly defined this goal.

3. Amending the Television without Frontiers Directive: Selected issues with cultural implications

The TVWF Directive incorporated an obligation for the Community to review it by 2002. This was however not the sole reason that prompted the revision. Neither can the cause be found in some of the shortcomings of the TVWF as an instrument for regulating European audiovisual media, as hinted above. Rather, the reason for a change was exogenous to the legal model and endogenous to the audiovisual environment. The advancement and increased adoption of digital technologies, combined with strong convergence effects, have radically and irreversibly transformed the media landscape. They have also triggered some specific developments in broadcasting markets, such as: (i) increased pay-per-view; (ii) non-linear services delivery; (iii) peer-to-peer exchanges of audiovisual content; (iv) changed viewer habits; and (v) new advertising methods. Together, these phenomena and processes called for a modernised legal framework to fit the new reality of European broadcasting.

The TVWF review can also be seen as an essential part of the overall reform, launched by the Green Paper on convergence in 1999, towards the turbulently developing, technologically driven sectors of telecommunications, information

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56 See e.g. the decision of the Commission to refer Sweden to the ECJ for its failure to change rules giving the State-owned company Boxer TV Access a monopoly over the provision of access control services in the Swedish digital terrestrial broadcasting network. The case is based upon Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ L 249/21, 17 September 2002. See European Commission, "Competition: Commission Takes Sweden to Court for Failure to End Broadcasting Services Monopoly", IP/06/1411, 17 October 2006.


58 See Article 25(a) TVWF.


technologies and audiovisual media. The reform of the media sector was indeed the last building block in this major undertaking of the Community, which is also endowed with a specific role in the context of the Lisbon strategy to establish the EU as the “most competitive and dynamic knowledge-based economy in the world”. 62

The actual review process of the TVWF, which lasted more than four years and involved some hard bargaining, 63 commenced with the Fourth Communication on the application of the TVWF Directive for the period 2001-2002. 64 In an annex to this Communication, the Commission proposed a work programme for the modernisation of audiovisual services rules and a timetable of future actions. 65 The subsequent efforts focused upon six priority areas, namely: (i) rules applicable to audiovisual content services (scope); (ii) cultural diversity and promotion of European and independent audiovisual production; (iii) media pluralism; (iv) commercial communications; (v) protection of minors and human dignity, right of reply; and (vi) rights to information and short reporting. 66

Of the various changes that the AVMS brings about, we focus our attention on two of the novel (and most contentious) solutions, which are likely to have critical effect on the media ecosystem in Europe and on the diversity of cultural expressions therein. These key issues are (i) the scope of the AVMS and the form of cultural quota mechanisms; and (ii) the AVMS rules on advertising and product placement.

3.1. Extended scope of the AVMS

The most groundbreaking element of the reform involves a readjustment of the scope of the Directive. The Commission’s crucial argument in this respect was that, given the impact that audiovisual media services have on the economy and society, the AVMS rules should apply to all content services, irrespective of the technology that delivers them. This is in stark contrast to the previous situation, where the different delivery modes received different regulatory treatment and caused regulatory asymmetries.


63 Procedurally, the adoption of the AVMS was subject to the co-decision formula set out in Article 251 EC, which involves the Commission, the Council and the European Parliament. Key documents in this process are the original proposal of the Commission of 13 December 2005; the compromise text tabled by the Finnish Presidency, the Report of the Committee on Culture and Education, and the text adopted by the EP amending in first reading the Commission’s proposal. On 24 May 2007, after some subsequent changes brought in by the Commission, a political compromise on the text of the AVMS was reached.


65 In the period up to the adoption of the new Directive, legal certainty in the changing environment of European media has been guaranteed through an interpretative Communication on television advertising, in particular new advertising techniques (split screen, virtual and interactive advertising) and update of the Recommendation on the protection of minors and human dignity. See European Commission, Commission Interpretative Communication on certain aspects of the provisions on televised advertising in the “Television without Frontiers” Directive, OJ C 102/2, 28 April 2004 and Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry, OJ L 38/72, 27 December 2006.

To remedy this situation, a broader, generic definition of audiovisual media service was proposed, which also implies a larger scope for application of the AVMS. Pursuant to Article 1(a) thereof, an audiovisual media service is identified through six essential elements, which must be simultaneously present. These elements are:

(i) a service within the meaning of the Treaty provisions (Articles 49 and 50 EC);
(ii) provided under editorial responsibility of a media service provider;\(^{68}\)
(iii) the principal purpose of which is the provision of programmes consisting of moving images with or without sound;\(^{69}\)
(iv) in order to inform, entertain or educate;
(v) to the general public;
(vi) by electronic communications networks.\(^{70}\)

3.1.1. Linear and non-linear audiovisual media services

Under the all-encompassing category of audiovisual media services, two sub-categories are defined, which are treated differently under the AVMS regime. The first sub-category is that of television broadcast or linear service. It

\(^{67}\) "Audiovisual media service’ means a service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council. Such an audiovisual media service is either a television broadcast as defined in point (e) of this Article or an on-demand service as defined in point (g) of this Article, and/or audiovisual commercial communication’. Pursuant to some examples given by the Commission, the following qualify as audiovisual media services: films, telefilms, serials on demand; sports events on demand; entertainment shows on demand; video reports of concerts and live arts performances on demand; TV news reports on demand; and advertising delivered in connection with these on-demand services. In contrast, advertising not delivered in connection with the on-demand services; video clips inserted in websites when the main purpose is not the delivery of audiovisual content but to deliver information on the activities of the site owner; animated images inserted on press websites and blogs for non-commercial purposes, are not covered by the definition of audiovisual media service. See European Commission, “The Commission proposal for a modernisation of the Television without Frontiers Directive”, MEMO/05/475, Brussels, 13 December 2005.

\(^{68}\) Media service provider is defined in Article 1(d) AVMS as “the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised”.

\(^{69}\) The concepts of “programme” and “editorial responsibility” were introduced by the EP in pursuit of a clearer delineation from other audiovisual services. Programme is defined as “a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama” (Article 1(b) AVMS). Editorial responsibility is “the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided” (Article 1(c) AVMS).

\(^{70}\) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108/33, 24 April 2002. Article 2(a) thereof defines electronic communications networks as “transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed”.
covers audiovisual media services “provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule”.

The second sub-category comprises on-demand or non-linear services, which are offers of audiovisual content “for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider”.

Upon the basis of these definitions, one can say that the rule-of-thumb for delimitating the categories of linear/non-linear services is the possibility of choice and control the user can exercise and also the impact they have on society (being “pushed” to everyone or “pulled” individually).

Taken together, the broader definition of audiovisual media service and the delineation of the two categories have (at least) three important effects:

(i) first, the overarching idea of platform-neutral content regulation is properly reflected and the transport technology does not lead to the exclusion of any content services from the reach of the AVMS;

(ii) second and most importantly, the “country of origin” principle, as the core to the Community audiovisual media regulation regime, is extended to all content services, including non-linear services. This minimum level of harmonisation guarantees a functioning single market and prevents the emergence of an uneven playing field laden with diverging national rules: Indeed, while it is often said that non-linear services were previously unregulated, 19 out of the (then) 25 Member States already had some form of regulation. The rules at the EC level can allegedly also contribute to legal certainty, which will support the convergence of linear and non-linear on the supply side and create a beneficial environment of consumer trust and product awareness;

(iii) third, some flexibility is preserved, which allows for a less stringent approach to new media services (the so-called “graduated regulation”). The regulation of conventional television broadcast (or linear media services) remains almost unchanged (with some relaxation of the rules on advertising and product placement, as we discuss below). In contrast, non-linear services are subject to a much lighter regime and need to satisfy only a basic tier of rules. These rules cover the protection of minors and human dignity; right of reply; identification of commercial communications; and minimum qualitative obligations regarding commercial communications.

The overall effect aspired to by the above-outlined reform was, in the words of the Commission, to increase choice, diversity and investment in the European audiovisual media leading to a “vibrant ‘audiovisual content without frontiers’ industry that is strongly rooted in the EU”.

71 Article 1(e) AVMS.
72 Article 1(g) AVMS.
73 Recital 42 AVMS. See also C-89/04 Mediakabel BV v. Commissariaat voor de Media, judgment of 2 June 2005, ECR [2005] I-4891.
74 All of the Member States had some requirements on advertising, protection of minors and human dignity. None had rules regarding European or independent productions and only one Member State had some regulation of advertising limits. See Horlings et al., supra note 60, at pp. 16-17.
75 Horlings et al., ibid. at p. 75.
77 European Commission, supra note 67.
Yet, this aspiration (which awfully reminds of the TVWF rhetoric) may remain unfulfilled, both in economic and in societal respect. In practical terms, the effects of the changes made cannot be unequivocally framed as positive. While the TVWF affected only licensed broadcasters, the AVMS now covers a much broader range of stakeholders, who formerly were, if not unregulated, at least less regulated (by generic rules such as the e-Commerce Directive). Although the providers of non-linear services will only have to comply with the laws of their own Member State, the regulatory burden upon them is substantial and may be detrimental. Innovation and entry of new market players may indeed be seriously hampered. User-generated content as an emerging feature of broadband use and the related business models, such as Google and YouTube, which support the insertion of advertising into the more popular pieces of content may now be affected: the content producer, who chooses to accept advertising, will be subject to the AVMS as a non-linear provider, even though the advertising itself is chosen by the site host. This may be prohibitive for furthering the positive effects of user created and distributed content, which is often central to consumers’ Internet experience, and reflects the key media policy components of diversity, localism and non-commercialism.

New linear operators (e.g. new channel providers) will also face relatively heavy regulatory burdens (in contrast to the incumbent linear operators for whom the nominal burden is small). In seeking a reduction in sunk costs and realisation of positive network effects, content providers will have the stimulus to consolidate, which may reinforce concentration in broadcasting (and the

80 This was a major contentious issue during the AVMS adoption. See e.g. Bob McDowall, “The Television without Frontiers Directive: Another ‘Directive Too Far’”, IT Analysis, 5 May 2006; The Economist, “Regulation without Frontiers”, 12 October 2006.
81 Marsden et al., supra note 78, passim.
82 Marsden et al., ibid. at p. 25. As far as these providers are commercial, the Directive applies. Recital 16 AVMS stresses that the economic element must be significant to justify the application of the Directive. Accordingly, the scope “does not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest”.
83 A 2007 OECD report acknowledges the enormous potential that user created content has. It states that, “[t]he Internet as a new creative outlet has altered the economics of information production and led to the democratisation of media production and changes in the nature of communication and social relationships […]. Changes in the way users produce, distribute, access and re-use information, knowledge and entertainment potentially give rise to increased user autonomy, increased participation and increased diversity. These may result in lower entry barriers, distribution costs and user costs and greater diversity of works as digital shelf space is almost limitless”. See OECD, Participative Web: User-Created Content, DSTI/ICCP/IE(2006)7/FINAL, 12 April 2007, at p. 5. See also Mira Burri-Nenova, “User Created Content in Virtual Worlds and Cultural Diversity” in Christoph Beat Graber and Mira Burri-Nenova (eds.), Governance of Digital Game Environments and Cultural Diversity, Cheltenham, UK: Edward Elgar, forthcoming 2009.
related distribution) markets and thus have a negative impact on the diversity of cultural expressions in the European media environment.

3.1.2. “Cultural” quotas for non-linear services?

In a non-economic context and considering the broader definition of audiovisual media services, an immediate concern is whether the existing quota mechanisms for European works (Article 4 TVWF) and for independent productions (Article 5 TVWF) are preserved under the AVMS regime. In the framework of TVWF, Article 4(1) prescribed that Member States ensure “where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping”. This proportion was to be achieved progressively, on the basis of suitable criteria. Article 5(1) TVWF provided further that, where practicable and by appropriate means, broadcasters reserve at least 10% of their transmission time, or alternatively, 10% of their programming budget, for European works created by producers who are independent of broadcasters.

Articles 4 and 5 TVWF were the only tools at Community level that were per se meant to serve cultural goals, ensuring a balance of offerings in the EC broadcasting markets. Regardless of the implementation option chosen by the individual Member States, the impact study prepared for the TVWF review showed that the measures to promote European and independent productions have indeed had considerable impact. The average ratio of European works in the qualifying transmission time of the channels rose from 52.1% in 1993 to 57.4% in 2002. The average proportion of independent productions increased from 16.2% in 1993 to 20.2% in 2002. The impact study suggested further that,

86 Marsden et al., supra note 78, at p. 130.
87 Emphasis added. “European works” were defined pursuant to criteria set out by Article 6 TVWF.
88 Article 4(1) TVWF.
89 For an overview of the national legislation put in place in the diverse Member States, see David Graham and Associates, Impact Study of Measures (Community and National) Concerning the Promotion of Distribution and Production of TV Programmes Provided for under Article 25(a) of the TV Without Frontiers Directive, Final Report Prepared for The Audiovisual, Media and Internet Unit of DG Information Society, 24 May 2005, at chapter 6. While the majority of Member States has transcribed the definitions directly into national legislation, France and Germany apply stricter definitions. France distinguishes between audiovisual works and cinematographic works. Germany defines what is included as qualifying hours: feature films, television movies, series, documentaries and comparable productions. Six Member States – Finland, France, Italy, The Netherlands, Spain and the United Kingdom – apply higher percentage requirements than those contained in TVWF on some or all of their broadcasters. Regulatory authorities in most Member States also have a range of sanctions to address failures to adhere to Articles 4 and 5 (from warnings to fines and – in some Member States, and for the most serious cases – shortening or revoking a broadcaster’s licence). Only the regulators in Austria, Cyprus, Iceland, Ireland and Sweden have no power to sanction broadcasters not complying with Articles 4 and 5. See Attentional et al., Study on the application of measures concerning the promotion of the distribution and production of European works in audiovisual media services (i.e. including television programmes and non-linear services), Draft Final Report, 21 October 2008, at p. 323. See also Irini Katsirea, Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Member States, The Hague: Kluwer Law International, 2008.
91 Graham and Associates, ibid. at p. 14 and chapter 7. This trend has been confirmed by the latest report, which found that more than 63% of programming time was devoted to European works and over 36% to works by independent European producers. See European Commission, Eighth Communication on
taking into account these developments, there is no need to change either the majority share for European works or the minimum share for independent productions: Articles 4 and 5 TVWF were deemed to already be achieving their cultural aims "inasmuch as [...] [they] have increased the proportion of European works and independent productions broadcast by channels in the EU".92

The EU Commissioner for Information Society and Media, Viviane Reding, was delighted by the high share of airtime devoted to European works and stated that, “[t]his is proof of the high quality of Europe’s home-grown audiovisual content and of the vitality of an audiovisual industry that draws upon Europe’s rich cultural diversity”.93

This is a very handsome and at first sight plausible argumentation. But does it reflect reality? We are in fact not that confident that the higher share of European productions is a sign of increased (or existing) diversity of cultural expressions. First, it must be clarified that the definition of what qualifies as “European work” is neither based upon originality and quality criteria nor does it require a particular expression of national and European themes.94 It is based merely on the construct that a majority of its authors and workers reside in one or more Member States and comply with one of the three conditions: (a) the work is made by one or more producers established in a Member State or States party to the CTT; (b) the production is supervised and controlled by producer(s) established in one or more of those States; or (c) the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by producer(s) established outside those States.95

By subscribing to this definition of European works, little is achieved to prevent the increasing homogenisation of content and deteriorating quality of programmes:96 a “Big Brother” type of show financed with European money qualifies perfectly as both a European work and an independent production. In this shape and form, the cultural diversity rationale for the promotion of European works is indeed barely distinguishable from a protectionist one, simply aiming to secure a certain amount of airtime for works produced with European money.97


93 Graber, supra note 44, at pp. 253-254.

94 Article 6(2) in conjunction with 6(1)(a) and (b) TVWF. This definition is largely unchanged under the AVMS (see Article 1(r), points (i)-(iii).

95 See supra section 2. There is evidence that primary channels have reduced the proportion of European works that are stock programmes (generally more expensive) and increased the proportion of (generally cheaper) flow programmes. See Graham and Associates, supra note 89, at section 7.3.4.

96 Such a rationale is apparent from Recital 20 TVWF (“Whereas it is therefore necessary to promote markets of sufficient size for television productions in the Member States to recover necessary investments not only by establishing common rules opening up national markets but also by envisaging for European productions where practicable and by appropriate means a majority proportion in television programmes of all Member States”). See also John D. Donaldson, “‘Television Without Frontiers’: The Continuing Tension between Liberal Free Trade and European Cultural Integrity” (1996) Fordham International Law Journal 20, pp. 90-180; Frederick Scott Galt, “The Life, Death, and Rebirth of the ‘Cultural Exception’ in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face
Moreover, while everyone seems ecstatic about the high levels of European and independent productions, the causal link between these and the quota mechanism is not clear. It is noteworthy here that the impact study could not prove that, in the absence of Articles 4 and 5 TVWF, the trade deficit with the US would have been larger and that the measures to promote the circulation of programmes within the EU have also promoted exports. Data from the most recent Commission’s report on the application of Articles 4 and 5 TVWF also show that the average transmission time devoted to European works in Bulgaria and Romania, i.e. two previously unencumbered with the quota duties countries, were already above the prescribed levels (67.65% in 2005 and 72.83% in 2006 in Bulgaria, and 51.08% in 2005 and 57.95% for 2006 in Romania).

Despite the dubious justification and effectiveness of the quota mechanism, the path dependencies for audiovisual regulation within the EU are too strong to allow meaningful adjustments. As far as traditional broadcasting is concerned, the existing rules were simply taken over from the TVWF to the AVMS.

The more interesting question during the AVMS discussions was however whether the quota mechanism will be translated into the domain of non-linear audiovisual services as well. While there was a strong conviction that a quota rule would be burdensome and in any case, difficult to install and track in online settings, a way was sought to bring in some cultural policy elements and ensure that further developments can be monitored. As a result, the AVMS includes a soft-law provision, which creates an obligation for the Member States to ensure that media service providers under their jurisdiction “promote, where practicable and by appropriate means, production of and access to European works”. It is further clarified that, such promotion could relate, *inter alia*, to the financial contribution to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes. Member States are to report every four years on the implementation of this provision and following up on these data and an

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*98* Although it was found that, “there is a greater appetite for US programming among European audiences than for programmes produced in other Member States […] because US programme storylines have broad appeal, whereas European production has a national cultural appeal which does not travel well”. See Graham and Associates, supra note 89, at p. 18 and section 9.3.3. For an interesting comment on the global power of American popular culture (influencing through attraction rather than coercion), see Neal M. Rosendorf, “Social and Cultural Globalization: Concepts, History, and America’s Role” in Joseph S. Nye and John D. Donahue (eds.), *Governance in a Globalizing World*, Washington, DC: Brookings Institution Press, 2000, pp. 109-134.

*99* Graham and Associates, ibid. at section 8.5.

*100* European Commission, supra note 91, at p. 6.


*102* Article 3(i)(1) AVMS (emphasis added).

*103* Article 3(i)(1) and Recital 48 AVMS. A previous version of the latter provision also included the option of a minimum share of European works proportionate to economic performance. See Horlings et al., supra note 60, at p. 52.

*104* Article 3(i)(2) AVMS. Recital 48 AVMS clarifies that within the framework of these reports, Member States should take into account the financial contribution by such services to the production and rights acquisition of European works; the share of European works in the catalogue of audiovisual media services, as well as in the effective users’ consumption of European works proposed by such services. The recent Attentional study does however stress that measuring and monitoring the application of Article 3(i) may in practice be difficult (Attentional et al., supra note 89, at pp. 24-28). For instance, on-demand services rarely enable consumers to select titles by origin of production. Many players interviewed stressed the fact that
independent study, the Commission is then obliged to report to the Parliament and the Council, taking into consideration the market, technological developments and the objective of cultural diversity.\textsuperscript{105} Accounting for the open formulation of the above provision, it seems (at least theoretically) that if the soft rule’s application would not be deemed satisfactory,\textsuperscript{106} there is a way for hardening the obligations. It can also be the case that some Member States will include harder rules already at this stage since the Directive prescribes only a minimum level of obligations and the goal rather than the means. Support for this claim can be found in the fact that some Member States, such as Belgium and to lesser extent France and Poland, already have rules in place that serve a purpose similar to that of Article 3(i) AVMS. It is particularly interesting to note here that the French Community of Belgium has subjected non-linear television services to the same obligations as other television broadcasting services, which may be symptomatic of the future implementation efforts.\textsuperscript{107}

Against this backdrop, one could argue that a quota system for non-linear audiovisual services is doable. But is it desirable? Is it going to work and really contribute to the diversity of cultural expressions in an utterly changed media landscape? Are there any other more perspicacious legal models?

We cannot positively answer these questions yet since the media markets are in flux and most of the developments are in their infancy.\textsuperscript{108} Despite the consumers are simply not interested in selecting titles based on where they have been produced. Rather, they are interested in selecting them according to genre, title, director, actor or technical criteria such as the language or the technical format in which the content can be viewed. Also, search functionalities are highly influenced by the internet culture, with many typical internet search criteria being applied to non-linear services (e.g. search criteria based on the “most viewed”, “top rated”, “exclusive” or “film of the month” or “our selection”). See Attentional et al., supra note 89, at p. 296-297.

\textsuperscript{105} Article 3(i)(3) AVMS.

\textsuperscript{106} The recent report of the application of Articles 4 and 5 TVWF looked also at the possibilities of implementing Article 3(i). The report found that European titles are, in general, a key component of on-demand catalogues for both broadcasters and pure video-on-demand (VoD) players. Only 17\% of pure VoD players and 12\% of broadcasters interviewed said that their catalogues consisted of less than 25\% European titles. The actual number for broadcasters often was 100\%, as they normally replicate their linear schedules in their non-linear offers, minus the titles for which they do not own the on-demand rights (and which are generally not European). By contrast, 33\% of pure VoD players said their catalogues comprise between 25\% and 75\% of European titles. Pure VoD players allocate 100\% of their programme budget to acquisitions, with non-European imports representing almost half of the total, meaning that the pure VoD players have spent no money at all on commissioning new programmes. By contrast, on-demand services operated by broadcasters seem to spend around 75\% of their on-demand budgets on national commissions (although this figure is a proportion of an extremely limited budget). See Attentional et al., supra note 89, at pp. 23-24.

\textsuperscript{107} The 2003 legislation of the French Community of Belgium is based on a principle of technological neutrality, without any distinction between distribution platforms. This has led the regulator to consider non-linear television services as being subject to the same obligations as other television broadcasting services, including the obligations on European works, independent productions, French language programming and spending on audiovisual production. The regulator has actively applied these obligations to the first non-linear audiovisual service within its jurisdiction. See Attentional et al., supra note 89, pp. 63-67.

\textsuperscript{108} RAND Europe has outlined three plausible scenarios for the digital future of audiovisual media: (i) Linear Continuum: where the citizen behaviour will change at the margins, but media consumption will remain a largely linear experience; (ii) Digital Content Divide: where the digital “haves” will experience greatly increased interactive media use, while an equal number of “refuseniks” will continue exactly as before to rely on offline media and public service broadcasters; (iii) Time Shifting Linear Consumption: where the majority of the population will use broadband and mobile or in-home devices to time-shift their media to suit their schedule instead of that of the broadcaster. See Horlings et al., supra note 60, at p. 8.
constraints of prediction, these developments do give us enough arguments to claim that a simplistic quota rule transition to digital media is likely to fail. Even if one ignores the doubts surrounding quota efficiency in conventional broadcasting, under the conditions of digital media, the virtues of this cultural tool are to be seriously questioned.

Firstly, the effects of a quota mechanism for non-linear services are uncertain and may even have diametrically opposed outcomes. A first option is that consumers (being empowered by technology) would simply not choose European works and thus render any investment/catalogue quota ineffective. In such a situation, the quota rule would create a great deal of bureaucracy, its implementation costs would be high but its effects negligible. Another, rather different option is an application of the so-called “Long Tail” theory. This means that in the new environment of indefinitely diverse media, the consumer selection will constantly generate new and/or niche products (similarly to the Amazon bookselling platform). Consumers will be stimulated to consume products that would otherwise not be available to them (because of the scarcity of timeslots in TV schedules) and induce markets to offer new types of content, including, for instance, archived European content, original works, documentaries or director’s cuts. This may ultimately lead to a higher share of available and effectively consumed European works, which, if realised, will be a genuine expression of cultural diversity.

Building upon the last point, it must be stressed that digital media have not merely provided for another media outlet next to television but have profoundly modified the entire information and communications environment. Some of the salient features of this environment, such as: (i) the proliferation and diversity of content; (ii) new organisation and accessibility of information; (iii) changed notion of scarcity; (iv) reduced storage, distribution and search costs in the digital space; (v) empowerment of the user to choose and control content; and (iv) new modes of content production, where the user is not merely a consumer but is also an active creator (individually or as part of the same scenarios have been reiterated by the Commission in its Staff Working Document annexed to the AVMS proposal.

109 In its briefest form, the Long Tail theory, holds that in digital markets: (i) supply and demand are not concentrated only on a small definite number of products (as in the offline world) and the tail of available variety is almost endless; (ii) the entire tail is within reach economically; and (iii) all those niches, when aggregated make up a significant market. These developments are due to the significantly reduced in the digital environment storage and distribution costs, as well as the new methods of searching and finding products and services online. See Chris Anderson, “The Long Tail: Why the Future of Business Is Selling Less of More”, New York: Hyperion, 2006. See also Erik Brynjolfsson, Yu Hu and Michael D. Smith, “From Niches to Riches: The Anatomy of the Long Tail” (2006) Sloan Management Review 47/4, pp. 67-71; Erik Brynjolfsson, Yu Hu and Duncan Simester, “Goodbye Pareto Principle, Hello Long Tail: the Effect of Search Costs on the Concentration of Product Sales” (2007) MIT Center for Digital Business Research Paper.


111 Horlings et al., supra note 60, at p. 66; Marsden et al., supra note 78, at pp. 22-23. See in this respect, European Charter for the Development and the Take-up of Film Online, initiated in May 2005 by Commissioner Reding. See also European Commission, Communication on Creative Content Online in the Single Market, COM(2007) 836 final, 3 January 2008.

112 Benkler, supra note 84.


114 This relates to the long tail theory. See supra note 109.
community) will certainly have implications for the cultural policy toolkits applied. Upon careful assessment, this may mean shrinking regulation, on the one hand (e.g. dismantling the quotas), but may also demand additional regulatory intervention, on the other (e.g. boosted universal service provision\(^{116}\); modified role of the public service broadcasters (PSBs)\(^\text{117}\); stronger incentives for high quality productions\(^{118}\)) and user participation.

In the modernisation of the TVWF, the European legislator has not fully considered these options and appears rather unimaginative in its rule design approach by simply preserving the quota system for linear and creating soft rules for non-linear services.\(^{119}\) Admittedly, the European legislator is not politically unbound (especially considering the fuzzy Community competence in cultural matters, as defined in Article 151 EC\(^{120}\)) and the parties involved in the AVMS reform were unwilling to take up and pursue the controversial “cultural questions” and reignite the latent conflicts between integrationists and intergovernmentalists, interventionists and liberalisers, when other, notably economic, interests were at stake, as the following instance of advertising explicates.

3.2. Audiovisual commercial communications

The second major reform brought by the AVMS is in the area of advertising, or what is now referred to as “audiovisual commercial communications”. This is indeed a most crucial area of media regulation, since advertising is the main source of revenue for European television broadcasters and likely to remain so.\(^{121}\) The gross television advertising market has been consistently expanding


\(^{118}\) The EC is always very watchful about which European formats travel well, However, the following list shows that this is by no means a sign of quality. In recent years, the formats were well exported are Survivor; Big Brother; The Office; Dancing with the Stars; Hell’s Kitchen; Supernanny; Deal or No Deal; 1 vs. 100; So You Think You Can Dance; The Rich List; Grease: You’re the One that I Want; Creature Comforts; and Fat March. See Attentional et al., supra note 89, pp. 108 and 276.

\(^{119}\) There may also be a range of practical problems that need to be accounted for. As a recent study shows, European programmes are seen as expensive. When asked whether European programming is affordable, 60% of broadcasters and 58% of pure VoD players “rather disagree”. When asked whether European programmes are easier to acquire, 60% of broadcasters “rather disagree”, while 58% of pure VoD players either “rather” or “strongly disagree”. Then, the idea that European programmes are the best way to attract European consumers is not clearly supported by the players. While two third of the third parties tend to agree with that assertion, 33% of pure VoD players “rather disagree”, and 17% of them even “fully disagree”. This may be because pure VoD players’ feel that access to European programming is difficult for them as rights are already secured by the broadcasters. See Attentional et al., supra note 89, at p. 293.


\(^{121}\) European Commission, supra note 34, at p. 4.
and reached €25.7 billion for the EU15 in 2004, which is a 7.2% increase in relation to 2003.\textsuperscript{122} As far as new media are concerned, Internet advertising and computer games revenues are the fastest growing share of media spending and expected to continue growing considerably.\textsuperscript{123}

Similarly to the “audiovisual media service” definition, the concept of “audiovisual commercial communication” is a broad one. It is a notion taken from the e-Commerce Directive with an almost identical content\textsuperscript{124} and is meant to encapsulate all rules related to advertising. It is defined as “images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, among others, television advertising, sponsorship, teleshopping and product placement”.\textsuperscript{125}

In the so-defined domain of audiovisual commercial communications, the first objective of the reform undertaken was to secure a basic tier of rules at the Community level, which would provide legal certainty across all Member States. Thus, pursuant to the AVMS, all audiovisual commercial communications must not: (i) use subliminal techniques;\textsuperscript{126} (ii) prejudice respect for human dignity; (iii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation; (iv) encourage behaviour prejudicial to health or to safety; or (v) encourage behaviour grossly prejudicial to the protection of the environment.\textsuperscript{127} Further, all forms of commercial communications regarding cigarettes and other tobacco products, medicinal products and medical treatment available only on prescription are prohibited.\textsuperscript{128} Audiovisual commercial communications are also not to cause any physical or moral detriment to minors.\textsuperscript{129}

The second objective of the TVWF review in the field of audiovisual commercial communications was to deregulate them and adopt a lighter, flexible approach allowing more possibilities for broadcasters and content providers to increase the value of advertising time, which would also properly reflect the more multi-faceted media environment.\textsuperscript{130} According to the principles of flexibility and simplicity pursued, the EC legislator introduced two blocks of
modifications: first, a relaxation of the rules on the insertion of advertising in TV programmes and daily advertising limits, and second, new regulation of product placement. We look into these below and contemplate their justifications and potential effects on cultural diversity.

3.2.1. Rules on advertising

The AVMS removes some of the existing quantitative constraints on advertising. The current three-hours-per-day limit on advertising is dropped, since practical experience has shown that in fact no TV channel comes close to it. The 12-minute upper limit on all advertising in any given hour however is maintained. As to the insertion of advertising, the Commission was eager to grant broadcasters more freedom to choose the most suitable moment for advertisements within the programmes. The EP however was adamant in this regard and insisted upon the principle that advertising and teleshopping spots can be inserted only between programmes. In the final AVMS, an explicit formulation of this rule is avoided and Article 11(1) states only that Member States must ensure, “where advertising or teleshopping is inserted during programmes, that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme” is not prejudiced.

The frequency of advertising breaks was a hot topic in the discussions of the AVMS. In its initial proposal the Commission foresaw a minimum of 35 minutes between the advertisements inserted in films made for television (excluding series, serials, light entertainment programmes and documentaries), cinematographic works, children’s and news programmes. The proposal of the EP Committee on Culture and Education reversed this to the TVWF benchmark of 45 minutes and included concerts, theatre plays and operas in the provision. Interestingly, the text adopted by the Parliament at first reading ignores the proposal of its own committee and even goes below the minimum suggested by the Commission. The rule is now that the transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by advertising and/or teleshopping once for each scheduled period of at least 30 minutes.

Thus, while the EP has normally put brakes on the Commission’s spur to liberalise advertising in audiovisual media, it is apparent here that the willingness to allow more leeway to broadcasters has prevailed. This undoubtedly gives better opportunities for broadcasters and content providers to monetise but may also speed up the already advanced commercialisation of

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131 Article 18 AVMS states that, “[t]he proportion of advertising spots and teleshopping spots within a given clock hour shall not exceed 20%”. See also Recital 59 AVMS and the Interpretative communication on certain aspects of the provisions on televised advertising in the “Television without Frontiers” Directive, supra note 15, at paras 9-13.

132 Emphasis added. One could view Recital 58 AVMS as a sort of leftover of the EP’s demands. The latter states that, “[t]he Directive is intended to safeguard the specific character of the European television landscape, where advertising is preferably inserted between programmes, and therefore limits possible interruptions for cinematographic works and films made for television as well as for some categories of programmes that still need specific protection”.

133 Article 11(2) AVMS. The provision clarifies further that the transmission of children’s programmes may be interrupted by advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided the scheduled duration of the programme is greater than 30 minutes. No advertising or teleshopping may be inserted during religious services.
television. Trying to show the programmes of greatest appeal in the most valuable timeslots in order to attract advertising naturally leads to marginalisation of specific, original programmes and those that otherwise diverge from the mainstream.

3.2.2. Rules on product placement

The second important change in the domain of audiovisual commercial communications is the newly formulated attitude towards product placement. Product placement is defined as “any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration.”

In the original proposal of the Commission, product placement was fully “legitimised” and taken as an essential element of advertising techniques. The opposition was however too strong. The compromise reached is to preserve the ban on product placement but it is no longer an outright ban. Product placement in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes is permitted. Such programmes must respect certain conditions: they should never affect or jeopardise the editorial responsibility and independence of the media service provider, nor should they “directly encourage the purchase or rental of goods or services” or give “undue prominence to the product in question”. Following the general rule of separate and clearly identifiable commercial communications, viewers are to be appropriately informed of the existence of product placement at the start and at the end of the programme, and when a programme resumes after an advertising break. In any event, product placement for tobacco products, cigarettes or medicinal products or medical treatments available on prescription only is not allowed.

We need to note here that, while the EP limited the scope of the legitimisation of product placement, what is allowed is not negligible: indeed,
the major audiovisual formats of cinematographic works, films and series made for television and sports broadcasts do allow product placement.

The Commission argues that by providing a clear framework for product placement new revenues for the European audiovisual industry would be secured. This would increase its competitiveness, especially vis-à-vis the US media industry, where product placement accounts for 1.7% of the total advertising revenues of free-to-air broadcasters and grew by an average of 21% per year between 1999 and 2004. More oddly, the Commission also believes that the new rules on product placement will “help to boost our creative economy and thus reinforce cultural diversity”. Indeed, both the rules on advertising and the rules on product placement are seen as “further instruments safeguarding cultural diversity”.

While the less restrictive Community regime on product placement may be somewhat justified in view of its value as a financial source for content providers and in order to prevent the emergence of multiple national rules distorting the single market, it is difficult to see how product placement contributes to cultural diversity.

The nature of product placement is such that it is an integral part of the fictional work or sports event. Due to this essential characteristic, the viewer cannot simply skip the advertisement or switch channels until the commercial break is over. Furthermore, being often part of the storyline of fictional works and thus part of the “reality” they represent, its attractant effect may be much stronger than that of conventional advertising in commercial breaks. The commercial intention of product placement is indeed partly concealed and therefore less obtrusive or even not realised at all by the recipients who cannot avoid this type of integrated advertising easily. With the advances in technology enabling consumers to “pull” content individually, the incentives to include product placement will be increased both for the content providers and for the companies whose products/services are advertised. This will naturally lead to an increase in the quantity and quality of product placement (in the sense that its intertwining with the plot will be perfected thereby multiplying its effects ). Thus, the commodification of artistic productions may be

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143 The EU has notoriously vast deficit vis-à-vis the US, which amounts to about €4.1 billion. See Graham and Associates, supra note 89, at section 3.3.1.


145 European Commission, supra note 67.

146 Ibid.

147 There are different types of product placement. One can distinguish between product placement per se, where branded goods are presented, either visually (if the product is shown) or verbally (if it is mentioned or described). Endorsement is an intensification of the verbal placement, when the media representative mentions certain positive features of the product. One may also distinguish different degrees of product integration: on-set placement where the product is only part of the requisite scenery versus creative placement where the product plays an active role in the plot.


149 It has been established that stronger placement effects can be expected when the placement is presented as a natural part of the story. See Rössler and Bacher, ibid. at p. 101.

intensified and diversity of cultural expressions smothered rather than stimulated.

4. The AVMS and cultural diversity

Cultural diversity has always been defined as one of the vital justifications for European audiovisual media policy. At its very onset, epitomised by the Rhodes Summit of the European Council, the Council stressed that the future TVWF initiative should “provide an opportunity of demonstrating the richness and diversity of European culture” and “contribute to a substantial strengthening of a European cultural identity”. Later, when formulating the principles of the Community’s audiovisual strategy for the digital age, the Commission stated that, “[t]he audiovisual industry is [...] not an industry like any other and does not simply produce goods to be sold on the market like other goods. It is in fact a cultural industry par excellence. It has a major influence on what citizens know, believe and feel and plays a crucial role in the transmission, development and even construction of cultural identities”.

In the AVMS, the Parliament was particularly insistent on the amendment of Recital 3, which, pursuant to the EP’s formulation, held that, “[a]udiovisual media services are as much cultural goods as they are economic goods. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services, and the enforcement of those rules, notably in order to preserve the fundamental rights and freedoms laid down in the Charter of Fundamental Rights of the European Union, the European Convention for Protection of Human Rights and Fundamental Freedoms and the United Nations Covenant on Civil and Political Freedoms, and in order to ensure the protection of minors and vulnerable and disabled people”.

This has been the vehemently defended stance of the EC at the international level as well. On the one hand, it has led to the elaboration and adoption of an international legally binding instrument for the protection and promotion of cultural diversity – the UNESCO Convention on Cultural Diversity – which is

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152 Ibid.
154 The final AVMS text, while preserving the above text, substantially shortened it. Recital 3 now reads: “Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services”.
now in force and enjoys strong support worldwide. On the other hand, the EC and its Member States have refused to table any proposals for further liberalisation of audiovisual services in the realm of the WTO in order to reserve policy space for domestic cultural policy measures. While opinions diverge whether this is the right way to secure the diversity of cultural expressions in a globalised interconnected media setting, it must be noted that the UNESCO Convention itself is not a very apt instrument since it foresees no legally binding obligations for the State Parties (but a sizeable block of rights), involves no necessity or proportionality tests to differentiate between licit and illicit measures, has no enforcement or adjudicatory mechanisms. There again, one could say that the rhetoric, which has been reiterated in the AVMS, has fallen short of tangible and meaningful results.

To conclude, it appears that despite all these good intentions and handsome rhetoric, in our examination of some of the major provisions of the AVMS, we saw no concrete solutions addressing cultural diversity considerations or any of the values innate to cultural identity and diversity. The broad definition of audiovisual media services would allow for expanding the reach of the EC media framework and an extension of the economically beneficial “country of origin” principle. On the other hand, the regulation of non-linear services may be onerous for smaller market players or individual providers of content, which may in turn create a barrier to emerging creativity and online content distribution. The preservation of the status quo regarding quotas for European works and independent productions, which remain applicable to television broadcast but not to non-linear services, is a mere political compromise, which disregards the contemporary media environment and its dynamics. In its present form, we argue that it bears no real relation to cultural policy objectives and even if achieved, the quotas do not reflect cultural diversity. With respect to advertising and product placement, we held that the liberalising rationales have prevailed and there are no genuine considerations of protecting and promoting the diversity of cultural expressions.

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159 Recital 5 AVMS states: “In its resolutions of 1 December 2005 and 4 April 2006 on the Doha Round and on the WTO Ministerial Conferences, the European Parliament calls for basic public services, such as audiovisual services, to be excluded from liberalisation under the GATS negotiations. In its resolution of 27 April 2006, Parliament supports the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in particular that “cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value”. The Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions approved the UNESCO Convention on behalf of the Community. The Convention entered into force on 18 March 2007. The Directive respects the principles of that Convention” (footnotes omitted).
5. A flawed concept of cultural diversity?

One reason for the amazing gap between the rhetoric of the European legislator and the ill-suited toolbox of the AVMS could be that there exists no real understanding of what cultural diversity in audiovisual media is. The UNESCO Convention, despite its successful effort in elevating cultural diversity as a valid legitimate goal, provides no guidance to this underlying concept but subscribes to a broad and all-encompassing definition. Without any generalisation aspirations, we look at the contours of cultural diversity in the narrow context of EC audiovisual media policy.

In its cultural policy endeavours, the EC still tends to stick to versions of international relations theory stressing the competitiveness of nations vis-à-vis others as the primary governance problem. The High Level Group on Audiovisual Policy was deeply convinced, for instance, that, “[a]t the heart of the matter is the question of whether the predicted explosion in demand for audiovisual material will be met by European productions or by imports. […] The danger is that the channel proliferation brought about digital technology will lead to further market fragmentation, making it more difficult for European producers to compete with American imports”. To prevent this, and to put it in an overly simplified way, what the AVMS does is to secure access to the European production of “Big Brother” in preference to a US production of “Big Sister”.

The issues relating to cultural diversity are however much more complex. In policy terms, it is clear that the concept of cultural diversity has its roots in the discussion of trade and culture and the perceived strong negative impact of economic globalisation upon local culture. Cultural diversity is the present and positively formulated version of “exception culturelle” – the slogan that was fervently defended by the European Community and Canada during the Uruguay Round of negotiations in the WTO insisting upon the exclusion of cultural goods and services from the multilateral trade system.

While it is undoubted that “trade generates complex and often contradictory effects”, it is equally certain that trade is not a “zero-sum” game and there are a number of ways in which trade enhances cultural flows and exchanges. In the “trade and culture” discourse however the common (and particularly loud) statements are that cultural diversity is impoverished and indeed almost extinguished as the globalised flow of easy entertainment coming from

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160 Article 4(1) of the UNESCO Convention defines “cultural diversity” as referring “to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies”.


165 For some classic thoughts in this regard, see Paul Krugman, “Competitiveness: A Dangerous Obsession” (1994) Foreign Affairs 73:2, pp. 28-44.
Hollywood dominates and homogenises. This (mis)conception is difficult to put right or at least soften, and is extremely over-politicised. In the specific sense of cultural policy-making, this debate is additionally burdened with notions of cultural and national identity that lead to national sovereignty susceptibilities. In the sub-context of policy-making in audiovisual media, the discussion is further complicated since “one’s view on the role of media in society is intimately bound up with one’s view of democracy and the proper bounds of governmental power” (which in the EC context is further burdened with issues of competences and subsidiarity). Ultimately, all these interrelated discourses are in a profound state of transition: endogenously (within the nation state), “as the audiovisual sector moves from being a separable and quarantined domain of governance to its enactment as part of a whole-of-government modelling in which it emerges as a service industry in a ‘digital economy’” and exogenously (outside the nation state), as liberalisation, migration and other forces of globalisation induce sweeping societal shifts that make modern society increasingly homogeneous across cultures and heterogeneous within them.

Under the latter circumstances, it becomes outdated and increasingly inappropriate to apply notions of cultural diversity, which “tend to favour ‘billiard ball’ representations of cultures as neatly bounded wholes whose contents are given and static. These understandings downplay ‘the ways in which meanings and symbols of culture are produced through complex processes of translations, negotiation and enunciation’, as well as by contestation and conflict”. To be clear, these are precisely the perceptions of

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166 Graber, supra note 44.
167 See e.g. Anthony Giddens, Runaway World: How Globalisation Is Reshaping Our Lives, London: Routledge, 2002. With regard to culture, Giddens (at p. xxiv) holds: “Western, and more specifically American, cultural influence is visible everywhere – in films, television, popular music and other areas. Cultural standardisation is an intrinsic part of this process. Yet all this is relatively superficial cultural veneer; a more profound effect of globalisation is to produce greater local cultural diversity, not homogeneity. The United States itself is the very opposite of a cultural monolith, comprising as it does a dazzling variety of different ethnic and cultural groups. Because of its ‘push-down’ effect […] globalisation tends to promote a renewal of local cultural identities. Sometimes these reflect wider world patterns, but very often they self-consciously diverge from them”. Tyler Cowen also insists that global monopolies and imported technologies have led to promoting local creativity by generating new markets for innovative, high-quality artistic productions. See Tyler Cowen, Creative Destruction: How Globalization Is Changing the World’s Cultures, Princeton: Princeton University Press, 2002, at p. 146 and Tyler Cowen, In Praise of Commercial Culture, Cambridge, MA: Harvard University Press, 1998, in particular at pp. 15-43.
169 O’Regan and Goldsmith, supra note 161, at p. 88.
172 Yudhishtir Raj Isar, “Cultural Diversity” (2006) Theory, Culture and Society 23/2/3, pp. 371–375, at p. 372, referring to Nick Stevenson, Cultural Citizenship: Cosmopolitan Questions, Maidenhead: Open University Press, 2003, at p. 62. In terms of trade and culture, Singh has also noted that, “[t]he cultural voices coming through on the international commercial networks rely less on some primeval notion on authentic diversity than on hybridity and innovation. They serve to illustrate not just the complexity of cultures and their transnational linkages but, more importantly, a distinctiveness that is confident of borrowing from genres around the world and more or less unafraid of commercial processes”. See J.P.
the UNESCO Convention on the international level, whose premise is that it is cultural diversity between nations and not within nations that needs to be protected and promoted.\textsuperscript{173} In the AVMS context, there are also the odd relationships between “European” and “non-European” culture, between “European” and national identities.\textsuperscript{174}

\section*{6. Some concluding thoughts}

A revision usually entails a correction, improvement and/or an update. The AVMS is an update but hardly an improvement on the previous TVWF regime, in particular as far as its contribution to cultural diversity in the European media is concerned. When examining the provisions of the AVMS, we exposed a wide gap between the cultural diversity rhetoric and the real instruments put in place by the Community legislator. The lack of a clear and comprehensive vision of how to approach the new dynamic multi-faceted audiovisual media environment is also apparent. Besides the dubious justification and effectiveness of the quota mechanism, another, and perhaps even stronger, strand of criticism can be formulated with regard to the underlying concept of cultural diversity that the EC has embraced.\textsuperscript{175} It is presently a mere political slogan without any discernable contours that can be translated into a meaningful and workable toolbox.

The significance of defining the parameters of cultural diversity is augmented as we move towards an intrinsically dynamic and more complex media environment. It is critical in this regard that the Community abandons (or at least attempts to abandon) its “Europe against the rest of the world” strategy, which is difficult to justify both in economic and in cultural terms. A second largely inadequate policy is the Community’s reliance on quota systems – these were a simple tool applied for television (that everyone could agree upon) but are now outdated and almost nonsensical.

It is also crucial that the Community develops a positive and comprehensive approach towards the contemporary media ecology that cautiously accounts for the changes in cultural content production, distribution, access and consumption. This may call for a whole new package of measures, especially as audiences become more and more fragmented,\textsuperscript{176} as layers other than the content

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\textsuperscript{173} Burri-Nenova, supra note 155.


\textsuperscript{175} Sharing this position, see also McGonagle, supra note 117.

\textsuperscript{176} See European Commission Communication on accelerating the transition from analogue to digital broadcasting, COM(2005) 204 final, 24 May 2005; European Commission, “EU Member States on Course for Analogue Terrestrial TV Switch-off”, IP/09/266, Brussels, 16 February 2009. Upon the transition to digital, every household will receive between 20 and 40 free TV channels. This growth in channel choice will reduce the total audience share of the primary channels and the share of individual primary channels in each Member State. Audience fragmentation will put revenue pressure on the primary channels (especially commercial ones) and undermine the public funding of leading public primary channels. Furthermore, new media distribution channels will continue drawing consumers away from traditional entertainment media,
layer (i.e. physical and logical) become critical for access to content, and as new self- and co-regulatory models proliferate.

Admittedly, the Community has already taken steps in this context (e.g. with respect to media literacy, content online and content production in the framework of the Media 2007 programme), but there is still a significant lack of coherence and prioritisation. Neither is there lots of innovation. Various standard-setting texts adopted by the Council of Europe show, for instance, much more sensitivity to the contemporary media and a willingness to experiment, which may be vital for regulatory initiatives in a fluid environment. At the same time, the Commission’s Communication on a European agenda for culture in a globalizing world, still praises the TVWF and its contribution “to the strengthening of media pluralism and cultural diversity”. 

further reducing the audience share of primary channels. See Graham and Associates, supra note 89, at sections 3.5.1; 3.5.4 and 3.5.5.


179 Recital 37 AVMS states that, “[m]edia literacy refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They are better able to protect themselves and their families from harmful or offensive material. Therefore the development of media literacy in all sections of society should be promoted and its progress followed closely”. See also European Commission, “Making Sense of Today’s Media Content: Commission Begins Public Media Literacy Consultation”, IP/06/1362, Brussels, 6 October 2006.

180 See supra note 111.


182 See e.g. Council of Europe, Recommendation Rec(2007) 2 of the Committee of Ministers to member states on media pluralism and diversity of media content, 31 January 2007; Recommendation Rec(2007) 3 of the Committee of Ministers to member states on the remit of public service media in the information society, 31 January 2007; Recommendation CM/Re(2007) 16 of the Committee to member states to promote the public service value of the Internet, 7 November 2007. See also McGonagle, supra note 117.

183 European Commission, Communication on a European agenda for culture in a globalising world, COM(2007) 242 final, 10 May 2007 and European Commission, Inventory of Community actions in the field of culture, Accompanying document to the communication on a European agenda for culture in a globalizing world, SEC(2007) 570, 10 May 2007. The Communication defines three interrelated sets of objectives, to which all actors (the Member States and their regions, stakeholders in the field of culture and the Commission) are called upon to contribute. These sets of objectives encompass: (i) promotion of cultural diversity and intercultural dialogue; (ii) promotion of culture as a catalyst for creativity in the framework of the Lisbon Strategy for growth and jobs; and (iii) promotion of culture as a vital element of the Union’s international relations. See European Commission, Communication on a European agenda for culture in a globalising world, ibid. at p. 8.

184 Ibid. at p. 10.