

## 27 QUOTA RULES IN RESPECT OF AUDIOVISUAL MEDIA REGULATION – ON THE BORDERLINE OF ECONOMIC AND CULTURAL CONSIDERATIONS

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### 27.1 INTRODUCTION

The evaluation of quota rules of the Television Without Frontiers (TVWF) Directive<sup>1</sup> were not entirely unambiguous even at the time of their birth; moreover, having regard to external relations, the EU was forced to confront with the USA in the framework of the World Trade Organisation (WTO) during the adoption process of the TVWF Directive and in the course of its implementation. Later, doubts have been expressed in relation to the applicability of the quota rules and also the aim to be pursued by these rules, which problems mostly emerged in the relationship between the EU and its Member States. Irrespective of the difficulties of the application of its rules and the emerging international conflicts, the quota rules were still in force after the extensive amendments to the TVWF Directive in 1997 and also in 2007, furthermore, the quota rules were slightly expanded to the on-demand audiovisual media services.<sup>2</sup>

The current paper intends to explore the original regulatory aims behind the development of quota rules and to briefly introduce the regulation and its respective interpretations and the solutions of the Member States that diverge from the general rules of the TVWF Directive. Finally, the present paper also points out the major criticisms expressed towards the quota rules.

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1 Council Directive 89/552 OJ 1989 L 298/23 (TVWF Directive).

2 European Parliament and Council Directive 2010/13 OJ 2010 L 95/1 (Audiovisual Media Services Directive) Arts. 13, 16 and 17.

## 27.2 BRIEF ASSESSMENT OF THE DUAL NATURE OF THE MEDIA SERVICES

The issue of quota rules demonstrates a close connection with one of the fundamental problems of media regulation. The dual nature of the regulated area, namely the fact that media services bear economic and cultural features at the same time, significantly influences the direction of media regulation. The situation becomes even more complex in case we consider culture as an industry. The recent phenomenon of ‘cultural industry’ implies the duality of culture and economy, in addition to the tension existing between economic and cultural approaches towards the media.

According to Neuwirth, this tension occurs at the regulatory level in a way that fundamental principles of free trade should be balanced with non-trade values and principles. Free trade presupposes the constant liberalisation of trade and the phenomenon is based on the principle of non-discrimination which should be aligned with values such as culture, environmental protection, national security and human rights. Nevertheless, the latter values are by no means neutral and they assume state behaviour or intervention, which are founded on the balancing of values, i.e. on differentiation. On the international plane, such uncertainty appears, among others, in the duplication of international institutions, since these institutions manage the same problem in different ways. At a global level such activity is carried out for instance in the WTO and different specialised agencies of the United Nations, such as the UNESCO, the United Nations Educational, Scientific and Cultural Organisation.<sup>3</sup>

Although in the current paper I do not intend to touch upon the ongoing dispute regarding the legality of quota rules,<sup>4</sup> it is nevertheless important to mention it in a few words as the dispute provides a good example for the settlement of conflicts stemming from the economic and cultural interpretation of audiovisual services within the framework of the previously mentioned, duplicated system of international institutions. Following the failure of establishing an agreement in the framework of the WTO regarding the liberalisation of services, largely due to the adoption of quota rules enshrined in the TVWF Directive, the USA attempted to enforce liberalisation as it is set out in the GATS by way of bilateral trade agreements. In response to this, as a counterbalance, the EU endeavoured to enforce the execution of the UNESCO’s convention on the protection and promotion of the diversity of cultural expressions<sup>5</sup> and to maintain the subsidies and quotas in respect

3 R.J. Neuwirth, ‘The Culture Industries: From the Common Market to a Common Sense’, in David Ward (Ed.), *The European Union and the Culture Industries: Regulation and the Public Interest*, Ashgate, Hampshire, 2008, p. 243.

4 L. Nyakas, ‘A média a nemzetközi kereskedelemben’, in A. Koltay and L. Nyakas (Eds.), *Magyar és európai médiajog*, CompLex, Budapest, 2012, pp. 199-207.

5 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

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of national contents by concluding protocols with the states having a bilateral agreement with the USA.<sup>6</sup>

A coherent policy which represents a unified standpoint in respect of the conundrum between trade and culture has not yet developed on the international level, moreover, the expression cultural industry also requires some clarification.<sup>7</sup>

In the audiovisual policy of the EU, as a regional economic organization, this fundamental conflict was resolved in a peculiar way.<sup>8</sup> In the common regulation, set out in the TVWF Directive of 1989, the EU intended to establish a common market for television services<sup>9</sup> by harmonising some aspects of Member States' media regulations and establishing minimum regulations capable of dismantling the barriers impeding the free movement of services. By referring to the previously applied expression, the TVWF Directive was mainly developed pursuant to the principles of free trade in order to achieve deregulation. In respect of the non-harmonised regulatory sphere, the EU left other aspects of media regulations, such as social and cultural viewpoints including for instance public media services, in the competence of the Member States, stipulating that having regard to the harmonised legal sphere Member States are entitled to adopt more stringent or detailed rules that are in compliance with the aim of the TVWF Directive and EU law in general.<sup>10</sup> In terms of media policy, the EU decided in favour of the separation of economic and cultural regulatory issues, in line with the respective provisions of the founding treaties and CJEU case-law.

We may arrive at the conclusion (pursuant to the above described logic) that the audiovisual policy of the EU concerns exclusively economic issues; however reality is far removed from this view. The qualification of quota rules, which were previously regulated in the TVWF Directive and notwithstanding extensive amendments, respective provisions were maintained in the AVMS Directive as well, implies several ambiguities. This may also be inferred from the aforementioned international conflict, which raises questions in relation to the nature of Union audiovisual rules as well. In the following, I shall review the regulatory aims and intentions underpinning the development of quota rules.

6 T. Gibbons and P. Humphreys, *Audiovisual Regulation under Pressure – Comparative Cases from North America and Europe*, Routledge, London, New York, 2012, p. 151.

7 S. Galloway and S. Dunlop, 'A Critique of Definitions of the Cultural and Creative Industries in Public Policy', 13(1) *International Journal of Cultural Policy* (2007), pp. 17-31.

8 P. Keller, *European and International Media Law. Liberal Democracy, Trade and the New Media*, Oxford University Press, Oxford, 2011, p. 115; Z. Horváth, *Kézikönyv az Európai Unióról*, HVG-Orac, Budapest, 2007, pp. 481-482; T. Kende and T. Szűcs (Eds.), *Bevezetés az Európai Unió politikáiba*, CompLex, Budapest, 2009, p. 1078.

9 Television without Frontiers Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable COM(84)300 final Brussels, 14th June 1984.

10 L. Nyakas, 'Az audiovizuális média szabályozása az Európai Unióban', in A. Koltay and L. Nyakas (Eds.), *Magyar és európai médiajog*, CompLex, Budapest, 2012, pp. 157-174, 166-169; L. Nyakas 'A közszolgálati műsorszolgáltatás a közösségi jog kontextusában – avagy az audiovizuális szolgáltatások természetéről folytatott európai vita', X(2-3) *Collega* (2006), pp. 227-230.

## 27.3 REGULATORY BACKGROUND OF THE QUOTA RULES OF THE TVWF DIRECTIVE

### 27.3.1 *Cultural and Economic Considerations*

The Hahn report<sup>11</sup> issued in 1982 represents the beginning of the EU's audiovisual regulation, envisaging an interventionist Community audiovisual approach and policy.<sup>12</sup> Besides market integration, the report found extremely important to emphasize European political and cultural unity and report considered that the establishment of a transnational system of television broadcasting plays a central role in fulfilling this ambition. Thus, Hahn proposed Community regulation which strengthens a single European culture and identity.<sup>13</sup>

The idea enshrined in the Hahn Report failed and the Green Book preparing the TVWF Directive unequivocally refused the vision of launching a common European television, opting rather for sectoral regulation in the common market which basically established the economic conditions for ensuring free television services without frontiers, considering the latter to be a service essentially economic in nature.<sup>14</sup>

Besides the economic aspects, cultural considerations<sup>15</sup> also emerged among the regulatory goals in the draft report of the Economic and Social Committee issued in 1985 in the framework of the Green Book containing also the proposal of the European Commission on the TVWF Directive.<sup>16</sup> It is clear from the draft report that in the course of its preparation these cultural considerations were raised for fear that a similar process will take place in Europe as previously occurred in the USA, when new forms of broadcasting such as satellite and cable emerged. According to these misgivings, the European audience, accustomed to a completely different television environment where the repertoire focused mainly on cultural and social issues, would be faced with a mass of light entertainment television programmes in order to achieve high ratings, consequently, quality entertainment,

11 Report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport on radio and television broadcasting in the European Community, Working Documents 1981-82, Document 1-1013/81, 23 February 1982. (Hahn Report, 1982).

12 The Hahn Report represented the so-called cultural interventionist dirigiste trend in the course of the political discussions of the EU. This trend favours the economic and financial intervention of the state and the EU, while contrary to this, the liberal trend prefers the realisation of free market which implies non-intervention.

13 R. Collins, 'The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community', 11(361) *Cardozo Arts & Entertainment Law Journal* (1993), pp. 380.

14 Nyakas, 2012, p. 167.

15 *Id.*, p. 4. Cultural aspects.

16 Revised draft report on Television without Frontiers – Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable [COM(84)300 final], CES 374/85, 17 July 1985 (a továbbiakban: Jelentéstervezet).

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informational and educational contents would be forced into the background.<sup>17</sup> Collins recalls these fears by citing the speech of Jacques Delors, the former president of the European Commission, given at the founding ceremony of the Audiovisual Eureka in 1989, in which Delors elaborates that we should not treat culture in the same way as we treat other commercial commodities and we should not leave its fate to market powers pursuant to the principle of *laissez-faire*. Simultaneously he poses the question to our ‘American friends’ whether ‘we have the right to live?’<sup>18</sup>

Returning to the draft report and deducting the conclusions from this train of thoughts, the regulatory institutions of the EU arrived at the conclusion that Member States legislators must create an environment that adequately protects cultural identity by promoting national creations without applying restrictive means, for instance measures that are discriminative or restrict competition.<sup>19</sup>

It is apparent from the wording of the draft report that in this case, the EU basically determines the direction to be followed by the Member States in a framework document preparing the Community regulation of cultural issues that actually fall under the competence of the Member States! The targeted aims cover the support of high quality European programmes, the development and support of the entire European broadcasting industry,<sup>20</sup> in addition to the preservation of cultural perception in respect of television media services.

The 1986 Council proposal for the TVWF Directive<sup>21</sup> contains cultural targets among the aims to be achieved by Community legislation, nevertheless, the draft TVWF Directive constantly links these cultural targets with economic goals. Such economic indicators include, among others, the increase in the volume of television production by way of which the related national cultural industries could be developed, while facilitating the expression of the special cultural identity of a given Member State; supporting medium-sized enterprises in entering the cultural industry; facilitating broadcasting in order to promote cultural exchange besides the economic focus of European integration.<sup>22</sup>

In summary, it could be said that in the 1986 draft TVWF Directive cultural targets were set in parallel with economic goals.

17 This has occurred by the second part of the 1990s with the liberalisation of audiovisual media market, in addition to the spread of commercial media and multi channel broadcasting.

18 Collins, 1993, p. 362.

19 Jelentéstervezet 4.4.-4.7. pontok.

20 *Id.*, 4.8. pont.

21 Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, COM(86)146 final/2, 6 June 1986.

22 *Id.*, 3. pont.

### 27.3.2 *Shaping the Text of the TVWF Directive*

Scholarly literature highlights that the concrete legal text of the TVWF Directive appeared very late in the legislature process, moreover, when the text was released it was deemed as a concession to France. The draft TVWF Directive primarily intended to ensure the free movement of broadcasting services within the internal market and to dismantle barriers and regulatory restrictions distorting competition. The programmes of the Member States and language quotas could be identified as obstacles typical of France, a country possessing a significant and complex cultural toolkit for the support of its national audiovisual industry. In this respect, two possible solutions existed: either the abolition of restrictive standards in the course of harmonisation, or the harmonisation of national quota rules, as in the case of other Directives. Finally, the latter solution was chosen as France intended to further support its own broadcasting and film industry, moreover, France did not want foreign competitors who unrestricted by stringent quota rules as those set out in the French system to enter the market.<sup>23</sup> In case we assess the question from a European dimension and not from a Member State perspective, we may say that the inclusion of the quota rules into the TVWF Directive could basically be considered as a result an agreement forged between cultural, interventionist approaches, the so-called dirigiste trends and the liberal trends prioritising the common market.<sup>24</sup>

As regards the specific regulation, according to the 1986 draft TVWF Directive, at least 30% of the transmission time shall be reserved for television films<sup>25</sup> produced within the framework of Community works and this proportion shall be increased to 60% within 3 years. Similar progressive regulations were proposed in respect of television programmes produced by independent producers within the framework of Community works, however according to the draft proposal, in this case the broadcasters shall increase the transmission time from 5% to 10% within a period of three years.<sup>26</sup> The 60% rate otherwise mirrored the French broadcasting quota rule system which was finally reflected in the text of draft TVWF Directive.<sup>27</sup>

The so-called Barzanti Report issued in 1987<sup>28</sup> mirrored the opinion of the European Parliament's respective commission and slightly amended the content of the European

23 Cf. O. Castendyk, 'Quota for European Works', in O. Castendyk et al. (Eds.), *European Media Law*, Kluwer Law International, The Hague – London – Boston, 2008. pp. 429-456, n. 13, lj, pp. 435, 440; Gibbons and Humphreys, 2012, pp. 75-79, 140; I. Katsiera, 'Why European Broadcasting Quota Should Be Abolished?', 28(2) *European Law Review* (2003), pp. 190-209, pp. 191, 208.

24 Collins, 1993, pp. 374-375.

25 European works.

26 L. TVWF irányelvjavaslat 2. és 3. cikk.

27 *Id.*, 55, pont.

28 Report drawn up on behalf of the Committee on Legal Affairs and Citizens' Rights on the proposal from the Commission of the European Communities to the Council (COM(86)146-final – Doc C 2-38/86) for a directive on the coordination of certain provisions laid down by law, regulation or administrative action in

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Commission's draft proposal prepared in 1986. The Brazanti Report maintained the aim that 60% of the broadcast programmes shall be Community works but annulled the corresponding 30% minimum rate and provided moderate rules in respect of paid and thematic channels.<sup>29</sup> The rigorous quota rules almost thwarted the adoption of the TVWF Directive, but following the resolution of a significant political tension, France finally agreed the tempered version of the TVWF.<sup>30</sup>

27.4 REVIEW OF THE TVWF AND AVMS DIRECTIVES' QUOTA RULES

The 1989 legislation maintaining the duality characteristic of the preparatory materials of the directive, namely the legislator considered that the norms of the TVWF Directive in respect of quota rules express both cultural and economic aims. The preamble of the TVWF Directive clearly states, that co-ordination is nevertheless needed to make it easier for persons and industries producing programmes having a cultural objective to take up and pursue their activities directly. Next, the text of the TVWF Directive identifies the minimum requirements in respect of all public or private European television programmes for audiovisual productions as one of the fundamental means of promoting the above mentioned cultural objective due to the fact that in its cultural part audio-visual industry promotes production, independent production and distribution. While the obligation to broadcast European television programmes aims at promoting markets of sufficient size for these cultural productions to recover the necessary investments,<sup>31</sup> the applicable norms in respect of the productions created by independent producers, including broadcasting time or obligations regarding the budget of production, also aim to attract new financial resources as well as establishing the appropriate for founding small and medium-sized enterprises.<sup>32</sup> Castendyk points out that the reference to such cultural objectives were set out in recital 25 of the preamble of the 1997 Directive<sup>33</sup> amending the 1989 directive which refers to Article 128 of the Maastricht Treaty<sup>34</sup> according to which the Community needs to take into account cultural aspects in the course of pursuing its activities falling under other provisions of the Treaty.<sup>35</sup> Besides economic and cultural objectives, in the amendment

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Member States concerning the pursuit of broadcasting activities. Session Documents 1987-1988, A2-246/87 (a továbbiakban Barzanti jelentés).

29 *Id.*, 22, 23.

30 Castendyk, 2008, p. 436.

31 TVWF Directive Art. 4(1).

32 *Id.*, Art. 5(1).

33 European Parliament and Council Directive 97/36 OJ 1997 L 202/60.

34 Castendyk, 2008, pp. 433.

35 Art. 151(4) TEC, Art. 167(4) TFEU.

to the TVWF Directive adopted in 1997 the promotion of competitiveness emerged as a new objective of the EU.<sup>36</sup>

The Directive was extensively modified as compared to the proposal prepared by the Commission and the draft opinion of the Parliament. The rules related to the promotion of distribution and production of television programmes were tempered and according to the new rules, broadcasters had to reserve the majority of their transmission time for European works,<sup>37</sup> therefore the abovementioned proportion of transmission time was reduced to 50%. Moreover, the principle of progressiveness and the minimum proportion criteria was retained with slight modifications. Namely, in order to attain the broadcasting of European works exceeding 50% of the transmission time, the performance of the Member State concerned had to be taken into account with the progressive increase in transmission time following the rules set out in the TVWF Directive.<sup>38</sup> According to the new provisions, Member States had to ensure that broadcasters reserve at least 10% of their transmission time for European productions created by independent producers, furthermore, in this respect the 10% portion of the programming budget also remained. Nevertheless, rules were retained regarding the minimum portion requirements.<sup>39</sup>

The purpose of Article 6 of the TVWF Directive is assist in the interpretation of quota rules by defining the notion of 'European works'. Effectively, on the basis of four independent criteria an audiovisual work may fall under the scope of Articles 4 and 5 of the TVWF Directive. The connecting link between the criteria is European establishment, therefore, a production could be qualified as a European work based on the origin of the workforce, the producer, persons who supervise and control the production or the source of funding.<sup>40</sup>

The quota rules regarding television broadcasting did not change with the AVMS Directive.<sup>41</sup> However, an important, albeit slight adjustment was made to the rules in respect of European works to promote on-demand audiovisual media services.<sup>42</sup> The expansion is very minor as the phrasing of the text is similar to the rules governing the broadcasting of television programmes; at the same time, the rules did not determine specific target proportions to be achieved.

36 *Id.* The author miscorrectly refers as Sections 5 and 28 of the preamble of directive 36/97/EK highlights the development of competitiveness regarding programme industry.

37 TVWF Directive Art. 4.

38 *Id.*, Art. 4(2).

39 *Id.*, Art. 5.

40 O. Castendyk, 'Definition of European Works', in O. Castendyk et al. (Eds.), *European Media Law*, Kluwer Law International, The Hague – London – Boston, 2008, pp. 471-487, 474.

41 TVWF Directive Arts. 1(1) point n), 16-18.

42 *Id.*, Art. 13.



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27.5 MEMBER STATE SOLUTIONS – NATIONAL QUOTAS

As it became apparent from the target system of quota provisions, the reason for adopting common EU rules was to provide a regional answer to global processes. Namely, on the one hand to protect and support the European audiovisual industry from the pressure exerted by the USA's film industry, and consequently, on the other hand, to increase and strengthen European television programme production potential, including European and co-production works, by facilitating the appearance of new small and medium-sized enterprises and unifying the available resources.

The question is whether Member States could identify with this broader goal and to what extent they made use of these rules for local and national purposes, basically for the support of their own audiovisual industry, by setting up national quotas in their audiovisual media regulation. In the following I will assess the quota rules from the perspective of EU Member States with substantial economic power, next, I shall turn my attention to Member States with a smaller audiovisual industry.<sup>43</sup>

27.5.1 *National Quotas in Larger EU Member States*

It is worth opening with France because, as already indicated above, the evolution of the quota rules was largely due to the fact that France intended to preserve its own television and film support scheme through developing extensive EU rules. As some authors point out, the cultural policy pursued in France consists basically of a 'complex protectionist quota and support system'<sup>44</sup> and only a part of this covers the promotion of producing and broadcasting national television programmes. As it appears from the 1986 draft TVWF Directive, French television quota rules are more stringent than the relevant EU provisions since linear audiovisual media service providers are required to reserve at least 60% of their transmission time for European works and at least 40% for originally French language works (*d'oeuvres d'expression originale française*). This proportion must be observed in all cases in prime transmission time.<sup>45</sup> Originally French language works also include creations produced in regional languages, such as Breton. It is worth noting that the 40% quota in respect of French language works is deemed to be part of the European quota. Thematic

43 The study merely assesses quota rules at the level of Member States with respect to traditional (linear) television and radio broadcasts, therefore it does not cover the requested audiovisual media services.

44 Gibbons and Humphreys, 2012, p. 75.

45 The French media law (Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard) Version consolidée au 17 novembre 2013). Art. 70, and also the executive decree (Décret n° 90-66 du 17 janvier 1990 pris pour l'application de la loi n° 86-1067 du 30 septembre 1986 et fixant les principes généraux concernant la diffusion des oeuvres cinématographiques et audiovisuelles par les éditeurs de services de télévision.) Art. 7.

satellite and cable channels are exempted from these stringent rules in case they agree to support the French independent production sector; nevertheless, the 50% European quota proportion is applicable to them as well. Moreover, public and commercial broadcasters are required to invest in the production of French audiovisual creations and films up to a certain percentage of their revenues achieved in the previous year.<sup>46</sup>

In the United Kingdom, public service oriented content obligations to reflect local, regional or national communities' demands corresponded to quota requirements. These requirements were relatively stringent, since the former regulatory authority, the Independent Broadcasting Authority (IBA), obliged the ITV rendering public services on commercial grounds at the time, to dedicate 86% of its broadcasted programmes to British productions, which was later reduced to 65% by the Broadcasting Act adopted in 1990. For public broadcasting entities the new Communication Act adopted in 2003 prescribes programme quotas in respect of independently produced works that are originally created in the United Kingdom or created regionally, thus, Ofcom plays a major role in the development of quota rules.<sup>47</sup> It follows from the legislation that terrestrial broadcasters need to comply with stricter quota rules in the United Kingdom than set out in the AVMS Directive, furthermore, EU requirements are applicable for cable and satellite broadcasters, albeit these rules are rarely observed.<sup>48</sup>

In Germany there are no specific quotas regarding national production and the respective EU regulations applicable to all German broadcasters are referred to in Article 6<sup>49</sup> of the interstate treaty on broadcasting.<sup>50</sup> We must note that Article 6 paragraph 1 generally represents the cultural model and approach to the audiovisual industry by declaring: 'television broadcasters shall contribute to the protection of German and European television and film productions as they form part of our cultural assets and audiovisual heritage.' Article 6 paragraph 2 expresses the EU requirement of broadcasting predominantly European works in the transmission time; however, the provision makes clear that European quotas may also be fulfilled by German productions. The lack of specific national production quotas did not affect negatively the production of German television programmes, as a matter of fact, in 2007 Germany produced television programmes in the value of £ 4.5 billion which is considered to be the highest amount in Europe. This outstanding result could be accomplished due to a number of factors, for instance, the relatively high level of public funding, i.e. the operation fee provided for public broadcasting, the large internal

46 Gibbons and Humphreys, 2012, pp. 75-76.

47 Communications Act 2003, Arts. 277-278, 285-289.

48 Gibbons and Humphreys, 2012, pp. 102-103.

49 W. Schulz et al. (in cooperation with T. Wind), 'Regulation of Broadcasting and Internet Services in Germany – a Brief Overview', *Arbeitspapiere des Hans-Bredow-Instituts*, Nr. 13, 2nd edn, March 2008, pp. 13-14.

50 Fünftehnter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge (Fünftehnter Rundfunkänderungsstaatsvertrag vom 15./17.12.2010).

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market and export capacity to the culturally and linguistically similar countries such as Austria and Switzerland all supported this development.<sup>51</sup>

In Italy the harmonisation of the AVMS Directive was implemented by Legislative Decree number 177 of 31 July 2005.<sup>52</sup> Articles 6 and 44 of the Legislative Decree regulates quota rules, while Decree number 66/09/CONS of 13 February 2009<sup>53</sup> issued by the unified regulatory authority, the *Autorità per le Garanzie nelle Comunicazioni* (AGCOM), details the rules on implementation. According to the authors Apa and Cavalcanti, Article 3 of the decree sets out that in case of pay-per view services, at least 10% of the transmission time must be maintained for European works not older than 5 years, and at least 20% of these works must be originally in Italian language irrespective of the place of their production. In terms of independent production, an AGCOM decision declares that free-to-air broadcasters are required to set aside 30% of their annual revenue for creations that comply with the conditions of ‘Italian culture’, which portion is 35% in case of paid television services.<sup>54</sup>

27.5.2 *National Quotas in Smaller EU Member States*

As for the quota rules of smaller EU Member States, Belgium, due to its unique constitutional system, attempts to mirror territorial, linguistic and cultural differences and diversities in its quota rules. Article 154 of the Flemish media act<sup>55</sup> and Article 44 paragraph 1 of the Walloon media act<sup>56</sup> both integrated the provisions of the AVMS Directive in respect of European works, providing that 50% of the respective quotas need to be reserved for Dutch and French speaking programmes or for the creations of authors originating from Flemish and Walloon communities. The mentioned Articles, namely Article 154 and Article 44 paragraph 2 contain the provisions of the AVMS Directive in respect of independent producing which also imply a constraint, namely, that the majority of the quotas

51 Gibbons and Humphreys, 2012, p. 126.

52 Decreto Legislativo 31 luglio 2005, n. 177, Testo unico dei servizi di media audiovisivi e radiofonici (Az audiovizuális és rádió médiaszolgáltatókról szóló törvényerejű rendelet, olasz médiakódex), <www.medi.alaw.it/radiotv/2005177.htm #sthash.x1OJtOCY.dpuf>.

53 Delibera N. 66/09/CONS Regolamento in materia di obblighi di programmazione ed investimento a favore di opere europee e di opere di produttori indipendenti adottato ai sensi degli articoli 6 e 44 del decreto legislativo 31 luglio 2005, n. 177.

54 E. Apa and S. Cavalcanti, ‘Italian Broadcasters Face New Rules on Quotas of European-Created Content’, 20(7) *Entertainment Law Review* (2009), pp. 266-268.

55 27 March 2009 – Decreet betreffende radio-omroep en televisie.

56 26 March 2009 – Arrêté du Gouvernement de la Communauté française portant coordination du décret sur les services de médias audiovisuels.

which fall under the reserved 10% must be filled with the creations of producers originating from Flemish or Walloon communities.<sup>57</sup>

In addition, some communities prescribe substantive obligations for public broadcasters. According to the agreement between the government of the Flemish community and the Vlaamse Radio- en Televisieomroep (VRT), the VRT shall aspire with regard to linear television services to maintain at least 50% of its transmission time between 6 p.m. and 11 p.m. for Flemish (co)produced creations and regarding radio broadcasting at least 20% of the transmission time should be maintained for Flemish music productions. The Walloon government concluded a similar agreement with the Radio Télévision Belge Francophone (RTBF), the respective public broadcasting authority, and similarly to the statutory solution, Article 15 stipulates that the RTBF should broadcast European works in the proportion of 55% which will include the works of authors originating from the French community, furthermore, 35% of the transmission time should be reserved for works authored or produced by French speaking experts. The agreement also indicates that creations of the French community should be included in the quotas (10%) of independent producers. In addition, Article 43 paragraph 1 of the French community's media act includes programme structure quotas to support producing musical creations. Pursuant to the provision, all television programme editors are required to reserve 4.5% of the annual transmission time for songs which were written, produced, composed or performed by a person living in the French Region or in the Brussels Capital Region. A similar requirement is also stipulated with respect to radio programme editors.<sup>58</sup>

The Dutch media act<sup>59</sup> also contains provisions deviating from the quota rules of the directive. According to Article 2.112 of the Dutch media act, at least 50% of all public national or regional television media services shall comprise productions that are originally produced in Dutch or in Frieze languages and according to Article 3.24 this proportion shall be 40% in case of commercial media suppliers.

As Article 15 paragraph 1 of the Polish media act<sup>60</sup> sets out, television production broadcasters shall reserve 33% of their transmission time for creations originally produced in the Polish language. Article 15 paragraph 2 requires the same proportion of radio broadcasters (except for nationality and ethnic minority radios) in respect of Polish songs and 60% of songs sung in Polish shall be broadcast between 5 a.m. and 24 p.m.

According to the Portuguese Act on television services,<sup>61</sup> in compliance with Article 44 paragraph 2 of the Act on the protection of Portuguese language, nationwide television

57 P. Valcke and E. Lievens, *Media Law in Belgium*, Wolters Kluwer International, The Netherlands, 2011, p. 97.

58 *Id.*, p. 98.

59 Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet (Mediawet 2008).

60 Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji.

61 Lei n.º 27/2007, de 30 de Julho (Lei da Televisão), [www.anacom.pt/render.jsp?contentId=979660&languageId=1](http://www.anacom.pt/render.jsp?contentId=979660&languageId=1).

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broadcasters shall broadcast in the proportion of 50% productions during their transmission time, that have been produced originally in Portuguese. Apparently, this provision exclusively includes productions that are short-listed by the AVMS Directive – this is the so-called negative list. Pursuant to the subsequent paragraph, these television channels are obliged to maintain at least 20% of their transmission time for ‘creative’ productions originally produced in the Portuguese language. Article 2 paragraph 1 item c of the Act seeks to determine the definition of ‘creativity’, denoting creations comprised of structured creative elements, fictional or animation productions, documentary films, television dramas, cultural or art productions and also political productions.

Article 5 of the Spanish audiovisual act<sup>62</sup> regulates the right to cultural and linguistic diversity (*El derecho a la diversidad cultural y lingüística*). With respect to European productions, Article 5 paragraph 2 refers to the 51% rule of the AVMS Directive, moreover, the act also requires that at least 50% of the European quota be maintained for creations produced in the Spanish language.

Article 85 of the Slovenian media act<sup>63</sup> prescribes that in the daily transmission time each television production broadcaster shall broadcast their own programmes at least in the proportion of 20% and in prime time, that is the period between 6 p.m. and 10 p.m., this proportion shall be increased to 60%. Article 86 of the media act sets out that at least 20% of the daily music programmes of radio and television production broadcasters must be filled with music creations that include Slovenian music or music productions that are created or performed by Slovenian artists. In respect of the Slovenian public service broadcaster (Radiotelevizija Slovenija) this figure shall be increased to 40% in relation to each and every broadcast. Article 87 of the Slovenian media act regulates national quotas as well and paragraph 1 prescribes, as a general obligation, that television broadcasters shall aspire to mainly broadcast Slovenian audiovisual works in the course of their annual transmission time. However, paragraph 2 determines a 2% minimum ratio which shall be increased annually until it reaches the 5% level.

The Hungarian media regulatory framework<sup>64</sup> also contains national quotas. The Hungarian regulation adopted the solutions set out in the AVMS Directive, namely that ‘the media service broadcaster shall broadcast European works over half of its annual transmission time of linear audiovisual media services and Hungarian works over one-third of its transmission time Hungarian works’<sup>65</sup> On the basis of the 10% rule of the AVMS Directive, the Hungarian media act associates an 8% Hungarian quota rule in respect of

62 Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, [http://noticias.juridicas.com/base\\_datos/Admin/l7-2010.html](http://noticias.juridicas.com/base_datos/Admin/l7-2010.html).

63 Zakon o medijih – ZMed (Uradni list RS, št. 35/01 z dne 11. 5. 2001), <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1608>.

64 Act CLXXXV of 2010 on media services and mass-communication.

65 Mttv. Art. 20(1) point a).

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independent production, in other words, productions that are produced by independent Hungarian programme producers.<sup>66</sup> These proportions are higher in respect of public media service providers, as at least 60% of the annual transmission time of linear audiovisual media services shall comprise European works, while this ratio is at least 50% in case of Hungarian works. Furthermore, in respect of independent producers the 25% minimum quota rule shall apply uniformly.<sup>67</sup> In case of linear radio media services, at least 35% of the annual transmission time that is dedicated to broadcast musical creation, shall comprise Hungarian musical works.<sup>68</sup>

Briefly summarising the above mentioned examples we can come to the conclusion that, besides fulfilling their implementation obligations, the majority of the Member States have made use of the possibility provided for by the provisions of the TVWF and AVMS Directives regarding the promotion of the production and distribution of European works in order to support national audiovisual industry, irrespective of smaller or larger Member State media markets. Germany is an exception since, due to the above described reasons it was not necessary to establish separate national quotas. In case of Belgium, national quotas are regulated quite extensively, with provisions reflecting the Belgian constitutional system, namely the regulatory framework mirrors the national and linguistic regions. The national rules emerge as linguistic quotas in most of the cases: they are applied in respect of productions originally produced in the language of the state concerned and subtitled productions are not included. Furthermore, there are solutions that follow the logic of the concept of 'European' works prescribed by the directives, while binding national quotas to the (native) tongue of programme creators, such as performers or producers. Finally, Member States apply the principle of geographical origin, according to which national quotas are bound to the fact that programme creators are settled in a particular Member State.

It may also be observed that the proportion of national quotas is unequivocally higher in the case of public service broadcasters than in the case of commercial broadcasters. This phenomenon could be explained partly by the fundamental mission of public service broadcasting, in other words, with the purpose of universal national media service providers, and partly by the historical fact that erstwhile, public broadcasting was a state monopoly which also meant that the state was the main customer in the national audiovisual media industry.

The examples mentioned clearly illustrate that besides television broadcasting, certain Member States also apply national quotas in respect of radio broadcasting. The regulations of some Member States prescribe rules related to the broadcasting of national productions

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66 *Id.*, Art. 20(1) point b).

67 *Id.*, Art. 20(3).

68 *Id.*, Art. 21(1).

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in order to distribute them to the citizens of the Member State concerned, therefore, the provisions either propose broadcasting in prime time, or intend to exclude broadcasting from the period effectively less interesting for the consumers between 24 p.m. and 5 a.m.

## 27.6 CONCLUSIONS

### 27.6.1 *The Place of Quota Rules in the Framework of the EU's Audiovisual Rules*

Corresponding to the initial thesis of the current paper, the first question regards the place of quota rules in the framework of the EU's audiovisual regulatory policy, taking into account the different economic and cultural approaches.

The scholarly literature draws attention to the duality reflected in the individual regulatory objectives. Keller interprets the respective rules as seeking to provide a balance between the goals of national cultural policies and the imperative of guaranteeing free movement and fair competition, securing market access to enable market integration. This may be explained by the fact that besides fearing of the overwhelming pressure of the American film industry and its cultural impacts, the EU also realised the limited opportunities inherent in the European film industry, taking into account that European film production and distribution is historically fragmented and underfinanced. Therefore, besides (Member) State subsidiaries operating in the public media sector and the national film industry, Keller also deems quota rules to be fundamentally cultural instruments.<sup>69</sup>

Keller's train of thought can be further complemented by drawing attention to the duality under European media policy: while the quota rules, as implementing instruments of the TVWF Directive aim at accomplishing cultural unity, the purpose of the so-called MEDIA program<sup>70</sup> launched in 1989 is to achieve cultural diversity. The imperative of unity in diversity represents a shift in European audiovisual policy, with the sustenance of European cultural diversity replacing the aim of achieving cultural unity – indeed, the two concepts were merged and the phrase 'unity in diversity' has become the motto of the EU.<sup>71</sup>

As previously mentioned, according to the dirigiste trend, political and cultural unity are indispensable to achieve economic unity. This approach relies on the assumption that European unity cannot be accomplished without the participation of European citizens, indeed, they must be motivated in respect of the integration process by the establishment

69 Keller, 2011, pp. 455-457.

70 MEDIA Programme [http://ec.europa.eu/culture/media/index\\_en.htm](http://ec.europa.eu/culture/media/index_en.htm).

71 The EU motto [http://europa.eu/about-eu/basic-information/symbols/motto/index\\_en.htm](http://europa.eu/about-eu/basic-information/symbols/motto/index_en.htm).

of a common European identity. Well-informed European citizens are a crucial precondition for the development of a common European identity. This may be served by utilizing the potential of audiovisual services, with media and broadcast contents acquiring a significant role. Although cultural approaches have become legitimate aspects of European audiovisual policy taking into account the idea of cultural unity, concerns have been voiced in respect of 'cultural uniformisation' as an ultimate objective. Uniformisation goes together with intensive growth, the division of labour and competition which adversely affect the cultural creations of less effective programme producers originating mainly from Member States that are located linguistically and geographically on the periphery. Thus, while cultural unity supported by the quota rules provided an answer to the fears according to which the establishment of a unified broadcasting market would render the audiovisual sector of the European community vulnerable against the external, typically North-American competition, the MEDIA programme, which was basically launched in parallel with the TVWF Directive intends to manage an internal problem between the Member States by supporting the audiovisual industry of smaller Member States.<sup>72</sup>

Gibbons and Humphreys have arrived at similar conclusions as Keller, however, they place quota regulation into a broader context. They assume that European governance suffers from structural asymmetry and according to their view, the EU can achieve the neoliberal market much easier through negative integration (deregulatory policy) than by pursuing positive integration (regulatory policy) that adjusts the market. This concept is also discernable in the institutional system of the EU as negative integration, namely dismantling rules hampering free competition and free movement on the single market may be carried out much easier, since both the European Commission and the Court of Justice of the European Union have adequate competences in this field, while the task of the Council and the European Parliament to achieve legal harmonization pursuing democratic and public service goals by adjusting the market is much more exacting.<sup>73</sup>

Upon this backdrop, Gibbons considers the TVWF Directive to be a regulatory instrument with deregulative effects, opening the door to international, cross-border audiovisual services. Gibbons distinguished these instruments from positive public service obligations. His consideration were substantiated by the minimum rules laid down in the TVWF Directive which indicated a regulatory competition between the Member States due to the differences between the regulatory systems and the possibility to diverge from the minimum regulatory framework in terms of creating more detailed or stringent rules.<sup>74</sup>

<sup>72</sup> Collins, 1993, pp. 374-376, 383-384.

<sup>73</sup> Gibbons and Humphreys, 2012, p. 133.

<sup>74</sup> Cf. Gibbons and Humphreys, 2012, pp. 137-140, T. Gibbons, 'The Impact of Regulatory Competition on Measures to Promote Pluralism and Cultural Diversity in the Audiovisual Sector', 9 *Cambridge Y.B. European Legal Studies* (2007), pp. 239-259; 255.



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Woods and Harrison arrive at similar conclusions as the aforementioned authors when claiming that there are economic concerns behind the cultural quotas aiming to ‘stimulate and safeguard the European culture’, as the objective of these quotas is to protect the European single market and to establish an audiovisual industry which is competitive also outside of the territory of the EU.<sup>75</sup> As Gibbons concludes, the audiovisual rules of the EU express a protectionist and liberal policy at the same time, for the relevant provisions protect the media sector from globalisation, while in the internal market they facilitate competition between media enterprises.<sup>76</sup> Katsiera highlights the duality manifested in the quota regulation, namely, that the economic objective of boosting European audiovisual film production, goes hand in hand with the cultural aim, which is to protect European cultural identity.<sup>77</sup>

27.6.2 *Hindrances Impeding the Realisation of Cultural Objectives*

Besides the formulation of regulatory objectives in respect of quota rules it is also an important question how these objectives have been effectively realised. The achievement of cultural objectives is highly disputed, moreover, relevant literature is ambiguous about its success, claiming that the implementation of quota rules lacks efficiency. In their assessment, Harrison and Woods stress that regulation focuses on the European features of producers and not on the contents broadcast, as such, we are faced with a regulation of structural nature. The quotas capture production rules, more precisely, the regulation is based on the concept whether the control of a production is in the hand of an enterprise established in the territory of the EU. Thus, the two main characteristics of the rules are the European control over the production and the financing from European sources. While the purpose of the former rule is to strengthen European production against non-European influences, the latter aims to keep profit in Europe.<sup>78</sup>

Keller and Kollins arrive at a similar conclusion, stating that the term ‘European work’ merely describes the geographical feature of a production, therefore, the expression is not suitable for clearly highlighting the differences between European and non-European impacts. Their opinion is that the visibly protectionist obligations are ‘moderately successful’ in terms of encouraging Member States to ‘accelerate the production and broadcast of European audiovisual programmes’<sup>79</sup>:

75 J. Harrison and L. Woods, ‘Television Quotas: Protecting European Culture?’, 12(1) *Entertainment Law Review* (2001), pp. 5-14, at p. 5.

76 Gibbons, 2007, pp. 245, 252.

77 Katsiera, 2003, p. 208.

78 Harrison and Woods, 2001, pp. 6-7.

79 Cf. Keller, 2011, p. 462, Collins, 1993, p. 378.

There are other weaknesses inherent in quota rules which do not enable the regulatory framework to achieve the targeted cultural objectives. One of the problems, already a central issue at the time when the TVWF Directive was born, is connected to the notion of 'European culture'. In case we expect cultural impacts from these provisions, i.e. the protection of European culture and cultural identity, a common definition on 'European culture' is indispensable. The European Union, previously the European Community, did not specify exactly what is meant under the expression 'European culture' which is deemed the subject of protection. The next question regards the quality of a certain content, since regulation merely focuses on the nationality of the production (structural regulation), consequently, the relationship between the origin of the producer and the cultural value of the created audiovisual product is extremely simplified. In other words, although it is clear that national quotas promote national culture and language, the regulation absolutely does not guarantee high cultural quality.<sup>80</sup> The fact that there are no express cultural quality conditions regarding European creations, basically opened the way for broadcasters to fill the quotas with low-budget programmes.<sup>81</sup>

### 27.6.3 *The Global Competitiveness of European Creations*

The contradiction between cultural and economic aims has always been obvious but when the TVWF Directive was amended in 1997<sup>82</sup> a new objective of quota regulation was revealed pursuing the global competitiveness of European works, attempting to contribute to the success of these European creations on international markets.<sup>83</sup> The cultural objective of quota rules aiming to promote the production and broadcasting of high quality European works, is incompatible with global economic objectives simply because the concept ignores the impacts of the global market on corporate decision-making. Pursuant to corporate decision-making there are market constraints which require the production of programmes that are well positioned on global markets. In fact, the so-called 'formats' have a global market and are of essentially Anglo-Saxon and not European character; these are released on the European market. The market viability of the programmes produced in line with the quota rules will depend on whether they conform to mainstream creations and not on whether they were produced for a European audience.<sup>84</sup>

Gibbons views the regulatory possibilities of the state in a more positive light in respect of global commerce. According to him, states are in the position of pursuing effective regulatory policies which defend national culture also on the international stage. Whether

80 *Cf.* Harrison and Woods, 2001, p. 7, Katsiera, 2003, p. 198, Collins, 1993, p. 363.

81 Gibbons and Humphreys, 2012, p. 142.

82 TVWF (97/36/EC) Directive.

83 *Id.*, Recital (27).

84 Harrison and Woods, 2001, pp. 7, 11.

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states are able to achieve this policy depends on the effectiveness of their regulatory power in respect of the determination of national productions. This means the capability of the state to create, through its regulatory framework, a product that is typical for the regulatory environment concerned (regulated product differentiation). Effectively, this means a national cultural policy which conforms to national markets and at the same time encourages companies to produce and broadcast programmes, while withstanding the external pressure dictated by deregulation. Gibbons perceives this approach as a defensive strategy, which at the same time requires positive steps that support the sale of national products on the global market.<sup>85</sup>

27.6.4 *European v. National Quotas*

The purpose of including rules related to European works in the directives is to open national markets and to establish a common European audiovisual programme market, which is a rather economic objective, intending to also counterbalance the hegemony of the North-American film industry in the internal market.<sup>86</sup> This objective is complemented by the aim of protecting European culture and identity and boosting global competitiveness. We can clearly see from the rules introduced by the above mentioned Member States that the majority of Member States fill common European quotas with their own, nationally produced creations in order to strengthen their national culture and ultimately, their audiovisual industry. Obviously, this approach goes against initial regulatory objectives, namely to promote the broadcasting of creations produced in other Member States or produced in a pan-European co-production, decreasing thereby the fragmentation of the EU's internal market. Irrespective of the indicated aspirations, the audiovisual market within the EU remains fragmented due to cultural and linguistic constraints.<sup>87</sup>

It is not surprising that Member States have introduced national protectionist provisions by referring to European quota rules. Firstly, because the concept of 'being European' on the one hand means that Member States stand on common grounds and they share common roots, on the other hand, the term expresses respect towards cultural differences between Member States as well as European cultural diversity.<sup>88</sup> Thus, national quota rules are deemed to be in compliance with European regulation. Secondly, as previously mentioned in relation to the history of the regulatory framework, EU regulation has outgrown the regulatory scheme of a single Member State, resulting in the spread of the French model throughout the EU.

<sup>85</sup> Gibbons, 2007, p. 244.

<sup>86</sup> According to Katsiera it has already been materialised by the adoption of the TVWF Directive and the inauguration of the quota rules was not necessary. See Katsiera, 2003, p. 208.

<sup>87</sup> Collins, 1993, p. 379.

<sup>88</sup> Harrison and Woods, 2001, p. 8.

Last but not least, the collision of economic interests behind European quotas also deserves attention. Common European aspirations support the economic goals of the Directives, namely the access to European markets of creations originating from another Member State and the promotion of the production of pan-European co-production works, which approach actually favours larger Member States with major film production capacities at the expense of Member States with smaller audiovisual industries. Although, initially one of the objectives of the European quotas was to take actions against the perceived cultural imperialism of the American media industry, the effective result of the European rules is in fact is the dominance of German, French and British programmes in smaller markets which is actually detrimental to cultural diversity, which would have been the other objective of the directive.<sup>89</sup> This conflict was revealed in 2003 when the TVWF Directive was reviewed in the course of public hearings.<sup>90</sup> In response to national quotas, the Member States and enterprises concerned indicated several times both in the hearing and in their respective written comments<sup>91</sup> that it would be a 'positive progress' if new sub-quotas would be established for non-nationally produced European works.<sup>92</sup> The proposal was finally not included in the AVMS Directive.

In summary it could be stated that the opinions in connection with the utility of quota rules included in the TVWF Directive and maintained in the AVMS Directive are quite divergent, the common being the criticism of the established scheme. Except for views which would prefer the elimination of the regulatory system,<sup>93</sup> a common opinion may be outlined according to which quota rules are a moderately positive integrational element, resulting from a compromise between the economically liberal<sup>94</sup> and culturally committed interventionist (dirigiste) trends<sup>95</sup> prevailing in Europe.<sup>96</sup> While quota rules point toward homogenisation in the internal market, they effectively ensure protection against the audiovisual dominance of the USA.<sup>97</sup>

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89 Gibbons and Humphreys, 2012, p. 142.

90 Public consultation on the review of the 'Television without Frontiers' directive, 2003, [http://ec.europa.eu/avpolicy/reg/history/consult/consultation\\_2003/index\\_en.htm#hearings](http://ec.europa.eu/avpolicy/reg/history/consult/consultation_2003/index_en.htm#hearings).

91 Written contributions, [http://ec.europa.eu/avpolicy/reg/history/consult/consultation\\_2003/contributions/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/history/consult/consultation_2003/contributions/index_en.htm).

92 I. Katsiera, *Public Broadcasting and European Law. A Comparative Examination of Public Service Obligations in Six Member States*, Kluwer Law International – Wolters Kluwer, The Netherlands, 2008, p. 295.

93 Katsiera, 2003.

94 For instance the United Kingdom, Germany and Denmark which states were lobbying against the regulation.

95 While France, Spain, Italy and Belgium were lobbying on the side of the regulation.

96 Cf. Gibbons and Humphreys, 2012, p. 140; Gibbons, 2007, p. 257; Castendyk, 2008, p. 435; Collins, 1993, pp. 374-375.

97 Gibbons, 2007, pp. 257.