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**(Un)welcome guests: VoD platforms and the new rules on
European works quotas in Italy
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The definitive, peer reviewed and edited version of this article is published in Journal of Digital Media & Policy, 12 (3), pp. 451-470:

https://doi.org/10.1386/jdmp_00078_1

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Abstract

Programming and investment quotas in favour of ‘European works’ are an important element of the audiovisual ‘cultural policy toolkit’ in Europe. In reasserting their role, the revised 2018 Audiovisual Media Services Directive (AVMSD) has updated these rules in response to the rise of transnational video-on-demand services (VoD) across the continent. This article examines why and how Italy embarked on a reform of its domestic regime on quotas in 2017, in parallel with the revision of the AVMSD. It shows that Italian policy-makers sought to adopt a system of quotas that was far more stringent than the one previously in force and that also departed from the EU approach in significant ways. The evidence presented here shows that while national broadcasters managed to get the government to water down its initial proposals, Netflix and the other VoD providers were not involved in the formal discussions with the government until a late stage and were unable to shape policy outcome to their advantage. We argue the Italian case is a prime example of the continued commitment to quotas as a core element of the audiovisual cultural policy toolkit seen across Europe.

Keywords

1. Audiovisual Media Services Directive (AVMSD)
2. European Union (EU)
3. Media policy
4. Netflix
5. Quotas
6. Video-on-Demand (VoD)

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ACCEPTED AUTHOR MANUSCRIPT.

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(Un)welcome guests: VoD platforms and the new rules on European works quotas in Italy

Introduction

The impact of globalisation and new communications technologies on media policy has been the subject of much scholarly analysis (e.g., Flew et al 2016). Since the beginning of the new millennium, the emergence of the Internet as a delivery channel for audiovisual content and the internationalisation of the media industry have created stronger pressures on countries' 'cultural policy toolkits' in the audiovisual sector (Grant and Wood 2004). The concept of cultural policy toolkit refers to the range of regulatory and other policy mechanisms used by media policy-makers to promote cultural diversity, including public service broadcasting, media ownership rules, TV subsidies and local content quotas (the latter being the focus of this study). In their comparative analysis of how policy-makers in France, Germany, the UK and Canada responded to growing deregulatory pressures arising from an increasingly internationalised and competitive media environment, Thomas Gibbons and Peter Humphrey concluded that 'despite the challenges, these countries' respective cultural policy toolkit models appear robust and demonstrate a striking degree of political support with path-dependent policy-making' (Gibbons and Humphreys 2011: 191).

With regard to the impact of the European Union (EU) on its Member States (MSs), the study recognised the EU's dual capacity [...] 'to act as a shield and/or as a conduit for globalisation' (p. 196) and concluded that while the EU single market rules have worked in combination with the technological change to enable the internationalisation strategies of US media companies, advocates of cultural policy within the EU, led by France, have managed 'to achieve compromise policies that go some way towards promoting and protecting the cultural policy toolkit' (p. 197). Since the adoption of the Television without Frontiers Directive (TWFD) in 1989, the cornerstone of EU media policy, television broadcasters established in Europe have been required to ensure that a majority of their broadcast time is made up of European works. Additionally, at least 10% of either their broadcast time or programming budget must be reserved to independent productions. In the last 15 years, these rules have been updated to take into account the growth in video-on-demand (VoD) services, with the 2018 revision of what is now the Audiovisual Media Services Directive (AVMSD) introducing mandatory quotas for this type of services. As will be detailed below, this latest revision was arguably a case of 'upward regulation', illustrating the capacity of the EU, in Gibbons and Humphreys' words, to act as a shield for globalisation.

In parallel to EU-level efforts to adapt the cultural policy toolkit to the age of Netflix, a number of MSs attempted to incorporate VoD providers into their domestic regimes of financial contribution obligations, in order to direct more resources towards national producers and create more of a level playing field with traditional broadcasters (see Kostovska et al 2020). Our study investigates why, with the EU level process to revise the AVMSD already underway, one such MS, Italy, moved in 2017 to change its national rules on both programme quotas and investment obligations for European audiovisual works, considering the motivations and behaviour of the main actors involved in the process and the institutional and political factors that have shaped the course of events. Theoretically, the study uses the Italian case to engage with the argument put forward by Gibbons and Humphreys (2011: 5) that 'concerns about public service and cultural identity, [...] and a general policy "path dependence" [...] may counter pressures for deregulation'.

The Italian case has been overlooked by researchers writing about the audiovisual cultural policy toolkit in Europe. Work in this area has tended to focus on France (championing cultural protectionist measures on the European stage), Germany and the UK (two contrasting examples to France within Europe), and smaller MSs, facing particular problems owing to the small size of their domestic market (see, e.g., Svendsen 2011; Burgelman and Pauwels 1992). Yet, developments in recent years makes Italy an interesting case worthy of closer examination. The changes to the national regulatory framework introduced in 2017 were, as we show below, an attempt to move towards a much more stringent system of quotas, inspired by the protectionist French model, and marked a significant turning point in the history of European quota rules in Italy. By examining developments since 2017 we provide valuable insights into the domestic agendas driving regulatory policy at national level in this area, and the political opportunities and constraints that protectionist-minded policy-makers face in their efforts to regulate. The analysis also sheds light on the ways, and the extent to which, transnational VoD providers, notably Netflix, the new big kid on the block, engaged in the policy process in Italy, thereby contributing to an emerging body of work examining Netflix's lobbying strategies in the countries where it operates (e.g., Zboralska and Davis 2017; Lobato 2019).

The core contribution of this study is to offer scholars of European media policy an in-depth examination of the Italian case in relation to the important question of how national policy-makers in Europe are responding to the rise of transnational streaming services, and the institutional and political factors constraining (or enabling) their efforts to adapt domestic regulatory regimes within the parameters set out at EU level.

The article proceeds as follows. After describing the research methods, the section that follows offers a brief history of European content quotas before moving on to contextualise the Italian case. The remainder of the article traces the unfolding events in Italy between 2017 and 2019 through two phases demarcated by the national elections of March 2018. The final section draws some conclusions and considers the wider significance of this case-study.

Methodology

The analysis presented in this paper draws primarily on documentary evidence (for a discussion of document analysis in media policy research see Karppinen and Moe 2019). A systematic examination of a wide range of policy documents was conducted. These included: legal and regulatory texts, legislative drafts, policy reports, minutes of roundtable discussions, audio and video recordings of parliamentary hearings and position papers. At the time the research was undertaken, some of these documents were not yet in the public domain. The generalist and trade press provided a supplementary source of information. Every effort was made to ensure that the corpus, covering documents produced between 2017 and 2019, was exhaustive and included all possible documentation of the process. Evidence from documentary sources was triangulated by the second author, who followed closely the policy process on behalf of the Italian communication regulator AGCOM, tasked with adopting secondary regulation. Finally, document analysis was also triangulated with informal conversations held by the two authors with representatives of stakeholder organisations (wishing to remain anonymous). As the analysis benefits from the second author's insider status and contextual knowledge, a reflexive consideration is in order. AGCOM was invited to attend the policy negotiations between government and the main stakeholder groups as an adviser on technical matters, being the regulatory body in charge of implementing the rules and monitoring compliance, but did not have a direct stake in the issue. Therefore, any bias in the analysis resulting from the research team comprising a policy insider can be safely discounted.

EU, cultural protectionism and the quotas

The EU's media policy has been described as having a 'deregulatory structural bias' (Gibbons and Humphreys 2011: 194). This is due to the EU's limited scope for intervention in pursuit of cultural policy objectives under the principle of subsidiarity. However, as Broughton Micova et al. (2019: 220) have argued, the EU has combined what has been a 'fundamentally liberalising economic approach to media regulation [...] with specific interventions in the market aimed at protecting Europe's content industries', as a way of promoting cultural diversity and fostering a European identity. Adopted in 1989 with the main goal of removing barriers to the cross-border transmission of television services, the TWFD was liberalising and 'market-making', while also containing provisions relating to public interest goals (e.g. rules on protection of minors, advertising ban on certain categories of products, and restriction of advertising time). In particular, the introduction of quotas on European works, a protectionist and 'market-correcting' measure, reflected deep-seated concerns in some parts of Europe about the threat to the European content industries (and thus to European culture) posed by the spread of American films and TV shows on the new commercial channels.

These concerns have not waned. European and national policy-makers have continued to grapple with the implications of fast-changing technological and market conditions for European and local content regulation. Although EU quotas have received a lot of criticism due their vagueness and for being industrial policy dressed up as promoting cultural diversity (e.g., Woods and Harrison 2001; Katistrea 2003), the general approach to promoting European works has not fundamentally changed since 1989. Regulatory efforts have rather gone in the direction of *updating* the quota regime to the Internet era. The apparent paradox here is that rules that were first introduced in order to ensure visibility for European works in an era of 'scarcity' (limited number of TV channels) have continued to receive support in an era of unlimited shelf space. Arguably, however, the key justification for quotas does not stem from technical constraints at the distribution stage but rather lies with the underlying economics of media content provision (favouring strategies of internationalisation and vertical integration pursued by large US companies).

The 2007 AVMSD, which replaced the TWFD, was a first attempt to deal with the emergence of the Internet as a viable distribution channel for audiovisual content (Burri-Nenova 2007). It required MSs to ensure that on-demand audiovisual media services promote, where practicable and by appropriate means, the production of and access to European works. In this way it brought Internet-based 'non-linear' services for the first time within the scope of EU regulation, even though, lacking a specific threshold, this was hardly an enforceable requirement (at least in those MSs that opted to transpose the EU formulation literally into their national legislation).

In the following decade, the rise of Netflix and other transnational VoD providers prompted a further revision of the AVMSD (see Broughton Micova et al 2019; Apa and Gangemi 2019). First proposed in May 2016 and eventually adopted in November 2018, the revised AVMSD introduced *mandatory* quotas for VoD services. It required that at least 30% of the catalogue of VoD services be reserved for European works and that such works are given prominence. It also established that MSs are allowed to impose financial contributions to the production of European works not just on providers of audiovisual media services in their jurisdiction, but also on those established in another MS that target their territory. This de-facto derogation from the country of origin principle, at the core of the single market, is particularly significant. European policy-makers sought to discourage the practice of regulatory arbitrage by transnational VoD providers. By 2017 about one-third of VoD services in the EU were

targeting MSs other than the one in which they were established and over two thirds of ‘pay-on-demand services’ targeting foreign markets were concentrated in just three countries, namely the UK, the Netherlands and Ireland (EAO 2018: 3). The 2018 AVMSD was, therefore, designed to reduce the regulatory asymmetry between traditional broadcasters and VoD providers, by putting in place EU-wide European works obligations on VoD services and allowing destination countries to require contributions to domestic production. While the overall approach to the promotion of European works remained essentially the same, it was nevertheless a significant step towards updating European regulation designed in a broadcast era for an age of online streaming and VoD.

In transposing the Directive into their national laws, MSs were given much room for manoeuvre. The Directive allows for several options with respect to how to comply with the European works obligation on on-demand services. Moreover, the financial obligations placed on audiovisual media services are not mandatory. If MSs decide to introduce them they can opt to impose an obligation on providers to either invest directly into European works or to contribute to a fund for this purpose. However, the interplay between national and EU-level policy-making is more complex than just being about top-down transposition. The derogation to the country-of-origin principle with respect to financial obligations for audiovisual media services was to all intents and purposes an *ex post* ratification of national laws placing obligations on providers established abroad that had already been approved (or were well under way) in Germany and France (see Donders et al 2018; Apa and Gangemi 2019). Italy seemed another version of this complex interplay.

Italian media policy

The academic literature on media policy in Italy has tended to focus on issues around the regulation of media ownership and public service broadcasting, in the context of media tycoon Silvio Berlusconi’s twenty-year long dominance over Italian politics and his glaring conflict of interests (e.g., D’Arma 2015; Hibberd 2007). Other issues, including the cultural policy aspects of media regulation, have received little scholarly attention.

Literature from political and media studies highlights a number of features of policy-making in Italy that explain patterns observed in the country. In their seminal comparative study of media systems, Hallin and Mancini (2004) observed in relation to media policy that in Italy and other Southern European countries ‘the state’s grasp often exceeds its reach’ (p. 119), that is, ‘the capacity of the state to intervene effectively is often limited by the lack of resources, lack of political consensus, and clientelist relationships that diminish its capacity for unified action’ (ibid.). Analyses of media policy-making in Italy have highlighted institutional features of the Italian political system such as the fragmentation of the party system, government instability and ‘the very diffusive, inclusive, pluralist policy-making structures’ of the Italian post-war Constitution (Della Sala, 1997: 19) as factors constraining the ability of Italian governments to accomplish media reforms (D’Arma 2009).

Italy’s cultural policy toolkit has a lot in common with the French model, reliant on quotas and subsidies, but it can also be seen as featuring characteristics of the contrasting German one, reliant on public service broadcasting as the core element of the toolkit (for a discussion of these two models see Gibbons and Humphreys 2011). Italy shares with France a legalistic, rule-based approach to supporting the national cultural industries. There is a long tradition of state support for the film industry. As a form of cultural expression, films have historically enjoyed a privileged status vis-à-vis television and other types of audiovisual content. Support mechanisms for the cinema sector have shifted in recent years away from direct subsidies and

towards tax incentives (Cucco 2015). By contrast support for the television production industry is more recent. The industry itself only formed in the second half of the 1990s (Rai 2017), and while it has grown and attracted foreign capital in recent years, it remains fragmented and, few exceptions aside (e.g., Cattleya, acquired by ITV Studios in 2017), under-capitalised (see APA 2020). In parallel with its growth, however, the sector's interests have seen stronger representation (through its own trade association) and greater recognition by policy-makers. While nowhere as well-resourced as its German counterparts and with lower public support, the public broadcaster Rai, however, is by far the country's main investor in local films and TV series. In this respect Italy is more like Germany. Subject to no obligations for many years, the private sector, including pay-TV operators, historically invested little in domestic productions, unlike those in France. From the early 2000s, however, both free-to-air broadcasting group Mediaset and pay-TV operator Sky started to invest more with the latter pioneering a new era of 'high-end' television drama production in Italy. Even so, their investments remain much lower, and fluctuate more, than Rai's. According to data published by the Italian association of TV producers (Osservatorio della Fiction Italiana 2020), RAI accounted for a vast majority of first-run domestically-originated TV fiction released during the most recent TV season (2019/20), including output by VoD services (64% and 74% in terms of number of titles and hours respectively).

Transposing the TWFD, Italy required broadcasters to reserve a majority of their transmission time for European works through legislation in 1990 (see D'Urso et al 2015). These obligations were initially not enforced and it was not until the second half of the 1990s, under a centre-left government, that the issue received more attention. Following the 1997 revision of the TWFD, the Italian Parliament enacted the first legislation dealing specifically with quotas for European works. Going beyond the minimum standards set by the TWFD, the rules required broadcasters to comply with *both* programming and investment obligations in relation to the 10% sub-quota reserved to independent productions (instead of opting for either one). Moreover, it used revenue instead of programming budgets (a lower amount) as the basis for the calculation of the investment obligations. Agcom, the newly created communications regulator, was charged with implementing the rules and applying sanctions. Ten years later, in 2007, investment obligations were extended to pay-TV operators. Industry observers have credited the quota regime introduced in Italy in the late 1990s as a contributing factor to the growth of the national TV production sector in those years (D'Urso et al 2015).

This brief history of the transposition of EU quotas regulations in Italy shows that from the second half of the 1990s onwards Italian policy-makers have deployed quotas in ways that went beyond the minimum regulatory obligations set out at EU level. In highlighting key features of media policy-making in Italy and of its cultural policy toolkit, this section has served the purpose of framing the analysis that follows of the policy process between 2017-2019 leading to the reform of the domestic regime on quotas.

When in Rome...do as the French do: The Franceschini decree (2017-18)

Warming up

In order to understand the context in which the so-called 'Franceschini reform' of 2017 took place, it is necessary to first consider briefly the developments occurring in the immediately preceding years. The trigger for audiovisual policy developments in Italy since 2017 was an inter-ministerial decree adopted in 2013 which established programming and investment sub-quotas for Italian feature films. For the first time, all broadcasters were required to meet a financial obligation towards a specific genre, and they were asked to do so irrespective of the

thematic focus of their channels (e.g., a provider specialised in children's programming was obliged in any case to invest in Italian films). The adoption of the decree led to an increase in the number of waivers accorded by Agcom to broadcasters, mostly American multichannel providers (Agcom 2016a). A waiver granted to Disney in 2014, concerning both the general obligation on financial investment (10% of total revenue) and investment in Italian films, was the most controversial one. Agcom reported that Disney claimed to be 'unable to acquire independent European television series that faithfully represent the system of values and levels of quality capable of fully satisfying the specific expectations of the relevant public' (Agcom 2014: 3). It was neither Agcom's first derogation nor the first for cinematographic works, but the fact that Disney's claim was interpreted as implying the low quality of Italian productions (whereas, in fact, it was about the unsuitability of European children's series for the Italian market) contributed to fuel the controversy. After Disney's waiver, there were other similar cases involving, among others, Fox (2015) and Discovery Italia (2016). In these latter cases, Agcom's decisions were challenged by producers before the administrative court. The judge, however, sided with Agcom stating that broadcasters shall not be requested to invest in genres they are not interested in scheduling. These cases soured the relations between broadcasters and producers and gave the issue of quotas greater prominence.

Arm wrestling: Broadcasters vs. producers (Chapter I)

In the summer of 2017, the centre-left Government launched a process aimed at reforming the legal framework for the promotion of European and Italian works. The initiative was led by the Ministry of Culture exercising a mandate by Parliament provided for by the so-called 'Cinema Law' of 2016. The first round of consultation with industry stakeholders revealed a stark contrast between the production sector, calling for more stringent quotas, and broadcasters seeking to preserve the *status quo*. Siding with the producers, at the end of the consultation, the government produced a first draft of the legislative decree in September 2017 (henceforth 'Franceschini decree' from the name of the lead Minister). The reform was explicitly inspired by the French model, from which it even took some specific thresholds. In one key respect the approach of the Italian government was also different from the one adopted by European policy-makers. The revision of the AVMSD under way at the time in Brussels sought to reduce the regulatory asymmetry between traditional broadcasters and on-demand services by adopting more stringent rules for the latter while maintaining the *status quo* for linear broadcasters. By contrast, the Italian government opted for a *general* tightening of the quota rules, including those applying to traditional broadcasters. The draft text provided for an increase, from 50% to 60%, in the programming quota of European works for linear broadcasters, and for a doubling of their financial obligations within two years: from 10% to 20% of total revenue for commercial broadcasters and from 15% to 30% for public broadcaster Rai. Whereas previously these had to be investments in independent productions, the proposal specified that 'only' three quarters should be ringfenced for independents. Much higher penalties for non-compliance of up to 2.5 million euros were included, ten times more than under the previous rules. While taking into account some suggestions arising from a fact-finding survey undertaken by Agcom (2016a), the government ignored others, notably Agcom's recommendations to adopt a simplified and flexible approach to monitoring compliance and to prevent the wide use of exceptions.

Broadcasters strongly opposed the government's draft text. In three letters to Minister Franceschini jointly signed both by members of their trade association and other non-associated broadcasters, they protested that the increase in programming and investment quotas was unjustified and cumbersome. In particular, they argued strongly against two programming sub-

quotas: one applying during peak time (18:00-23:00) and the other one on ‘works of original Italian expression’ (henceforth, ‘Italian works’).

The bill approved by government in October 2017 partly addressed broadcasters’ concerns by reducing some of the proposed increases in quotas and by providing for a longer transition period before the new regime would come into full force (MiBACT 2017). In particular, the overall investment obligations were lowered from 20% to 15% for private broadcasters and from 30% to 20% for Rai (five sixths of which, instead of three quarter, to go to independent productions). There would be no investment sub-quotas on recent Italian works, unlike initially proposed, but a proposed sub-quota on Italian feature films, whose threshold had been unspecified, was set at 5% for Rai and 4.5% for private broadcasters. Programming sub-quotas for Italian works and during peak time slot were also lowered, but the latter quota was now specifically on ‘scripted Italian works’. Even if somehow watered down, the system of quotas envisaged by the government was still much more elaborate and restrictive (in keeping with the French model) than the regime in place at the time. Unsurprisingly, broadcasters continued to oppose it, calling for the removal of any increase in quotas, particularly those applying in peak-time, which they considered penalising towards ‘non-scripted’ genres and heavily infringing on their editorial freedom. Broadcasters also requested that compliance with the rules should be assessed on a three-year basis, in line with their investment planning cycle, and criticised sanctions for lacking proportionality.

By contrast, the various associations of producers and authors welcomed (often enthusiastically) the Government’s proposals, seen as a much-needed complement to the mechanisms of financial support for film and TV production introduced by the aforementioned ‘Cinema Law’ of 2016. The rules, they argued, would trigger a virtuous circle of growth in the independent production sector as a result of more resources flowing in, which in turn would enhance the quality of Italian works (100 Autori 2017), a strategic asset to be protected to avoid the risk of ‘cultural colonization’ (CNA 2017). By benefitting smaller producers, the new quota system was expected by some to contribute to the AVMSD’s goals to promote cultural diversity (Doc.it 2017).

Producers, however, were less united than the broadcasters. While generally welcoming the government proposals, the association of television producers warned against the risk of a *dirigiste* approach. They criticised the government for privileging feature films at the expense of other TV genres, thereby creating a situation described as ‘one genre being more equal than others’. They wanted the investment sub-quotas on Italian feature films to be removed, arguing that anyway film producers would be unable to meet the extra demand created artificially by the quota (APT 2017). They also agreed with the broadcasters that the peak-time quota for ‘scripted’ works would unjustifiably penalise non-scripted genres.

Missing an opportunity: The VoD providers and the Franceschini decree

The other main industry players affected by the Franceschini decree were the VoD providers. In reforming the quota rules for non-linear services, the Italian government looked at the approach taken by the Commission in its proposal for the revision of the AVMSD, which at that time (mid-2017) was being debated in the trilogue meetings. Three aspects were in line with the text under discussion in Brussels: the 30% catalogue share to be allocated to European works; the obligation to ensure adequate prominence for these works; and the application of the investment requirements also to providers of (on-demand) services established in another MS targeting Italian consumers (among which Netflix and Amazon). Both catalogue and

investment quotas were significantly increased compared to the existing rules (and the latter obligations would now also apply to VoD providers established in another MS).

The investment quota for on-demand services was set at 20% of revenue generated in Italy, which was the same threshold applying to private broadcasters in the first version of the Franceschini. Unlike broadcasters, however, neither Italian nor foreign VoD providers had participated in the roundtables and therefore had not made their voice heard during the negotiations with the Government before the adoption of the bill. Only Netflix had engaged with the government through informal meetings, but without seemingly being able to influence the outcome. While private broadcasters had successfully lobbied the government to reduce their investment quota from 20% of the first draft to 15% of the approved text (when fully operational), there was no corresponding reduction in the level of financial obligations placed on VoD services in the approved version of the Franceschini decree. Neither were VoD providers granted a *moratorium* for the year 2018, unlike broadcasters (though broadcasters, but not VoD providers, were subject to a specific investment quota for feature films).

The somewhat paradoxical outcome of the policy negotiations taking place during the second half 2017 was that on the whole the requirements for VoD services introduced by the Franceschini decree were *more* stringent than those applying to broadcasters. While the EU was intent on *reducing* the regulatory asymmetry between linear and non-linear providers (which, so the rationale went, disadvantaged the former vis-à-vis the latter), the Italian government had gone even further in creating a regulatory framework that overall placed more obligations on VoD providers than on linear broadcasters. However, this was *not* done by design. Rather, it was the result of the differential policy lobbying capacity of traditional industry stakeholders (both national broadcasters and producers), vis-à-vis VoD players. The 'pure' VoD providers based in Italy (i.e., those not connected to broadcasters) did not express any official position. The transnational VoD providers, affected by the decision of the Italian government to anticipate the derogation to the country-of-origin principle then under discussion in Brussels, were at that time (2017) not yet adequately equipped to address the issue on an institutional level, with the exception of Netflix (which had launched in Italy in 2015, one year earlier than Amazon Prime). Netflix submitted a written memorandum to a parliamentary hearing where it argued that far from creating a level playing field, the new rules would end up tilting it in favour of linear broadcasters, thereby hindering the development of the VoD market in Italy (Netflix 2017).

While driven by opposite goals, broadcasters and producers saw their interests somehow converging as they both called the government to protect the domestic industry in the face of the rise of transnational services. Broadcasters maintained that the significant resources that VoD providers were capable of investing into content production should be seen by regulators as an opportunity to share the burden of obligations more equitably among all providers. Authors and producers saw investments by VoD providers as potentially a huge boost for the domestic industry, though they also felt ambivalent about their aggressive international strategies, fearing that in the absence of adequate support measures, the Italian audiovisual industry would not be able to withstand the challenges of an increasingly global market (ANICA 2017).

The parliamentary debate on the government's proposal that followed led to few, relatively minor changes, mostly in favour of the broadcasters who were given greater flexibility in meeting the quotas. In the end, the government achieved its goal of introducing a more restrictive regime of quotas, with the support of producers. However, through their lobbying

efforts broadcasters managed to get some of the new restrictions relaxed and their entry into force postponed. VoD providers, by contrast, were not involved in the negotiations by the government, and most of them did not even try to get involved, with the exception of Netflix which engaged at some level with the process, but with no apparent success (see Table 1 below).

Table 1: The evolution of the quotas' obligations in Italy 2017-2019

		Previous regime	Franceschini Decree (2017)		Bonisoli Decree (2019)
			Proposal	Final	
Broadcasters - Programming quotas					
European works	All	50%	60%	60%	50%
Recent European works	RAI	20%		-	-
	Private	10%		-	-
Italian 'audiovisual' works	RAI	-	40%	30%	25%
	Private	-	40%	20%	16.7%
European works in peak-time (18:00-23:00)	All	-	60%	-	-
Scripted Italian works in peak-time (18:00-23:00)	RAI	-	40% ¹	12%	12%
	Private	-	40% ¹	6%	-
Broadcasters – Investment quotas					
European works	RAI	15%	30% ² (22,5%)	20% ² (16.7%)	17%
	Private	10%	20% ² (15%)	15% ² (12.5%)	12.5%
Recent Italian works	RAI	-	10%	-	8.5%
	Private	-	15%	-	6.25%
Italian feature films	RAI	3.6%	TBD	5.0%	4.2%
	Private	3.2%	TBD	4.5%	3.5%
VOD providers – Catalogue quotas					
Recent European works	All	20% ³	30% ³	30%	30%
Recent Italian works	All	-	15% ³	15%	15%
VOD providers – Investment quotas					
Recent European works	All	5%	20%	20%	>12.5%<20% ⁴
Recent Italian works	All	-	10%	10%	>6.25%<10% ⁴
Italian feature films	All	-	-	-	>1.25%<2% ⁴
Recent Italian feature films	All	-	-	-	>0.94%<1.5% ⁴

Notes: For broadcasters, programming quotas are expressed as minimum percentages of relevant transmission time; for VOD providers they are expressed as minimum percentages of the catalogue; according to the guidelines provided by the European Commission (Communication (2020/C 223/03)) the basis for the calculation should be the number of titles. For both broadcasters and VOD providers, investment quotas are expressed as minimum percentages on the total relevant annual revenues (excluding pay-TV revenues generated by sport packages' subscriptions). Unless where specified, the investment quotas are intended to independent producers.

(1) Not limited to scripted works. (2) The quota within brackets is to be met through investments in works from independent producers. (3) Not limited to recent works. (4) Dependent on the possible increases provided for in

the Bonisoli decree, namely: lack of operational headquarters in Italy, non-sharing of secondary rights with producers, use of works made by ‘merely executive’ producers.

The Italian job: The Bonisoli decree (2018-19)

Seeking a deal: Broadcasters vs. producers (Chapter II)

Among the concessions won by broadcasters during the negotiations on the Franceschini decree, the most consequential one proved to be the delayed entry into force of the new rules (from 2018 to 2019). After the national elections of March 2018 and the formation of a new coalition government led by the 5-Star Movement and the League (two Eurosceptic parties), broadcasters saw the change in the political scenario as an opportunity to press for the relaxation of the quota rules contained in the Franceschini decree. The Ministry of Economic Development, which was then led by the 5-Star Movement and which was traditionally more sensitive to broadcasters’ interests, came to play a more important role, though still subordinate to the Ministry of Culture, which had closer ties with the film sector and where the League held the lead position in the relevant undersecretariat.

In the autumn of 2018, the new government launched a process aimed at ‘simplifying’ the Franceschini decree, criticized for introducing rules that were ‘too rigid’ and failed to take into account ‘market dynamics and differences in business models and programming strategies’ (MiBAC 2018). The process took place over the course of seven months, between October 2018 and May 2019, during which time several meetings were held between broadcasters and producers (while VoD providers were not officially invited to participate). While the Franceschini reform had followed a ‘top-down’ approach, starting from a text drafted by the government and then submitted to the stakeholders, now a ‘bottom-up’ method was chosen, in which changes to the quota rules would be agreed first among industry stakeholders sitting at the negotiating table, which would then form the basis for the text to be drafted by the government.

Initially, broadcasters pressed the new government to amend the Franceschini Decree by the end of 2018 before it would enter into force. The producers agreed to enter into new negotiations with broadcasters. They appeared keen to secure at least some of the gains won with the Franceschini reform and seemed to sense that without a compromise reached by the end of the year, another postponement of the entry into force of the new quotas would give broadcasters more opportunities to press for further relaxation of the rules. In December 2018, after a second meeting, the two parties signed an agreement. The increases introduced by the Franceschini decree in both programming and investment obligations would be reduced (the former with a quota yet to be defined). The investment sub-quotas for cinematographic works would be kept but it was agreed that the percentages would be renegotiated. On other issues, however, in particular in relation to the programming quota for scripted Italian works during peak-time, there was no agreement. In consideration of the still partial nature of the agreement, the government delayed the entry into force of the Franceschini decree by 6 months until 1 July 2019. This was openly welcomed by broadcasters but not by producers, who had tried to ensure that at least those obligations for which an agreement with broadcasters had already been reached would come into force earlier.

The government’s six-month extension opened up a new phase of negotiations between broadcasters and producers. In March 2019, following a number of informal meetings, the two parties presented a new agreement to the government. There would be no increase in the general programming quota for European works, which (in keeping with the formulation adopted in the AVMSD) would remain unchanged as ‘most of the transmission time’. As for the

investment obligations, private broadcasters would benefit from an additional transitional period before the full entry into force of the new regime, with the 12.5% quota set to start from 2021 rather than 2020. Furthermore, it was also agreed that the sub-quota for Italian feature films would be set at 3.5% starting from 2020, a considerable reduction compared to the 4.5% set by the Franceschini Decree.

Producers, for their part, also scored some points. They managed to keep the programming sub-quota of Italian works unchanged (one third of the 50% share of European works) and they also held the line on the issue of sanctions. Broadcasters were particularly adamant that the programming quota for scripted Italian works during peak-time should be removed. They added a further argument to their arsenal, namely that these quotas would have a detrimental effect on content diversity by pushing all broadcasters to schedule certain genres at the expense of others (including news) in the part of the day when viewing is at its highest. As before, the producers were divided on this issue, with the television production sector siding with the broadcasters. After a further round of negotiations, it was agreed that the peak-time quota would be removed for private broadcasters, but not for Rai. In exchange, producers managed to get broadcasters to agree to reintroduce an investment sub-quota for 'Italian works', equal to half of the total investment that had been included in the first draft of the Franceschini decree.

Add a seat at the table: The VoD providers and the Bonisoli decree

Up until this point, the 'VoD issue' had been left out. The concessions won by broadcasters during their negotiations with producers, in which VoD providers had not been involved, had led to a further widening of the gap in the regulatory obligations for broadcasters vis-à-vis VoD providers (to the advantage of the former). In particular, the investment quota for VoD providers remained at 20%, higher than the 12.5% quota for broadcasters. However, in the final stage of the process, and after much insistence, all VoD providers, both national players (TIM, Chili) and transnational ones (Netflix, Amazon), were invited to participate in the ministerial working table where the VoD issue was dealt with, a significant step in the recognition of these actors in the policy-making process. During this phase, meetings were also held separately by VoD providers with government representatives. The main concern of VoD providers was that their investment quota should be aligned with the quota for broadcasters, by lowering it to 12.5%.

The government worked out a compromise. It agreed to bring the quotas for VoD providers down to 12.5%, but referred to an *ad hoc* regulation by Agcom to provide for a possible increase of up to a maximum of 20% should the investments made by VoD providers be 'inconsistent with a balanced growth of the national audiovisual production system'. Until approval of Agcom's regulation, however, this quota was ringfenced at 15%, with no possible increase. Two circumstances were identified that could lead to an increase in the quota. An additional 3 percentage points could be imposed in the event that a provider MS does not have an operational headquarters in Italy with at least 20 employees. The other circumstances that could lead to an increase of up to 4.5 percentage points would be either the failure to grant independent producers 'a share of secondary rights proportional to their financial contribution to the work in relation to which the investment is made' or the adoption of 'contractual models that entail a purely executive role for the producer'. The government also placed further obligations for VoD providers in relation to the sub-quota for Italian works, aligning them with the obligations for broadcasters, including that 3.5% of the investment of VoD providers should be allocated for feature films.

The government justified these changes with the ‘need to adopt a gradual approach’ to regulating VoD providers by introducing regulatory incentives ‘linked to a greater commitment to invest in the Italian territory’ (MiBAC 2018). The ‘greater commitment’ of large transnational players like Netflix and Amazon would be evidenced not only by the presence of operational headquarters in Italy but also by their terms of trade with producers. In particular, the government sought to discourage transnational VoD providers from adopting a system of commissioning known as ‘cost plus’, whereby the commissioning entity covers all of the production costs and pay the producer an upfront production fee, while making all the creative decisions and retaining all the exploitation rights for the work. Producers and the government did not consider this model as conducive to the long-term growth of the domestic industry.

VoD providers were critical about the government’s proposal, arguing that the investment quotas were not in line with the AVMSD, which states that the financial contributions requested from providers established in another MS must be ‘proportionate and non-discriminatory’ and that they conflicted with the Community treaties that guarantee the freedom of establishment and the free circulation of goods and services. According to Netflix (2019a), these obligations would result in higher barriers to entry and would hinder the development of the Italian VoD market. The issue of the compatibility of the proposed legislation with EU law was also debated following the approval in the summer of 2019 of the so-called ‘Bonisoli decree’ (from the name of the lead minister). Netflix brought this to the attention of the European Commission (Netflix 2019). Agcom (2019b) also highlighted some problematic aspects in its report to the government and subsequently expressed its intention to not apply the 3 percentage points increase for the non-establishment of a headquarters in Italy. The VoD providers, and in particular Netflix, were also critical about the investment sub-quota for feature films, urging the government to remove it, or at least to adopt a flexible approach which would take into account the type of content in the catalogue offered by a VoD service. On this point, the lobbying efforts of the VoD providers were effective, for the Bonisoli decree lowered them from the initial 3.5% to a range between 1.25% and 2%.

The policy process leading to the approval of the Bonisoli Decree was favourable to broadcasters (see Table 1 on p. xx). The increases in the quotas established by the Franceschini decree were either eliminated (programming quota) or reduced (investment quota), and broadcasters were also granted greater flexibility in complying with those rules. It was not, however, a clear-cut win for broadcasters. The sanctions regime envisaged by the Franceschini decree remained in place, as a counterweight to the greater flexibility accorded to broadcasters in meeting the quotas. The other main outcome of the process was to introduce greater safeguards in favor of *national* productions, namely an obligation to invest in Italian works for broadcasters, together with an investment quota on Italian cinematographic works for VoD providers. The government’s ‘gradual approach’ to regulating VoD providers, with higher investment quotas for those lacking operational headquarters in Italy and/or meeting the target through ‘cost plus’ commissioning, can also be understood in this sense. In the government’s intention, this should provide transnational VoD providers with a regulatory incentive to adopt production models that safeguard the creative autonomy of independent production companies and promote the long-term financial sustainability of the national industry. This strategy was certainly attuned with an ideologically heterogeneous parliamentary majority that saw in the protection of national interests one of the main glues, if not the main, of their governing alliance.

Conclusion

At the time of writing (April 2021), the policy process examined in this article, starting with the Franceschini reform in 2017, was not yet concluded. The ministerial decrees, on which the implementation of a significant part of the obligations depended, were still the subject of discussion among stakeholders. Meanwhile, Agcom's implementing regulation, approved in February 2020, was awaiting the mandatory opinion of the ministries. Successive changes to the rules and various issues around their practical implementation at the level of secondary regulation, a task delegated to two different rule-making entities (ministries and Agcom), all contributed to complicate the picture. A further issue concerned the transposition of the 2018 AVMSD. In November 2020, the Commission started an infringement procedure against Italy (and other 22 MSs) for failing to meet the deadline for transposition. Even though several quotas-related measures were anticipated with the reform launched in 2017, national legislation still required some updating, for example in relation to exemptions for services with low turnover and low audience.

What wider conclusions can be drawn from the case discussed here? In their comparative study of audiovisual regulation in Europe and North America, Gibbons and Humphreys (2011) put forward the argument that the cultural policy toolkit models of the countries they examined 'appear robust and demonstrate a striking degree of political support with path-dependent policy-making' (p. 191). They wrote of France that far from being under deregulatory pressure, the 'adaptation of its characteristic protectionist quota and subsidy system to the digital age could even be seen as a significant measure of upward regulation' (p. 78). The Italian case examined in this article provides new evidence that corroborates these conclusions in a different national context and at a different point in time, showing heightened sensitivity on the part of national policy-makers towards issues around the protection of domestic audiovisual industries in the face of strong globalisation pressures. The eventual outcome of the policy process traced in this article was the introduction of a more restrictive system of quotas than the pre-2017 regime, even after the significant concessions won by broadcasters especially during the second 'Bonisoli' phase. Considering the leading role of the Culture Ministry, traditionally sensitive to the interests of the film sector, the disruptive impact of VoD services on the film value chain was arguably a key factor driving efforts to tighten the quota regime. In recent years, Italian film companies have increasingly turned to programming and investment quotas as a way of widening their access to funding in the context of decreasing income from cinema admissions.

Institutional features of the Italian political system largely account for the tortuous path followed for reforming the quota regime. The difficulty to see the reform through was due to a change of government, institutional complexity and a highly legalistic approach to rule-making. The analysis also showed how 'legacy' stakeholder groups with close ties to ministries and regulators, notably the film industry but also broadcasters and the TV producers were closely involved in the policy-making process and able to influence its outcomes. By contrast, the VoD providers were new to the party: unwelcome guests feared by national broadcasters and towards whom national producers were ambivalent. They were excluded by the government from the formal meetings until a late stage. In spite of increased lobbying efforts led by Netflix, the policy outcome indicates that government was mostly unreceptive to the requests of VoD providers.

A final insight of the study relates to the more substantive aspects of the policy. Inasmuch as the emphasis in the second Bonisoli phase shifted towards protecting *national* productions by introducing or strengthening sub-quotas for Italian feature films and other 'scripted' genres,

the Italian case illustrates the tension that exists between the goals pursued at national level and EU policies designed to promote the circulation of *European* content within the single market as a way of fostering a *European* identity.

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