

# Academic watch on the treatment of culture in trade agreements and the regulation of electronic commerce on a global scale

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## THE REVIEW OF AUDIOVISUAL POLICY IN EUROPE : BETWEEN CULTURAL SOVEREIGNTY AND DIGITAL GLOBALISATION

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Recently, the agenda of the European Union (EU) on the audiovisual sector has been dominated by the review of the Audiovisual Media Services Directive (AVMSD). The key issue of this review was twofold: on one side, to prevent the establishment of formerly local and national standards in digital markets and ensure open audiovisual markets to transnational digital content, and, on the other side, establish governance arrangements in the digital economy in order to involve large online platforms in the financing, distribution and visibility of European audiovisual content.

The new AVMSD was adopted by the European Parliament on October 2, 2018 by 452 votes in favour, 132 against and 65 abstentions. EU Member States have until September 19, 2020 to transpose the Directive into national law. The new legislation is going to apply to all broadcasters, but also to video-on demand (VOD) platforms and online video sharing ones, such as Netflix, Disney+ and YouTube.

More specifically, the new text (Regulation (EU), 2018/1808) includes obligations for providers of on-demand audiovisual services to respect a quota of 30% for European works on their catalogues (see Box below).



Note that during the negotiations on the AVMSD review, the initial proposal from the European Commission was to set up a quota of 20% for European works. Several EU Member States, such as France, Spain, Italy, Greece and Romania, proposed the establishment of quotas of 30% or 40% for European works, whereas Finland, Luxembourg, Denmark, Ireland and the Czech Republic were against the perspective of including quotas on the online platforms' catalogues ([New Europe 2018](#)).

In addition, the revised AVMSD includes derogation to the country of origin principle in order to tax non-domestic VOD players targeting a given Member State (see Box below). The country of origin principle, seen as cornerstone of European audiovisual policy, means that service providers are only subject to the rules of their country of origin or home country, i.e. the country where they are established. According to the new AVMSD, where Member States require linear broadcasters and VOD providers, under their jurisdiction, to contribute financially to the production of European and national film content, they may also require linear broadcasters and VOD providers, targeting audiences in their territories, but established in other Member States, to make such financial contribution, but only in association with the turnover generated in the imposing country.

#### AVMSD ARTICLE 13

The article 13 of the new AVMSD has been at the core of the European public debate. According to paragraph 1 of the article 13, "Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure prominence of those works".

The paragraph 2 of article 13 provides 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 Member States to make such financial contributions, which shall be proportionate and non-discriminatory".

Finally, under the paragraph 3, "the financial contribution shall be based only on the revenues earned in the targeted Member States".

Member States shall report to the European Commission "by December 19, 2021 and every two years thereafter on the implementation of paragraphs 1 and 2" (paragraph 4 of article 13).



Indeed, the new text is based on a logic à la carte, which historically dominates EU intervention in audiovisual industries. It is indicative that in 2019, only France, Germany, Italy, Denmark and the Flemish Community of Belgium have developed obligations for non-domestic providers of on-demand audiovisual media services ([Donders et al., 2018](#)). In addition the new directive provides new rules on better protection of children against online violence, hatred and harmful advertising, as well as on a redefinition of advertising ceilings.


## Digital platforms market figures in Europe

According to available statistical data, in 2018 European audiovisual content (films and television programs) represented 26% of the available content on VOD services in the EU. British film and TV series titles make up the bulk of EU exports in VOD platforms. In this regard, while France is historically the leading producer of films in Europe (300 films in 2018, including 118 co-productions), in 2017, only 1.9% of the films available on Netflix in Europe (except France) were French ones. In a similar vein, in 2018 the US-based companies Netflix and Amazon Prime Video represented 74% of EU VOD revenues and 79% of EU VOD subscribers (Grece, 2019).

In France, in 2018 the top-20 most-consumed content on VOD platforms was in Netflix and Amazon Prime Video catalogues and it included only two non-US programs – the series La Casa de papel and Black Mirror. Regarding the French market, according to the 2018 overview of the Centre national du cinema (CNC), the VOD market is estimated at 455 million EUR, up 82.7% compared to 2017.

### FLASH

Under the discussions on the new bill, the discourse of French authorities and cinema milieu is built around the term “cultural sovereignty”. This term was also brought up in the 1990s during negotiations on the Multilateral Agreement on Investment. Finally, French authorities had considered it as “protectionist” and “defensive” and they opted for the term “cultural diversity”, a more “federating” term in the context of that time.



This figure represents approximately 35% of cinema admissions in France : in 2018, box office revenues reached 1 336.1 billion EUR. Over the last years, the VOD market is constantly growing, since it was estimated at 29.2 million EUR in 2014. According to CNC, “this year again, the US platforms (Netflix and Amazon Prime Video) significantly contribute to boost the market”.

## New bill on the public audiovisual service in France

In the new context, French authorities aim to establish a new and more ambitious audiovisual legislation in terms of obligations for digital players. The goal of the new bill is to “regain cultural sovereignty in the digital age” and to re-balance the rules of the audiovisual ecosystem between traditional players in the sector, such as TV channels, subject to several obligations and new digital players such as online platforms. The issue is to put in place new norms, which will support “the French cultural exception, the creation and the diversity of the offer” and will significantly modernize the financing model for films and audiovisual programs in France. In this view, like TV channels, online platforms should commit to invest a part of their turnover in French and European production.

## Principles of French public action in the audiovisual sector

The French public action in cinema and audiovisual sector is based on a key principle: providers of cinematographic and audiovisual works, whatever they may be, must participate in the financing of French and European audiovisual production. The French audiovisual model is characterised by a single policy instrument of intervention, the Centre national du cinema (CNC) and an active support of the cinema and audiovisual industry based on an autonomous mechanism for transfer and redistribution of revenues. This mechanism is linked to market performance rather than to State budget. The French audiovisual system brings the various actors of the industry to work in symbiosis.



The regulatory framework is effective since France is the leading producer in terms of films in Europe; through co-productions, it is the pivot of the European cinema activity; French film production has a very high market share compared to other national cinemas in Europe; and finally, French films financed by the CNC show satisfactory results in the European and international markets.


## CNC funding

The CNC budget is made up of three allocated taxes. Since 2012, tax revenue has decreased from 749 million EUR to 675 million EUR in 2017. According to 2019 forecasts, the CNC revenues reach 678.5 million EUR. The turnover tax on TV channels represents almost half of the CNC resources. In 2019, the expected amount is 294 million EUR. This tax is levied on advertising and sponsorship revenues – including catch-up TV services.

To this should be added the tax on providers of TV services, which is based on subscriptions and other amounts paid by users for one or more TV services. In 2019, the amount will reach 215.64 million EUR. Besides, two additional taxes contribute to CNC resources: the tax on cinema tickets, which amounted to 145.5 million EUR in 2019 and the tax on video (2019 forecast: 22.75 million EUR). The latter is based on the turnover of the physical video and VOD sectors.

We should note here that French authorities have established a “YouTube” tax, extending video tax to advertising revenues of video sharing platforms broadcasting content in France, whether established in France or abroad. The rate of this tax is 2%. This measure, as well as the extension of video tax to subscription VOD platforms established abroad, - known as “Netflix tax” - came into force in 2018 following a review by the European Commission. In 2018, the ‘YouTube’ and ‘Netflix’ taxes brought in around 10 million EUR. It is clear that the contribution of these major players is low compared to tax and support obligations of TV channels.





According to Frédérique Bredin, president of the CNC, “cinema theaters pay 140 millions, TV channels 290 millions and GAFA (Google, Amazon, Facebook, Apple) ten million (...) it is a small amount but the important thing was to formally incorporate them into our regulatory framework”.

## New mechanism for financing

In this regard, the new bill aims to establish a new financing mechanism, which can be applied on the large online platforms established abroad and targeting audiences in France. In the context of discussions on the implementation of the audiovisual reform, Franck Riester, French Minister of Culture, mentioned that the goal is to constrain online video platforms specialised in fiction programs, such as Netflix, Disney+, HBO Max and Amazon Prime Video, to invest at least 25% of their turnover generated in France. F. Riester also confirmed a minimum rate of 16% for platforms broadcasting broad interest content.

Online platforms should negotiate the investment obligations with the relevant sectors. But in the absence of professional agreements, a floor rate fixed by decree will apply. Finally, the French Minister of Culture notified that if online platforms fail to comply with this type of obligations, an array of sanctions would apply, risking even the ban of broadcasting content in France.

## Cinema and audiovisual milieu

Cinema and audiovisual professionals in France consider that large online platforms should be integrated into the French funding model, in the same way as other broadcasters, such as TV channels, cinema theatres, etc. The bill largely meets the expectations of the milieu. However, the ARP (Auteurs-Réalisateurs-Producteurs) association underlined that the role of decrees, which are going to specify the rules for applying the law, are “absolutely essential and should incorporate, as clearly as possible, the hybrid and sophisticated business models of platforms, that benefit from cultural works”. As such, it is urgent to take into account “the availability of works and set up guaranteed minimum per subscriber”. French Parliament is expected to examine the new bill on audiovisual public service in April 2020.

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