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Investment Obligations and Levies on VOD Media Service Providers and Cultural Policies of Member States

an Analysis from an EU and International Tax Law Perspective

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Svitlana Buriak and Dennis Weber*

Investment Obligations and Levies on VOD Media Service Providers and Cultural Policies of Member States

An Analysis from an EU and International Tax Law Perspective

Digital video streaming platforms that provide on-demand services are subject to financial contributions stemming from media policy regulations in different countries, including the majority of EU Member States. In particular, such financial obligations include direct investments in European media works or indirect levies for national film funds. In 2018, the European Union revised the Audiovisual Media Services Directive, extending the scope of the financial obligations to cover not only the domestic media service providers established in the country that requires financial contribution but also foreign media service providers targeting the audience in this state. The provision was transposed (or is considered to be transposed) in the domestic legislation of at least 14 EU Member States. Yet, the technical design of the respective domestic provisions significantly varies, which can lead to distortive effects on investments and trade in the European Union, including due to the risk of double imposition of financial obligations by several Member States on the same income.

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For the purposes of this research, the authors requested an input concerning industry experience in dealing with article 13 AVMSD from several industry stakeholders, in particular, Netflix, Sky, Pickbox and Nordic Entertainment Group. The inputs referred to the main challenges that the stakeholders faced in complying with the financial obligations under article 13 AVMSD (2018) and their experience regarding relative compliance burdens and different attractiveness of the systems adopted by different EU Member States for investors in the industry.
The authors would like to thank Ms Anastasia Beltiukova, a graduate of the Advanced LLM in International tax law of the Amsterdam Law School, for her valuable contribution to the conducted research, for brainstorming on the most challenging legal aspects and for preparing questionnaires for stakeholders aiming to collect business insights into the topic of the study. The authors would like also to thank Prof. Dr Marija Bartl, Dr Kristina Irion, Prof. Dr Peter Wattel and the anonymous reviewers for their valuable comments on an earlier draft of this article. All remaining errors and omissions are our own. Dr Svitlana Buriak is Assistant Professor at Amsterdam Center for Tax Law (University of Amsterdam), Professional Support Lawyer at Loyens & Loeff (Amsterdam) and Postdoctoral research fellow at Institute for Austrian and International Tax Law (Vienna University of Economics and Business). Dr Svitlana Buriak can be reached at s.buriak@uva.nl.
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In this article, the authors analyse tax-related issues regarding financial obligations, namely how certain well-established cross-border tax mechanisms can enhance the legislative AVMSD framework to achieve a better balance between the societal policy goal of promoting European culture, on one hand, and respecting economic rights in the implementation of the financial obligations for audiovisual media service providers under article 13(2) of the AVMSD on the other.

From an international tax perspective, the authors analyse whether financial obligations, in particular the levy for national film funds, can be regarded as an earmarked tax on business income, its compatibility with double tax treaties, as well as whether it is covered by the commitment of the OECD Inclusive Framework Members to remove the unilateral measures similar to digital services taxes (DSTs) for the purposes of OECD Pillar One.

Contents

1. EU Film Regulations and International Taxation: Points of Intersection 256
- 1.1. Regulatory background: Audiovisual Media Services Directive and financial obligations on digital streaming providers 256
- 1.2. The goals and relevance of this study 262

2. Seeking Proportionality between the Promotion of European Culture and Freedom to Conduct a Business: Policy Perspective 263
- 2.1. The requirement of proportionality under article 13(2) of the AVMSD and freedom to conduct a business under the EU Charter 263
- 2.2. The level of rates of financial obligations and proportionality 267
- 2.3. The base of financial obligations and proportionality 268
- 2.4. Interim conclusions 272

3. Tax Tools for an Effective and Proportionate AVMS Policy 273
- 3.1. "Targeting" rules under the AVMSD and the place of supply in VAT and OECD Pillar One 273
- 3.2. Credit and exemption method 277
- 3.3. Interim conclusions 280

4. Film Funds Levy on the Digital Tax Agenda 281
- 4.1. National film funds levy is an earmarked tax 281
- 4.2. Who pays the levy to national film funds? Direct or indirect nature and economic tax burden 282
- 4.3. Film levy and the scope of double tax treaties 285
- 4.4. Interaction of the levy and investment obligations with the DST and OECD Pillar One 286
- 4.5. Interim conclusions 289

5. Overall Assessment and Conclusions 289

1. EU Film Regulations and International Taxation: Points of Intersection

1.1. Regulatory background: Audiovisual Media Services Directive and financial obligations on digital streaming providers

The audiovisual media service industry is one of the most established in an IT-driven society. Today, one has different choices to enjoy their favourite movies and programmes either on television or online.[1] At the same time, the choice of different sources of entertainment by audiovisual content reveals the variety of business models that an audiovisual

1. European Commission, *Shaping Europe's digital policy: Audiovisual and media services*, available at https://digital-strategy.ec.europa.eu/en/policies/audiovisual-and-media-services (accessed 17 Mar. 2023).

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service provider can implement to run its business. In addition to the traditional form of video over-the-air broadcasting, a rapid digitalization of the economy in the last two decades brought about a different type of market player – video on demand (VOD) media distributors.[2]

Because of not only the economic but also the cultural and societal importance, audiovisual media services have been subject to an extensive regulatory framework in the European Union.[3] In particular, in 2010, the EU Parliament and Council adopted the Audiovisual Media Service Directive (AVMSD),[4] which was also revised in 2018.[5]

Among other developments, in article 13, the revised AVMSD stipulated a possibility for Member States to impose the obligation on VOD businesses to financially contribute to the production and distribution of European works. Financial contributions represent one of the EU regulatory measures that intend to serve the objective of promoting European audiovisual works and cultural diversity. The disruption of the traditional TV broadcasting by the emergence of the Internet and a strong market power of primarily US-originated VOD businesses hindered the cultural and economic presence of European producers in the market.[6] Such distortions of the market do not have only economic consequences but also consequences for the existence and proliferation of the European cultural identity and the cultural heritage of individual Member States. Every Member of the European Union has a unique historical and cultural code that cannot be lost because of mere market imperfections; therefore, the objective of supporting the cultural policies of Member States made a powerful case for a regulatory intervention.[7]

2. In the past 10 years, the paid video-on-demand (VOD) services overturned the overall EU audiovisual market, with total revenues increasing from EUR 388.8 million in 2010 to EUR 11.6 billion in 2020 (European Audiovisual Observatory, *Trends in the VOD market in EU28* (Jan. 2021), available at https://rm.coe.int/trends-in-the-vod-market-in-eu28-final-version/1680a1511a (accessed 17 Mar. 2023).
3. Recital 5 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95 (2010) [hereinafter Audiovisual Media Services Directive (2010/13/EU)] provides: "Audiovisual media services are as many cultural services as they are economic services. Their growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services."
4. Id.
5. Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) given changing market realities [hereinafter Audiovisual Media Services Directive (2018/1808)]. For an insightful analysis of the trends which brought about the revision of the Audiovisual Media Services Directive (2018/1808), *see* European Commission, *Commission Staff Working Document – Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU (SWD(2016) 171 final)*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0171 (accessed 17 Mar. 2023); and European Commission, *Commission Staff Working Document – Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/ EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States relating to the provision of audiovisual media services in view of changing market realities (COM(2016) 287 final) – (SWD(2016) 169 final)*, available at https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52016SC0169 (accessed 17 Mar. 2023).
6. J. Poort et al., *Research for CULT Committee – Film Financing and the Digital Single Market: Its Future, the Role of Territoriality and New Models of Financing* sec. 2.2 (Policy Department for Structural and Cohesion Policies 2019).
7. By 2020, in 18 Member States, the top 3 places (in subscriber count per national market) were taken by global players with Netflix and Amazon holding the first and second rank in almost all markets in which

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In order to strengthen the promotion of European works, two types of actions were found appropriate by the Commission and Member States: requiring a certain level of investments into European productions; and ensuring prominence of European works by means of content quotas in the catalogues of VOD services.[8]

The financial obligations to invest in European works, which are the focus of this analysis, are provided in article 13(2) of the AVMSD. There are two possible forms of financial obligations, among which Member States can either choose one of them or adopt both options:
(1) direct contribution to European works by means of either (co-)funding the production of or (pre-)buying rights in European works;[9] and
(2) indirect contribution in the form of a levy payable to the Member State's national film fund.[10]

Before 2018, a financial obligation on VOD services could be imposed only by the Member State where a VOD provider was established (the state of origin).[11] The biggest novelty of the 2018 revision of the AVMSD is that both the country of origin and the Member State where the VOD provider furnishes its services (the state of destination) can impose the financial obligations.[12] The imposition of the financial obligations on foreign VOD service providers in cross-border transactions triggered the necessity of compliance with EU requirements of proportionality and non-discrimination in a cross-border context. Moreover, the financial obligation attracted the attention from an international tax law perspective since levying a financial levy that could be considered equal to a tax on a non-resident entity can contradict the obligations of Member States under their double tax treaties.

With respect to the principle of proportionality, some Member States seem to have adopted more restrictive obligations on audiovisual media service providers than others. Article 13(2) leaves a lot of room for Member States to make policy choices on how to implement financial obligations on VOD providers into the domestic legislation.[13] Thus, Member States

they operate (European Audiovisual Observatory, *Trends in the VOD market in EU28* (2021), available at https://rm.coe.int/trends-in-the-vod-market-in-eu28-final-version/1680a1511a (accessed 17 Mar. 2023).

8. Poort et al., *supra* n. 6, at sec. 3.1.3.
9. Some Member States also take into account other types of investments for purposes of complying with the financial obligations of audiovisual media service providers. The principal characteristic of the investment obligations is that it gives an investor the rights related to a film which can be fully exploited to the investor's benefit, and thus, such mandatory contribution can be recouped.
10. D. Rena Idiz et al., *European Audiovisual Media Policy in the Age of Global Video on Demand Services: A Case Study of Netflix in the Netherlands*, 12 Journal of Digital Media & Policy 3, p. 434 (2021).
11. In the AVMSD the "country-of-origin" principle is included in art. 2(1): "Each Member State shall ensure that all audiovisual media services transmitted by audiovisual media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State." The criteria for providers to fall under the jurisdiction of a Member State are set out in art. 2(2)-(4), which determine the place of establishment in a Member State, with arts. 49-55 of the *Treaty on the Functioning of the European Union* (13 Dec. 2007) [hereinafter TFEU] as the last resort. The key role of the principle was justified by the rationale of avoiding the burden of compliance with the regulatory framework of 28 Member States (at the time of the revision of the AVMSD, the United Kingdom was an EU Member State.)
12. A. Vlassis, *Platform governance and the politics of media regulation: The review of the European Audiovisual Media Services Directive*, Journal of Digital Media & Policy p. 2 (2022), available at https://intellectdiscover.com/content/journals/10.1386/jdmp_00084_1#abstract_content (accessed 17 Mar. 2023). C. Iordache, T. Raats & K. Donders, *The "Netflix Tax": An Analysis of Investment Obligations for On-Demand Audiovisual Services in the European Union*, 16 International Journal of Communication, p. 551 (2022).
13. F.J. Cabrera Blázquez et al., *Investing in European works: the obligations on VOD providers*, IRIS *Plus* (European Audiovisual Observatory 2022).

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can first choose whether to implement financial obligations or not.[14] Second, they can decide what type of a financial obligation to introduce – direct contribution, indirect contribution or both types of obligation.[15] Last but not least, Member States are free to determine the base and rate for the chosen type of financial obligation.[16] It is not per se at odds with EU fundamental rights and the principle of proportionality that one Member State applies more restrictive rules than another Member State.[17] Nevertheless, more restrictive provisions within a range of reasonable alternatives can still affect the investment attractiveness of the Member States with a higher compliance burden. Table 1. provides an overview of the status of the implementation of financial obligations by Member States and the differences in the policy options made by them, which, in some cases, are very significant.

From an international tax perspective, first and foremost, it has to be noted that the AVMSD is not a tax directive.[18] However, in particular, the levy as a form of the eligible financial contributions under the Directive has been repeatedly addressed by Member States and different EU and international organizations as *tax*.[19] The design and effect of the levy indeed induces a closer scrutiny on the nature of the financial duty. As well as this, its application in the cross-border context requires an analysis of whether the charge complies with the international tax obligations under double tax treaties and the recent proposals on taxation of digital businesses.

In particular, in October 2021, the OECD issued a Statement on a Two-Pillar Solution to Address the Tax Challenges arising from the Digitalisation of the Economy, which was endorsed by 137 countries – members of the OECD Inclusive Framework.[20] The Statement provides the following: "The Multilateral Convention [to adopt a two-pillar solution] will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future."[21]

Even though 137 countries accepted the commitment to remove DSTs and "other relevant similar alternative measures", the scope of this commitment is ambiguous since there is no agreement of what constitutes a "similar alternative measure".[22] The OECD appears to

14. Id., at p. 24.
15. Id., at p. 25.
16. Id.
17. T. Tridimas, *The principle of proportionality*, in *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* p. 247 (R. Schütze & T. Tridimas eds., Oxford University Press 2018), referring to CA: SCC, 21 Sept. 1995, *RJR- MacDonald Inc. v Canada (Attorney General)*, para. 160.
18. Audiovisual Media Services Directive (2010/13/EU), recital 19.
19. European Film Agency Directors Association, *AVMS Directive – Country of Origin principle and financial contributions (levies)*, available at https://europeanfilmagencies.org/news-publications/our-positions/85-avms-directive-faq-country-of-origin-principle-and-financial-contributions (accessed 17 Mar. 2023). P. Kemppinen, *Examining the European and Nordic transposition of AVMSD Article 13(2): New opportunity for reinforcing the financial foundation of Sweden's audio-visual content production* p. 7 (2021), available at https://www.filminstitutet.se/globalassets/2.-fa-kunskap-om-film/analys-och-statistik/publications/other-publications/examining-the-european-and-nordic-transposition-of-avmsd-article-132.pdf (accessed 17 Mar. 2023); and OECD/G20 Inclusive Framework on BEPS, *Tax Challenges Arising from Digitalisation – Interim Report* p. 146 (OECD 2018), Primary Sources IBFD [hereinafter OECD 2018 Interim Report].
20. OECD/G20 Inclusive Framework on BEPS, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (OECD 2021).
21. Id., at p. 3.
22. E. Berber & A. Junge, *Eliminating Relevant Unilateral Measures Under Pillar 1*, Tax Notes International (28 Feb. 2022).

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Table 1. Direct and indirect financial obligations implemented by Member States

Member State	IO for national works	IO base	Levy	Levy base	IO and/ or levy	Cumulative effect (IO and levy)
Austria	0	n/a	Market share	Revenue of Austrian-based services	Only levy	Based on the market share
Belgium (Fr)	Up to 2.2% (progression)	Annual turnover	Up to 2.2% (progression)	Annual turnover	IO or levy	2.20%
Belgium (NL)	2%	Turnover in the Dutch-speaking region	2%	Turnover in the Dutch-speaking region	IO or levy	2%
Croatia	2%	Annual gross revenue	2%	Annual gross revenue	IO and levy	4%
Czechia	1%	Revenue	0.5%	Relevant revenue	IO and levy	1.5%
Denmark	0	n/a	6% (tbc)	Annual turnover	Only levy	6%
France	15%-25%	Net turnover generated in France	5.15%		IO and levy	20%-30%
Germany	tbd	n/a	1.8%-2.5% (pre-2018 AVMSD)	Annual turnover	Only levy	1.8%-2.5%
Greece	1.5%	AVMSD-related turnover in Greece	1.5%	AVMSD-related turnover in Greece	IO or levy	1.5%
Ireland	0	n/a	tbd	Revenue generated in Ireland	Only levy	tbd
Italy	17% with a ramp up (18% in 2023; 20% in 2024)	Up to a percentage of the net annual revenue	0	n/a	Only IO	17%-20%
Netherlands	4.5%(tbc)	Relevant net revenue generated in the Netherlands	0	n/a	Only IO	4.5% (tbc)
Poland	0	n/a	1.5%	Revenue (access fees or revenues from the broadcast of commercial communication)	Only levy	1.5%
Portugal	1.5%-4%	Revenue generated in Portugal	1%-4%	For advertisers, price paid; for subscriptions, per user	IO and levy	4%-8%

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Table 1. Direct and indirect financial obligations implemented by Member States (*Continued*)

Romania	40%	Up to 40% of the amount due to the Film Fund	3%-4%	Revenue	IO or levy	3%-4%
Spain	5%	"Income accrued" (revenue)	5%	"Income accrued" (revenue)	IO or levy	5%
No transposition	Sweden, Slovakia, Bulgaria, Slovenia, Lithuania, Latvia, Estonia, Hungary, Luxembourg, Cyprus, Malta					
TBD	Austria (e.g. extension of the scope), Finland					

Source: Based on the AVMSD Tracking Table provided by European Audiovisual Observatory (last updated 4 Nov. 2022); I. Kostovska et al., *Investment obligations for VOD providers to contribute to the production of European works: A 2022 update*, SMIT (8 Sept. 2022), available at https://researchportal.vub.be/en/publications/investment-obligations-for-vod-providers-to-contribute-to-the-pro; and M. Komorowski et al., *Investment obligations for VOD providers to financially contribute to the production of European works: A 2021 update*, SMIT (3 June 2021), available at https://researchportal.vub.be/en/publications/investment-obligations-for-vod-providers-to-financially-contribut.

recognize the levy on streaming services, i.e. indirect financial contributions, as a relevant similar measure to DSTs.[23] Yet, for example, the Danish Ministry of Culture, which introduced a cultural levy of 6% on the turnover generated by Danish and EU-based digital streaming platforms, declared that the financial levy should not conflict with the commitment concerning unilateral measures taken under the Two-Pillar Solution.[24] Hence, it is not yet certain though whether the levy has to also be removed in light of different objectives of the AVMSD and the OECD Two-Pillar Solution to tax corporate profits and in light of the nature of financial contributions, namely whether they can be seen as tax.

In addition, an audiovisual media service provider established in a Member State and targeting the other Member States can be henceforth subject to several financial contributions of the same kind. The wording of article 13(2) is clear that the principle of origin still applies to the financial obligations, yet gives a prerogative to a targeted Member State to impose the financial obligations on the revenues generates in the second state.[25] The country of origin instead is not limited in the territorial scope of revenues by the AVMSD; investment obligations and levy can be charged on the total revenue of an audiovisual media service provider established in the state including revenue from cross-border operations. The shared right of the origin and destination state can thus result in double imposition on the same revenue.[26] To avoid such a negative outcome, article 13(3) lays down the rule, according to which the country of establishment "shall take into account any financial contributions imposed by targeted Member States". Yet, the AVMSD is silent about how the state of establishment has to "take into account" a financial contribution imposed by the targeted state.

National practices of Member States show a range of different approaches to "taking into account", which do not always fully eliminate double imposition and which lead to the

23. OECD 2018 Interim Report, *supra* n. 19, at p. 146.
24. P.E. Lytken & G. Dam, *Denmark Considers Implementing a Digital Streaming Services Tax*, Bloomberg (18 Oct. 2022), available at https://news.bloombergtax.com/daily-tax-report-international/denmark-considers-implementing-a-digital-streaming-services-tax (accessed 17 Mar. 2023).
25. E. Apa & G. Gangemi, *The promotion of European works by audiovisual media service providers*, in *Research Handbook on EU Media Law and Policy* p. 343 (P.L. Parcu & E. Brogi eds., Edward Elgar Publishing 2021).
26. Id.

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fragmentation of the market. To address this shortcoming of the design of the rules, international taxation could offer valuable insights on different methods to avoid double imposition of financial obligations on audiovisual media service providers.

1.2. The goals and relevance of this study

This work aims to analyse the following questions:

– How can international tax tools help to achieve a better balance between the societal policy goal of promoting European culture, on one hand, and respecting economic rights in the implementation of the financial obligations for audiovisual media service providers under article 13(2) AVMSD on the other hand?

– Are the financial obligations imposed by Member States on non-resident audiovisual media service providers not against the obligations under double tax treaties, including potential changes to the treaties related to the OECD Pillar One proposal?

With this purpose, in section 2., the authors discuss how Member States can ensure that the implementation of the financial obligations for VOD providers does not create disproportionate restrictions to freedom to conduct a business under the EU Charter of Fundamental Rights. The AVMSD provides only minimal harmonization, stating that the implementation of any financial contribution by a Member State should be proportionate, non-discriminatory and in compliance with Union law.[27] However, it does not define what, in particular, the requirement of proportionality entails.

Section 3. deals with the question of which international tax tools could be relevant and useful to strengthen the legal framework of the AVMSD. A technically more accurate EU legal framework for the audiovisual sector will support building a non-distorting and coherent EU policy of promoting European works and culture and a more coherent implementation of the Directive by Member States. International tax law can provide valuable insights for the design of the financial obligations related to identifying the place of supply and revenue-sourcing, defining the right base for investment obligations and levies, or methods to eliminate double imposition of financial obligation on the same item of income by two Member States.

Section 4. addresses certain concerns regarding the co-existence of the financial obligations on audiovisual media service providers and general taxes, such as value added tax (VAT) and corporate income tax. This article demonstrates that in light of the OECD digital tax agenda, the tax treatment of highly digitalized business models cannot be addressed in isolation from other sector-specific regulatory obligations imposed on them. The lack of coordination between different types of financial charges and taxes creates multiple layers of taxation hindering the attractiveness of investment options and the investment climate in the European Union

27. Art. 13(2) and 13(3) Audiovisual Media Services Directive (2018/1808).

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2. Seeking Proportionality between the Promotion of European Culture and Freedom to Conduct a Business: Policy Perspective

2.1. The requirement of proportionality under article 13(2) of the AVMSD and freedom to conduct a business under the EU Charter

Article 13(2) of the AVMSD stipulates that any imposition of a financial obligation on an audiovisual media service provider by a targeted Member State "shall be proportionate". The requirement to implement the financial obligations with due respect to the principle of proportionality[28] induces Member States to find the right balance between the measures aiming to promote European culture and the rights and principles recognized in EU law.[29]

A principle that might be at stake with the financial obligations laid down by the AVMSD is the freedom to conduct a business under article 16 of the EU Charter of Fundamental Rights (CFR or Charter).[30] Freedom to conduct a business encompasses freedom to exercise economic and commercial activity, freedom of contract (which refers to the freedom to choose with whom to do business[31]) and freedom to determine the price, as well as free competition.[32] In the ECJ case law, freedom to conduct a business can be also invoked in conjunction with article 17 "Right to property" laying down the principle of free use of resources by entrepreneurs in the European Union.[33]

In the literature, freedom to conduct a business is often argued to be a weak right – large discretion is left to the public authorities implementing restrictions. The freedom can only be violated when a certain measure fully prevents one from carrying on a business activity as such. As long as the affected person could conduct business, even the most severe limitation to the way it is performed would not be at stake with the freedom's requirements.

In *Sky Österreich* (C-283/11), for example, the Court had to analyse whether the measure of the AVMSD (2010) that required the holder of exclusive broadcasting rights "to authorise any other broadcaster, established in the European Union, to make short news reports, without being able to seek compensation exceeding the additional costs directly incurred in providing access to the signal" amounted to infringement of the fundamental rights granted by articles 16 and 17(1) of the Charter. In this regard, the Court ruled the following:

> 46. The freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.

28. Art. 13(2) Audiovisual Media Services Directive (2018/1808).
29. W. Sauter, *Proportionality in EU law: A balancing act?*, in *Cambridge Yearbook of European Legal Studies* p. 445 (E. Leinarte & O. Odudu eds. Cambridge University Press 2021).
30. The Charter is legally binding equally to the treaties, in particular the TFEU, which guarantees four fundamental freedoms of movement. Even though the Charter became effective only with the Lisbon Treaty in 2009, the ECJ case law also before had been recognizing "the freedom to pursue trade or business [as a] general principle of European Union law". *See* DE: Opinion of Advocate General Bobek, 16 Mar. 2016, Case C-134/15, *Lidl GmbH & Co. KG v. Freistaat Sachsen*, [2016] ECLI:EU:C:2016:169, Case Law IBFD. As AG Bobek considered in AG Opinion in *Lidl v. Freistaat Sachsen* (C-134/15), "the Treaty of Lisbon elevated the Charter of Fundamental Rights to the level of binding primary law. By doing so it brought fundamental rights review of EU acts to the fore".
31. LU: ECJ, 10 July 1991, Joined cases C-90/90 and C-91/90, *Jean Neu and others v. Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1991], ECLI:EU:C:1991:303, para. 13, Case Law IBFD.
32. EU Agency for Fundamental Rights, *Freedom to conduct a business: Exploring the dimensions of a fundamental right* p. 21 (2015), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-freedom-conduct-business_en.pdf (accessed 17 Mar. 2023).
33. *Lidl GmbH & Co. KG v. Freistaat Sachsen* (C-134/15), para. 21.

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> 48. In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

In the case, the Court did not find the provision to "affect the core content of the freedom to conduct a business" since it did not prevent the holder of exclusive broadcasting rights from carrying on a business activity as such.[34] Yet, the Court, even in the absence of infringement of the freedom, applied the proportionality test to assess whether the measure was the least restrictive[35] possible to achieve the goal of the provision.

The application of the proportionality test, even when no infringement of the core essence of the freedom to conduct business is found, appears to be an important characteristic of the case law on article 16 of the Charter. The "restriction" stage of an assessment of whether a measure is in breach of freedom to conduct a business sets a very high standard – a person has to be fully precluded from carrying on an activity as such, which can be justified only in extreme circumstances (e.g. when such an activity is hazardous to the public order or other essential public interests). Mostly, restrictions to freedom to conduct a business are not absolute; hence, the proportionality stage would not have any relevance had it been pre-conditioned to the "restriction" stage of the Court's assessment.

At the outset, it is important to underline that it does not seem that the provisions regulating the financial obligations to invest in European production under the AVMSD or its implementation by Member States could severely infringe the freedom to conduct a business to the extent that an audiovisual media service provider cannot continue carrying on its business. Therefore, from a legal perspective, there might be very few grounds to challenge the provisions of the Member States implementing the AVMSD on the matter of compliance with the freedom to conduct a business.

Yet, freedom to conduct a business is not only a general principle of EU law but also an overall critical indicator of the efficiency of government regulation of business. The European Union Agency for Fundamental Rights specifies that "the freedom to conduct a business is relevant to a range of EU policies related to the Single Market, economic growth, and entrepreneurship. The need to provide a stable economic environment conducive to the development of business is emphasized throughout a wide range of EU instruments".[36] The Agency highlighted that regulatory burden can be one of "the existing obstacles to growth

34. AT: ECJ, 22 Jan. 2013, Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, [2013] ECLI:EU:C:2013:28, para. 49, Case Law IBFD.
35. An interesting part of the decision is that the Directive itself was challenged and not an implementing provision of a Member State. The Court applied the proportionality principle as "the least restrictive measure" test while, in a different case law, the Court considered that "the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue" (CZ: ECJ, 3 Dec. 2019, Case C-482/17, *Czech Republic v. Parliament and Council*, [2019] ECLI:EU:C:2019:1035, paras. 76-77; and UK: ECJ, 8 June 2010, Case C-58/08, *Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform*, [2010] EU:C:2010:321, para. 52). *See* Sauter, *supra* n. 29, at p. 445.
36. EU Agency for Fundamental Rights, *supra* n. 32, at sec. 1.2.

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and competitiveness".[37] Reducing unnecessary administrative burdens and regulatory requirements that do not significantly contribute to achieving EU policy goals is in the spirit of freedom to conduct business as a fundamental EU right and a critical direction of EU policy when designing any piece of a regulatory intervention. Therefore, even though freedom to conduct a business is considered to be a weak right in a court hearing, it is argued to be a yardstick of a good policy that aims to facilitate market economy, free competition and the EU single market.

In this respect, the principle of proportionality that requires finding the right balance between fundamental rights and freedoms and goals for regulatory interventions is of pivotal importance also for audiovisual media regulations. Perhaps a significant role of the necessity to guarantee the proportionality of regulatory interventions in free conduct of business induced the Court to apply the standard in the case law related to freedom to conduct a business, even when there was no infringement of the fundamental right.

It is important to further consider what standard of "proportionality" the Court applies in the cases when free conduct of a business is restricted by certain regulatory interventions. Overall, the case law of the Court contains two different standards of the principle of proportionality: the intervention should either amount to the "least restrictive alternative" or the measure should not be "manifestly disproportionate".[38] The first test most frequently applies to acts of the Member States provided that EU acts establish a certain level of minimum harmonization, while the second one applies to EU acts.[39]

The AVMSD is a piece of "minimum harmonization" legislation that lays down "the floor" of common rules for Member States.[40] The AVMSD does not establish specific technical rules for the design of investment obligations and levies by Member States. Therefore, it might be assumed that Member States go beyond the minimum harmonization of the AVMSD, thus acting in their own competence, which might preclude the assessment of the domestic legislation on the matter of proportionality.[41] Yet, first the AVMSD itself requires that an implementing measure should comply with the principle of proportionality; second, the AVMSD does not stipulate specific minimum harmonization technical rules for the financial obligations (e.g. base, rate, coordinating rules), which means that a Member State acts in the competence of the European Union when defining those specific elements, without which the financial obligations could not be enforced. Thus, the severance of the

37. Id.
38. Sauter, *supra* n. 29, at pp. 445-446.
39. The case law distinguishes two standards of the principle of proportionality depending on whether a measure is adopted by EU institutions or EU Member States: the "manifestly disproportionate" standard applicable to the acts of EU institutions and the "least restrictive measure" standard applicable to the laws of Member States that implement EU legislation. Sauter, id., at pp. 439-441, 445-446 and 452-464 (with reference to M. Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998)).
40. For the analysis of the application of fundamental rights to the acts of Member States that go beyond minimum harmonization, *see* F. de Cecco, *Room to move? Minimum Harmonization and Fundamental rights*, 43 Common Market L. Rev. 9, pp. 9-30 (2006).
41. *See* M. Bartl & C. Leone, *Minimum Harmonisation and Article 16 CFR: Difficult times ahead for social legislation?*, in *European Contract Law and the Charter of Fundamental Rights* pp. 113-124 (H. Collins ed., Intersentia 2017); J.H. Jans, *Minimum Harmonisation and the Role of the Principle of Proportionality*, in *Umweltrecht und Umweltwissenschaft; Festschrift für Eckard Rehbinder* pp. 705-717 (M. Führ, R. Wahl & P. von Wilmowsky eds., Erich Schmidt Verlag 2007); and De Cecco, id.

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AVMSD implementing measures by a Member State, in principle, could be subject to the "least restrictive alternative" proportionality standard.[42]

In the context of freedom to conduct a business, some commentators argue that the least restrictive means test is not usually (if ever) used to assess the proportionality of the measure since freedom to conduct business is a weak right.[43] Thus, the standard of proportionality for the freedom to conduct business is sometimes seen as that the intervention should not be intolerable.[44] The "intolerable interference" test, for example, was applied in *Deitsches Weintor*.[45]

Nevertheless, the latter case law of the Court on the freedom to conduct a business appears to follow not the "bluntly disproportionate" test but the "least onerous alternative".[46] *In* Sky Österreich*, the* Court underlined that the freedom to conduct a business was "not absolute, but must be viewed in relation to its social function".[47] The Court emphasized that the freedom "may be subject to a broad range of interventions on the part of public authorities"[48] but with due respect to the principle of proportionality under article 52(1) of the Charter.[49] Then, the Court conducted a step-by-step examination of proportionality "with exemplary discipline and clarity".[50] This decision was not revolutionary in terms that no violation of freedom to conduct business was found, but it demonstrated the high importance of the assessment of every regulatory intervention on the matter of proportionality.

In *Lidl v. Freistaat Sachsen*, AG Bobek analysed whether the labelling obligation for fresh poultry meat complies with article 15(1) and article 16 of the Charter and laid down the following three-stage analysis of proportionality: (i) the measure adopted should be *appropriate* to attain the legitimate objectives pursued; (ii) it shall not exceed what is *necessary* to attain the legitimate objectives (where there are several regulatory alternatives, recourse

42. The freedom to conduct a business affords protection to individuals in the European Union against the unjustified and disproportionate limitation on the exercise of the right only if the infringing measure falls into the scope of EU law. The national law provision of a Member State can infringe the freedom to conduct business only in the following circumstances: (i) it implements Union law "irrespective of the degree of the discretion the Member State enjoys and whether the national measure goes beyond what is strictly necessary for implementation"; (ii) it invokes a permitted derogation under Union law; or (iii) some substantive rule of EU law applies. The implementation of the AVMSD by Member States falls in the first category. Therefore, a specific national framework implementing the AVMSD can be scrutinized on the compatibility with the freedom to conduct business as a general principle of EU law enshrined in art. 16 of the Charter (DE: Opinion of Advocate General Sharpston, 22 May 2008, Case C-427/06, *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, [2008] ECLI:EU:C:2008:297, para. 69).
43. Bartl & Leone, *supra* n. 41, at pp. 118-119.
44. *See* D. Vasarienė & L. Jakulevičienė, *Freedom to Conduct Business During the Covid-19 Pandemic*, 26 Tilburg Law Review 1, sec 4.1. (2021).
45. DE: ECJ, 6 Sept. 2012, Case C-544/10, *Deutsches Weintor eG v. Land Rheinland-Pfalz*, [2012] ECLI:EU:C:2012:526, para. 54.
46. Vasarienė & Jakulevičienė, *supra* n. 44, at sec. 4.1.
47. *Sky Österreich* (C-283/11), para. 45; UK: ECJ, 8 July 2010, Case C-343/09, *Afton Chemical Ltd. v. Secretary of State for Transport,* [2010] ECR I-7027, para. 45; and DE & UK: ECJ, 23 Oct. 2012, Joined Cases C-581/10 and C-629/10, *Nelson and Others v. Deutsche Lufthansa AG and TUI Travel plc*, [2012] ECLI:EU:C:2012:657.
48. *Sky Österreich* (C-283/11), para. 46.
49. Id., at para. 47.
50. B. Pirker, *Case C-283/11 Sky Österreich: Taking proportionality seriously*, European Law Blog (29 Jan. 2013), available at https://europeanlawblog.eu/2013/01/29/case-c-28311-sky-osterreich-taking-proportionality-seriously/ (accessed 17 Mar. 2023).

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must be had to the least onerous); and (iii) the disadvantages caused must not be disproportionate to the aims pursued (*internal balancing*, or *proportionality* stricto sensu).[51]

The three-test analysis establishes a well-reasoned objective of EU law: an intervention in free conduct of a business in the European Union has to balance the legitimate interests of EU Member States and those of private parties carrying on economic activities in the internal market. In this regard, in the following sections, the authors analyse how Member States can ensure that the implementation of the financial obligations for audiovisual on-demand media service providers is done in a way that does not create unnecessary restrictions to the EU fundamental economic right, namely freedom to conduct a business.

2.2. The level of rates of financial obligations and proportionality

The first issue to start the discussion on the proportionality of financial obligations is their effective rate applied to the revenues of audiovisual media service providers. The economic effect of financial obligations adopted by different Member States, which implemented article 13(2) of the AVMSD, is the result of the different levels of financial burden. Some Member States opted for only one kind of financial obligation, direct investments or indirect levies; other Member States preferred incorporating both forms of financial duties on audiovisual media service providers.

France, for example, imposes both direct investment obligations and levies to finance the Center National du Cinema which are obligatory for VOD providers. The cumulative effect of these two obligations in France is the highest in the European Union and amounts to about 25%-30% of revenue to be reinvested in French and European works. The second country with the highest effective rate of financial obligations is Italy. It amounts to 17%-20% of the in-scope revenue subject to reinvestment.

In other Member States, the impact of the rules on the financial conditions of audiovisual media service providers is more moderate; the amount required to be utilized for promotion of European work varies from 1.5% in the Czech Republic and Poland up to 6% in Spain.

The difference in the effective rates of the Member States is thus considerable. The question that arises is whether the exceptionally high rates adopted, for example, by France and Italy, are justified in light of the goal of the promotion of "European works" pursued by the AVMSD. In addition, do not such high rates exceed what is necessary to achieve the cultural goals of the Member States?

When it comes to the suitability of exceptionally high rates to achieve the goals of the AVMSD, one can argue that the more funds are injected into national film productions, the more European works can be produced. Hence, high rates of the financial obligations are appropriate to attain the goal of strengthening the European culture and are justified in light of this goal.[52]

Regarding the second issue, it has to be noted that almost none of the Member States that imposed the financial obligations on audiovisual media service providers performed an economic assessment of the investment needs of the national film industries, which can

51. AG Opinion in *Lidl GmbH & Co. KG v. Freistaat Sachsen Bobek* (C-134/15), para. 40.
52. When assessing the matter, due attention has to be paid to the share of the investment obligations required to be made in "national" rather than "European works".

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also have different needs in different periods. Therefore, a continuous assessment of the budgetary needs of national firm funds can achieve a better balance for purposes of proportionality. For example, according to the Austrian legislation that applies to Austrian-based companies only,[53] the calculation of the investment obligation starts with the calculation of the cost of specific tasks of the Austrian Broadcasting Corporation. The Austrian government took the obligation to cover such cost up to EUR 2.25 million, whereas the rest of the expenses (the maximum amount: EUR 3.5 million per year) is divided among all the in-scope service providers based on their market share. In the authors' view, such a design of the financial obligations guarantees that the Austrian measure that de facto restricts the free use of resources does not exceed what is necessary to achieve the effective promotion of European works in Austria and the European Union. The Austrian approach might not be the only possible way to ensure that the limitations imposed on audiovisual media service providers are proportionate to what they aim to achieve. Nevertheless, neither France nor Italy, which introduced the highest rates, fairly demonstrated the need for exceptionally large investments, especially when compared to the other Member States. Such rates of investment obligations and levy as found in French and Italian legislation could risk going beyond what is necessary to achieve the goal of promoting European works and cause disproportionate disadvantages to the affected service providers.

Yet, both Italy and France historically have been exceptionally attentive to the national cultural audiovisual media production and active in this area. In general, Member States hold authority for their own cultural policy development, including setting up the required budget for the national and European audiovisual media production.[54] Consequently, even a very high rate of investment or levy obligation on VOD businesses is not disproportionate to the extent that there is a direct correlation between the budgetary needs and financial charges.

2.3. The base of financial obligations and proportionality

At the same time, high rates for financial obligations can be challenging if charged on "revenues" of audiovisual media service suppliers. Article 13(2) of the AVMSD establishes that the financial obligations have to be imposed on revenues of VOD providers, both for purposes of direct investment and levies to the national film funds. The Member States that implemented the AVMSD apply similar concepts of "net revenue" for calculating the relevant bases. Interestingly enough, there was no substantial policy or academic discussion on the issue of whether "net revenues"[55] is an appropriate base for the financial obligations. In contrast, in international tax law, similar taxes (e.g. the DST or withholding tax on automated digital services) were extensively criticized. In order to illustrate where the criticism comes from, it is important to distinguish different basic concepts of income.

53. AT: *Audiovisuelle Mediendienste-Gesetz* [Audiovisual Media Services Act], 2001 (amended 2022); and AT: *KommAustria-Gesetz* [Federal Law on the Establishment of a Communications Authority Austria], 2003 (amended 2022).

54. P. Dewey, *Power in European Union cultural policy*: *International Cultural Policies and Power*, in *Power in European Union Cultural Policy* pp. 113-126 (J.P. Singh ed., Palgrave Macmillan 2010).

55. Net revenues equal gross revenues (income with no deduction for expenses), and there are fewer tax obligations that are allowed to be deducted under the accounting rules of a particular country. For example, net revenues could be all proceeds in a specific period (e.g. financial year) less VAT.

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Corporate income taxes are levied on financial accounting *profits*. Sales taxes are charged on *revenues*. The capital that a foreign entity derives from a host state is taxed based on *net revenues* (e.g. withholding source tax on royalties). The selection of the tax base for each kind of taxation relies on well-defined specific objectives and principles pursued by a certain tax that allow the taxes to be proportionate.

For example, the key principle for designing corporate income taxes is taxation on a *net basis*.[56] According to it, taxpayers should pay taxes only on their earnings, i.e. *profits* that are defined as *total revenues* less *total expenses*. The importance of levying corporate income taxes on profits rather than revenues is crucial for preventing distortions to investment decisions and guaranteeing a level playing field for all businesses. If a company generates high total revenues, it can be the case that its total expenses are even higher than the total revenue. Consequently, the amount of profits will be negative. If in such a scenario, an income tax is levied on the amount of its revenues rather than profits, the tax impairs the entity's economic financial condition. In contrast, another enterprise with the same amount of revenue but significantly lower expenses will be highly profitable. Even though paying the income tax levied on revenues for such an entity also is not economically efficient, it will not cause as negative consequences as in the first example. Yet, if both entities are charged on their profits rather than revenues, the distortions to investment decisions are mitigated.

In the ECJ *Vodafone* case (C-75/18), the Commission challenged whether the Hungarian net revenue-based taxes are of relevance for the discussion of the financial obligations under the AVMSD. In 2014, Hungary introduced the Hungarian advertisement tax that used net revenues as the tax base. In a nutshell, Hungary implemented different rates for the in-scope enterprises depending on the revenue they produced; higher revenue resulted in a higher rate applicable to it. Among other issues of indirect discrimination of foreign and national enterprises, the Commission, AG Kokott and the Court expressed their positions on whether revenue could be an appropriate indicator of enterprises' ability to pay. According to the principle of ability to pay, the burden of a financial obligation imposed on a business should correlate with the wealth of the payor in order for a measure to be proportionate. The ECJ decision in the *Bevola* case acknowledged that the principle of ability to pay is a general principle of EU law that can be invoked inter alia to evaluate the proportionality of a restrictive measure.[57]

In the tax literature, it is considered that "the ability-to-pay principle requires the full deductibility of the cost incurred in the context of an income-generating activity".[58] The Commission's position in *Vodafone* was that turnover or revenue cannot be an indicator of an entity's ability to pay since, with no deduction of cost, it cannot reflect the financial capacity of that entity; high turnover does not always result in high profits, if any profits at all.[59] In contrast, AG Kokott in *Vodafone* expressed her position that turnover could be

56. *See* OECD, *Addressing the Tax Challenges of the Digital Economy – Action 1: 2015 Final Report* p. 35 (OECD 2015), Primary Sources IBFD [hereinafter *OECD Action 1*]; and Belastingdienst, *International aspects of taxation in the Netherlands*, available at https://download.belastingdienst.nl/itd/verdragen/iatn2008.pdf (accessed 17 Mar. 2023).
57. DK: ECJ, 12 June 2018, Case C-650/16, *A/S Bevola and Jens W. Trock ApS v. Skatteministeriet*, [2018] ECLI:EU:C:2018:424, para. 59, Case Law IBFD.
58. W. Schön, *International Tax Coordination for a Second-Best World*, 1 World Tax J. 1, p. 74 (2009), Journal Articles & Opinion Pieces IBFD.
59. R. Szudoczky & B. Károlyi, *The troubled story of the Hungarian advertisement tax: how (not) to design a progressive turnover tax*, 48 Intertax 1, secs. 3.3.1 and 3.3.3 (2020).

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an indicator of ability to pay.[60] The Court accepted AG Kokott's line of reasoning, stating that high turnover allows reaching the economies of scale effect and hence to reduce costs; therefore, according to the Court, in case an enterprise produces high turnover, it can be presumed to generate high profits.[61]

This decision faced well-reasoned criticism in tax literature. For instance, Szudoczky and Karolyi (2020) argued that the Court failed to provide good reasons why a legislator should be allowed to make presumptions about the level of profits of an enterprise if this data is available in the balance sheet of the entity.[62] Mason and Parada (2020) noted that "the Court made no factual findings on whether turnover is an accurate, or even relevant indicator of a taxpayer's ability to pay".[63]

The design of the investment obligations and levy for VOD providers under the AVMSD and the implementing legislation of Member States does not appear to take into consideration the ability to pay of the affected service providers. No consideration of the actual economic position (the amount of generated profit) of an audiovisual media service provider in a market can result in the following consequence: for entities with a stronger market power, the investment obligations and levy might only decrease the actual profit, which, as illustrated by case law, is not against the freedom to conduct a business; for an entity with a marginal rate of return, a high rate for investment obligations and/or levy charged based on revenues rather than the actual profit might fully prevent the audiovisual media service provider from carrying on an activity in European markets, thus affecting the very essence of the freedom to conduct a business under the Charter.

In defence of the policy choice of levying the investment obligations and levy on revenues rather than profits, there might be several arguments. First of all, only the state of origin can possess sufficient data on accounting losses to charge the investment obligation; thereby, only the state of origin could effectively assess one's ability to pay.[64] The derogation from the principle of origin to the principle of destination under the revised AVMSD could be seen as a justifiable ground to neglect the principle of ability to pay; audiovisual media service providers' revenue in the country to where the service is supplied could be the only financial indicator reliably available to the relevant authorities.

In this context, imposing the financial obligation on revenues rather than profits should not be seen as disproportionate to the extent that the financial burden of this disadvantage is mitigated by reasonable rates. For example, in 2021, the United Nations developed a withholding tax on business income from automated digital services (effectively comparable to the EU DST) that can be charged by a destination country on the amount of gross receipts (article 12B of the UN Model (2021)). The Commentary to the article stipulated that "the taxation of income from automated digital services on a gross basis [revenues] may result in … excessive taxation".[65] In order to compensate for the weakness of the system, the

60. HU: Opinion of Advocate General Kokott, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. V. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, [2018] ECLI:EU:C:2019:492, Case Law IBFD.
61. HU: ECJ, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. V. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, [2018] ECLI:EU:C:2019:492, para. 50, Case Law IBFD.
62. Szudoczky & Károlyi, *supra* n. 59, at sec. 3.3.3.
63. R. Mason & L. Parada, *The Legality of Digital Taxes in Europe*, 40 Va. Tax Rev. 175, p. 33 (2020).
64. Schön, *supra* n. 58, at p. 72.
65. *Commentaries on the Articles of the United Nations Model Double Taxation Convention between Developed and Developing Countries* art. 12B(4) (2021), Treaties & Models IBFD [hereinafter *UN Model* (2021)].

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United Nations argued that the rates should be around 3%-4% at most. Hence, imposing an investment obligation or a levy on net revenues with no account to the ability to pay of an entity could be compensated by lower rates.

In principle, excessive taxation is not against the fundamental economic rights and freedoms to the extent that it does distort intra-EU trade. For example, in *De Danske Bilimportører v. Skatteministeriet*, the Court had to decide whether a levy on the registration of new motor vehicles in Denmark, which amounted to "105% on the first portion and 180% on the remainder of the price",[66] adopted for the principal purpose of raising tax revenue,[67] could be equivalent in effect to quantitative restriction on trade between Member States or afford indirect protection to domestic products.[68] Since Denmark did not have its own production of motor vehicles, the Court considered that the measure did not have any intent of the protectionism of domestic manufacturing. The levy was part of a general system of internal dues on goods, the excessive rate of which was not against the economic freedoms. If one draws a parallel with the implementation of the AVMSD by Member States, excessive rates of the investment obligations and levy should not be against EU law, in particular, the freedom to conduct a business and freedom to provide services, provided that there is no discrimination between domestic and foreign audiovisual media service providers.

Yet, the decision in *Berlington Hungary and others* provides that excessive financial contributions might, in some circumstances, infringe EU freedoms if they prevent an individual from conducting a business as such. In the case, the Court ruled on the issue of whether "a five-fold increase of the flat-rate tax payable by operators of slot machines in amusement arcades and, in addition, introduces a proportional tax on that activity constitute a restriction of the freedom to provide services".[69] The applicant in the case, inter alia, argued that the flat rate tax on a lot machine exceeded the amount of profits that the machine could generate, which resulted in "an immediate average monthly loss" and in "non-existent or, at most, minimal" profit.[70] The Court ruled that the tax would be against the freedom to provide service if the increase "produced an effect comparable to that of prohibiting the operation"[71] and "was actually liable to prohibit, impede or render less attractive the exercise of the freedom to provide the services", even if the measure did not entail any discriminatory treatment of foreign and national entities.[72] When applying a similar line of reasoning to the AVMSD context, the authors consider that excessively high rates of investment obligations and levies charged on net revenues that may have the consequence of a negative profit of an enterprise do not have an effect comparable to prohibiting the activity; it was not the intention of the legislator. However, the financial obligation under the AVMSD can negatively affect loss-making businesses and deprive them of opportunities to restore the financial condition.

In defence of the implementing provisions of Member States, one could raise an argument that the investment obligation and levy do not share the same nature as financial obligations

66. DK: ECJ, 17 June 2003, Case C-383/01, *De Danske Bilimportører v. Skatteministeriet, Told- og Skattestyrelsen*, [2003] ECLI:EU:C:2003:352, para. 9, Case Law IBFD.
67. Id., at para. 11.
68. Id., at paras. 3-9.
69. HU: ECJ, 11 June 2015, Case C-98/14, *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v. Magyar Állam*, [2015] ECLI:EU:C:2015:386, Case Law IBFD.
70. Id., at para. 39.
71. Id., at para. 41.
72. Id., at para. 40.

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under tax regulations. In contrast to tax charges, an audiovisual media service provider can obtain a return on direct investments, thus avoiding any financial disadvantages. Yet, the return on investment is not guaranteed especially if the decision on what to invest in is not based on the commercial viability of the investment but on the strict requirements of the domestic legislation on eligible investments. In this respect, the authors consider that the ability-to-pay principle for direct investments under the AVMSD can be reformulated as ability to reinvest: a media service provider should have financial capacity to reinvest a portion of revenues into new productions based on its individual financial condition. Otherwise, the obligation to make such an investment disregarding the real financial capabilities of the enterprise (e.g. the loss situation) distorts the competition between the audiovisual media service providers that have different real financial capabilities.

Interestingly, the only country that, to some extent, considered the situations when relevant companies generate losses is Italy. In Italy, if a provider does not make any profit in two consecutive years, it is exempted from the investment obligation. Still, if the provider generates only marginal returns or no profit in several – but not consecutive – years, the obligation persists.

2.4. Interim conclusions

To sum up, the authors recommend that Member States consider several elements when implementing the AVMSD in order to achieve the right balance between the audiovisual media policies and EU economic freedoms. The first recommendation for Member States would be to assess the real needs of the national audio visual media industries. By establishing a direct correlation between the needs and the expenses, Member States can eliminate the risk of going beyond what the AVMSD and Member States' cultural policies require in terms of investments and contributions.

The second recommendation would be to implement the principle of ability to pay for the levy and a modified principle of "ability to reinvest" for direct investment obligations. The goal of these principles should be to implement the AVMSD in a proportionate manner, in particular to prevent a situation where the competition between the industry giants and smaller players with lower profit margins is distorted due to the lack of proper consideration to the real economic position of undertakings under the AVMSD. The balance could be achieved by either applying high rates for investment obligations and levies (such as in the case of France in Italy) charged on profits[73] of audiovisual media service providers or marginal rates levied on revenues.

Last but not least, it is important to take into account the situations where an undertaking is at loss. Currently, Italy appears to be the only country, the legislation of which contains an exemption from the financial obligations in case a service provider generates losses.

73. It can be administratively problematic for Member States to determine the profit of an enterprise that is established in another Member State and targets the territory of the first state. In such a case, an alternative solution to align the financial obligations with the principle of ability to pay could be a formulary "net profit option", which was proposed in art. 12B UN Model for the purposes of applying a withholding tax on income from automated digital services. According to it, an assumption of the amount of profits of an enterprise is made based on the profitability level in a given industry or the profitability level of a group. Even though such an assumption is not fully informative with respect to the real profits of each individual enterprise operating in the industry, the mechanism is less distortive to the competition in the market.

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3. Tax Tools for an Effective and Proportionate AVMS Policy

3.1. "Targeting" rules under the AVMSD and the place of supply in VAT and OECD Pillar One

This section will further demonstrate that certain tax tools can enhance the coherence and conceptual value of the AVMSD and national laws that implement article 13 of the AVMSD.

Since the AVMSD for the first time adopted the principle of destination for the financial obligations, rather than the origin-based approach, the "targeting" rules are also a novelty of the 2018 version. A Member State is allowed to impose a financial obligation only if a VOD provider *targets* the audience in the country. The AVMSD lists several indicative factors when assessing the targeted states, which are the following:

- advertisement or other promotions specifically aiming at customers in its territory;
- the main language of the service; or
- the existence of content or commercial communications aiming specifically at the audience in the Member State of reception.

The domestic legislation of Member States determines whether VOD providers "target" local audiences in different ways. *Spanish* legislation has no specific definition of "targeting". *Germany* also merely states that VOD services need to be available in German and that they need to generate sales in Germany.

Greece offers the definition of "targeting" that is closer in line with the requirements set in the AVMSD. VOD suppliers are considered to target the Greek audience when:

- advertising is specifically addressing the Greek audience;
- Greek is the main language of a provision of their service (even by simply using subtitles); and
- the services provided contain programmes of commercial announcements targeted to the Greek audience or concerning specifically this audience.

In *Portugal*, the law establishes that the obligations arise for operators that "target audiences or direct commercial offers to the public in national territory, applying only to income realized in the national market".[74] These requirements were further rectified in the implementing regulation that is also aligned with the AVMSD. According to the implementing regulation, VOD services are considered to be targeting Portuguese audience or direct commercial offers when:

- they are made available to viewers through electronic communications networks;
- they accept paid or free access from viewers, customers or users in Portugal or aim to reach these viewers, customers or users by including advertising or promotions specifically targeted at them; or
- the service uses the Portuguese language, in its original version, or by means of subtitling or dubbing, in the respective contents or in the audiovisual commercial communication it broadcasts.

Such broad indicators of "targeting" can, in certain specific circumstances, distort the identification of the taxable revenue allocated to a Member State.

74. PT: Law No. 55/2012 art. 14A(7) (2012), available at https://dre.pt/dre/legislacao-consolidada/lei/2012-74931963 (accessed 17 Mar. 2023).

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The first immediate example is the countries that can speak the same language. German is the official language in Germany, Austria, Belgium and Luxembourg; French – in France, Belgium and Luxembourg. English is the official language in Ireland and Malta and is also the language spoken by the strong majority of EU residents.[75] When two countries that have the same official languages apply the language as an indicator of "targeted country", there is the risk that one of the countries can falsely assume that a service targets the audience within its territory. Therefore, the AVMSD additionally provides that the targeted state is allowed to impose financial obligation only on revenues generated in this territory.

Yet, the AVMSD does not include any harmonizing rules on determining the place where revenue is generated. The lack of such rules was not an issue when only the country of origin could impose the financial obligations. However, with the adoption of the destination-based approach, the Commission potentially underestimated the challenges that might arise when identifying the place of supply and calculating the revenue generated there. Attributing revenue to a targeted Member State is strongly based upon appropriate identification of the place of service supply. In order to avoid potential double charging by multiple Member States, the AVMSD has to develop a list of definite factors to determine a "targeted" Member State.

For example, a source of inspiration could be the EU Portability Regulation, which entered into force on 1 April 2018.[76] According to this regulation, consumers across the European Economic Area (EEA) can access their online content on-demand as if they were at home when living or travelling within the EEA.[77] Prior to the Regulation, it was not possible, for example, for a Dutch consumer to watch Netflix when present in France or Croatia; a separate subscription had to be acquired for every country.[78] The portability of content was economically disadvantageous for VOD suppliers. Nevertheless, the Commission adopted highly consumer-friendly regulations "for the smooth functioning of the internal market and for the effective application of the principles of free movement of persons and services".[79]

Now, the Regulation provides that, from a legal standpoint, the service of suppliers is deemed to occur only in the residence state of the consumer.[80] Taking this regulation in conjunction with article 13 of the AVMSD would mean, for example, that the revenue from the subscription fee of the Dutch consumer physically located in France has to be deemed to arise in the Netherlands where the service is deemed to be supplied.[81] Hence, for VOD service providers, the source of revenue would be determined by the residence state of the user. To identify the residence state of a user, the AVMSD provides a list of 11 different factors, among which are, for example, an identity card, the payment details, payment of local

75. *Share of population with knowledge of English in non-native European countries as of March 2019*, Statista (Mar. 2019).
76. European Parliament and Council Regulation 2017/1128 of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168 (2017) [hereinafter EU Portability Regulation].
77. UK: *Guidance: Cross-border portability of online content services* (2021), available at https://www.gov.uk/guidance/cross-border-portability-of-online-content-services (accessed 17 Mar. 2023).
78. A. Herold, *Digital Single Market for Audiovisual Content: Utopic or Win-Win for all?*, in *European Film and Television Co-production: Policy and Practice* p. 257 (J. Hammett-Jamart, P. Mitric & E.N. Redvall eds., Springer 2018).
79. Recital 1 EU Portability Regulation.
80. Art. 4 EU Portability Regulation.
81. Provided that the subscription is made in the Netherlands and that the service is available in Dutch.

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taxes, IP address, etc. An extensive list of the factors on the Regulation indicates the level of complexities that VOD providers and regulators normally face when determining the place of supply. The factors laid down in the Regulation could be used for the purposes of defining "targeting state" by the AVMSD since, in a nutshell, both the "residence state" and "targeted state" boil down to the place of intended, rather than de facto, supply of the service.

Nevertheless, it is not clear what could be the relevance of the Regulation for the AVMSD. There is no explicit remark in the text of the AVMSD that would link it to the Regulation. The provision on the scope of the Portability Regulation only stipulates that it does not apply to the field of taxation. For the purposes of the Regulation, it also explains "online content services" inter alia as "an audiovisual media service as defined in point (a) of Article 1 of Directive 2010/13/EU".[82] It entails that the Regulation and the Directive apply to the same scope of audiovisual media service providers. Yet, when defining where the place of supply of the service is, the acts do not use the same terminology. The Regulation determines the place of supply as "the member state of [user's] residence",[83] while the AVMSD as "the targeted Member State". The authors consider that a closer convergence between the Regulation and the Directive on determining the place of supply could ensure higher integrity of the regulatory environment for VOD providers and lower compliance burden.

To make a step even further, in order to mitigate the complexities of compliance with different regulations established for different purposes but seeking to impose a certain financial charge in the destination country, a closer convergence could be achieved among the AVMSD, the Portability Regulation and the regulations in the tax area, in particular VAT or OECD Pillar One.[84] For example, there is also no specific definition of "targeting" in *France* but the base for the investment obligations and levy is defined as the revenues made in France in line with the VAT rules. Table 2. illustrates the factors that are used in different regulatory frameworks to define the place of supply of digital content services.

The Portability Regulation has a more extensive list of factors compared to the VAT Implementing Regulation or the OECD Pillar One. Yet, the factors that are relevant for all regulations other than AVMSD are the recurring data on geolocation or IP address and payment details (bank details, billing address of the purchaser). These factors can complement the AVMSD when identifying the targeted state as the state where a user has its permanent residence. The additional factors listed in the Portability Regulation, such as an identity card, could not be reliable to identify the place of permanent address in the EU reality of the free movement of workers. Yet, with EU digital identity, for example, that could contain the information on the user's address of the registration,[85] this factor could also be effective for sourcing the revenue of audiovisual media service providers.

It is worth noting that the OECD Pillar One lists the factors in a hierarchical order of their relevance. It entails that the factor that is higher in the list has higher priority, and only if it is not available can the factors that are lower in the list be relied upon. Implementing

82. Art. 2(5)(i) EU Portability Regulation.
83. Art. 5 EU Portability Regulation.
84. The OECD Pillar One Project is not finalized yet. The discussion in this sec. is based on the *OECD Report on Pillar One Blueprint* (OECD 2020) [hereinafter OECD Pillar One Blueprint]. The goal of the project is to create a new taxing right for market jurisdiction to levy corporate income tax on foreign businesses.
85. European Commission, *European Digital Identity Strategy* (16 Sept. 2020), available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-digital-identity_en (accessed 17 Mar. 2023).

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Table 2. Place of supply in Portability and VAT Regulations and the OECD Pillar One

AVMSD	Portability Regulation[1]	VAT Implementing Regulation	OECD Pillar One
(a) advertisement or other promotions specifically aiming at customers in its territory; (b) the main language of the service; or (c) the existence of content or commercial communications aimed specifically at the audience in the Member State of reception	(d) an identity card or any other valid identity document; (e) payment details; (f) the place of installation of a set-top box, a decoder or a similar device used for supply of services to the subscriber; (g) the payment by the subscriber of a licence fee for other services provided in the Member State; (h) an internet or telephone service supply contract or any similar type of contract; (i) registration on local electoral rolls, if the information concerned is publicly available; (j) payment of local taxes, if the information concerned is publicly available; (k) a utility bill of the subscriber; (l) the billing address or the postal address of the subscriber; (m) a declaration by the subscriber confirming the subscriber's address in the Member State; (n) an IP address check	(a) the billing address of the customer; (b) the IP address of the device used by the customer or any method of geolocation; (c) bank details such as the location of the bank account used for payment or the billing address of the customer held by that bank; (d) mobile country code; (e) other commercially relevant information	1 recurring data on geolocation or IP address; 2 billing address of the purchaser; 3 mobile country code; 4 information on residence input by the purchaser; 5 other available information that can be used to determine the jurisdiction of the ordinary residence of the purchaser

1. The means of verification under points (i) to (k) shall only be used in combination with one of the means of verification under points (a) to (h), unless the postal address under point (i) is included in a publicly available official register.

this mechanism in other regulations could avoid the situation where two Member States use different factors for revenue sourcing, which, however, lead to inconsistent outcomes.[86] Moreover, an obligation for digital service providers, including audiovisual media service providers, to keep track of various geolocation methods and other commercial information for different regulatory purposes creates an additional compliance burden.[87]

Therefore, the authors suggest that the European Union could facilitate the harmonization of the targeting rules for different regulatory purposes in order to avoid disparities in the national laws of Member States and to create a friendlier business environment in the European Union.

86. *See* G. Berretta, *From Use and Enjoyment to Geolocation: A Crossover from VAT to DST?*, Kluwer International Tax Blog (20 Apr. 2021), available at http://kluwertaxblog.com/2021/04/20/from-use-and-enjoyment-to-geolocation-a-crossover-from-vat-to-dst/?print=print (accessed 17 Mar. 2023).
87. Id.

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3.2. Credit and exemption method

An additional consequence of the introduction of the destination principle in addition to the principle of origin is that two countries can impose an investment obligation or levy simultaneously. To avoid the double imposition of the financial charges and consequent detrimental effects to cross-border activities in the EU single market, article 13(3) imposes the obligation on the state of establishment to "take into account any financial contributions imposed by targeted Member States". Nevertheless, the AVMSD does not indicate any specific mechanism of how a Member State has "to take into account" the financial obligations of a VOD provider in a targeted Member State.

The input from several stakeholders demonstrated that the double imposition is not always a problem that arises in the daily operation of VOD providers because most Member States limit their right to impose the financial obligation only to the revenues that arise in their territory.[88] Nevertheless, the response might be also impacted by the place of establishment of the respondents. For example, if the place of establishment is in the Netherlands, which still did not transpose article 13 of the AVMSD into its domestic legislation, a company that is established in the Netherlands cannot be subject to double imposition by the country of origin and a targeted country.

The issue of double imposition is important because Member States cannot apply the financial obligations only to foreign and not domestic providers, thereby infringing the freedom to provide services and freedom of establishment. The only potential way to fully prevent situations of double imposition is that both the country of origin and the targeted state limit their jurisdictions only to the revenues generated in their respective territories. However, the wording of article 13(3) of the AVMSD demonstrates that this limitation is mandatory for the transposition only for targeted Member States but not for Member States of establishment.

For example, in Austria, only media services that are based in Austria need to make financial contributions.[89] The rules do not include any relief mechanism from double imposition if an Austrian company is subject to a financial obligation in another Member State. The Polish legislation[90] also extends the scope to VOD providers established in Poland and foreign businesses, whereas the territorial limitation to the scope of the revenue applies only to foreign VOD services. The legislation does not appear to provide a specific mechanism for relief from double imposition of the levy applicable in Poland. The absence of a relief method is detrimental to cross-border trade and the EU single market.

In international taxation, there are two widely recognized methods for relief from double taxation that occurs as a result of residence and source states – credit and exemption meth-

88. The authors asked Netflix, Sky, Pickbox and Nordic Entertainment Group for their input on the issue of whether the double imposition of financial charges by several Member States occurs in their daily operations. Netflix informed the authors that it does not normally happen in their practice. The same question was addressed to other stakeholders, which provided their input. Sky responded that the absence of a legal mechanism to prevent double imposition of financial obligations by the targeted Member State and the state of establishment on the same (share of) income is relevant but not a very important challenge. Nordic Entertainment Group specified that the issue is very important and challenging for them. Finally, Pickbox responded that they did not know whether the issue was important or not.
89. Komorowskip et al., Table 1. source info.
90. Id., at p. 55. *See* PL: Polish Cinematography Act 2005 (Ustawa o Kinematografii, Dz. U. 2005 Nr 132 poz. 1111), art. 15.

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ods. Similar to the conflict of the rights for financial obligations between the country of establishment and the targeted state under the AVMSD, the residence state normally has the taxing right over the worldwide income, while the source state has the taxing right over the income generated in its territory. A method for relief of double taxation is applied by the residence state, where the source state exercises its taxing right.[91]

In a nutshell, the exemption method for the AVMS financial obligations would require the state of establishment to fully exempt the revenues generated in a targeted Member State from domestic investment obligations or levy, if the targeted Member State imposes the respective charges. The credit method, in turn, implies that the amount of the financial obligation in the residence state has to be decreased on the amount paid in the targeted Member State.

For example, there is a VOD provider X established in France, who supplies audiovisual media services to the audience in Italy. The total net annual turnover of provider X is EUR 50 million, and the market share in France is 15 per cent. With these parameters, the VOD company has to bear the investment obligation and pay the levy to the French national film fund. The base for the calculation of the investment obligation is the worldwide total revenue less VAT, the levy to the national film fund and duly justified advertising management costs. The applicable investment obligation rate is 25%.

The content of the provider X is also available in Italy. The total net revenue (total gross revenue less VAT) generated in Italy amounts to EUR 15 million. The applicable rate of investment obligation in Italy is 17 per cent.[92] Both France as the country of establishment and Italy as a targeted state can impose a financial obligation in respect of the EUR 15 million generated in Italy. But, according to article 13(3), France is obliged to take into account the financial obligations charged in Italy.

Article 25 of the French decree stipulates that when an operator of an on-demand audiovisual media service established in France provides a service that targets the territory of another EU or EEA Member State and this state requires financial contributions in this regard, these contributions are deducted from those due in France.[93] This provision means that France applies the credit method for purposes of investment obligations. Thus, the investment obligation in France on the income from Italy, EUR 3.75 million (15 million × 25%), has to be decreased by the amount due in Italy – EUR 2.55 million (15 million × 17%). As a result, Company X would need to make an investment of EUR 2.55 million in Italy and EUR 1.2 million in France (3.75 – 2.55) financed by the revenue generated in Italy. Had France adopted the exemption method, VOD provider X would pay only EUR 2.55 million in Italy and zero in France on the Italian revenue. In this case, France would only impose financial obligations on the revenue generated in France.

For the investment obligation, the credit method is also applicable in Greece.[94] Portuguese, Italian and Spanish relevant laws do not provide any specific rule on double imposition relief, but their investment obligations only apply to the revenue generated in their territo-

91. *See OECD Model Tax Convention on Income and on Capital* arts. 23A and 23B (27 Nov. 2017), Treaties & Models IBFD [hereinafter *OECD Model* (2017)].
92. IT: *Decreto Legislativo* [Legislative decree] n. 208, art. 55(2)b (8 Nov. 2021).
93. FR: *Décret n. 2021-793 du 22 Juin 2021 relatif aux services de médias audiovisuels à la demande* (22 June 2021) [hereinafter Decree 2021-793].
94. GR: Law 4779/2021 art. 17(3) (2021).

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ries.[95] Therefore, these Member States apply the territoriality principle, i.e. base exemption to their domestic providers which target foreign audiences, including non-EU or EEA audiences.

With respect to the levy, France seems to adopt a different double relief method. For taxpayers established in France, the amount paid in another Member State is not included in the tax base.[96] Table 3. provides an example of the effective tax rates under different relief mechanisms for a VOD provider established in France and targeting an audience in Portugal with a total net revenue in Portugal of EUR 1 million.

Table 3. The comparative table of different double imposition relief methods for the levy

	France	Portugal
Net revenue generated in the territory (EUR)	0	1,000,000
Applicable levy rates	5.15%	1%
Tax base (before relief) (EUR)	1,000,000	1,000,000
Amount of the levy due (EUR)	51,500	10,000
1. Total tax burden:	**6.15%**	
Credit method: Tax due (EUR)	41,500	10,000
2. Effective tax rate:	**5.15%**	
Exemption method: Tax due (EUR)	0	10,000
3. Effective tax rate:	**1.00%**	
French relief mechanism: Tax due (EUR)	50,985	10,000
4. Effective tax rate:	**6.10%**	

In Table 3., the first result (1. Total tax burden) is the total effective tax rate applied to the Portuguese revenue of a VOD provider established in France without any relief mechanism.

The second number is the effective tax rate if the credit method is applied. It is calculated in the following way: the state of establishment has to reduce the tax due on the amount of tax paid abroad, i.e. amount of tax due in France = amount of tax due in France before the application of a relief mechanism – amount of tax paid on the same income abroad (41,500 = 51,500 – 10,000).

The third number is the effective tax rate if the exemption method is applied. The country of establishment simply exempts the income generated abroad from the levy. Consequently, the levy should be paid only in the targeted state.

The fourth number is the effective tax rate if the provisions of the French law concerning the levy to the national film funds are applied. According to the provision, for taxpayers established in France, the amount paid in respect of tax due for the transaction in another Member State of the European Union is not included in the levy base. It means that the tax paid in Portugal, EUR 10,000, should not be included in the levy base in France,

95. Art. 14A(7) Decree 2021-793: "The obligations provided for in this article apply to television operators and operators of on-demand audiovisual services under the jurisdiction of another Member State, whenever these operators target audiences or direct commercial offers to the public in national territory, applying only to income realized in the national market."
96. FR: *Code général des impôts* 1950 (amended 1 Jan. 2023), art. 1609(IV)(2).

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EUR 1,000,000. Accordingly, the tax base in France has to be EUR 990,000, which has to be multiplied by 5.5% to receive the amount of levy due in France: 990,000 × 5.5% = 50,985. The total tax liability of the VOD provider in Portugal and France is then EUR 60,985, which makes around 6.1% of the total revenue.

Table 3. illustrates that the current French domestic provisions on relief from double imposition for levy only marginally "takes into account" the levy paid in other Member States but does not provide an effective relief from double imposition. The analysis demonstrates that France appears to be the least favourable jurisdiction to establish a VOD business because of imposing the financial obligations not only on French but global revenues of the VOD business and because the chosen relief method for the levy only marginally mitigates double taxation.

From a VOD service provider perspective, the lack of an effective double imposition relief mechanism detrimentally impacts the investment activities especially in light of the fact that the financial obligations do not take into account the ability to pay of the affected businesses. At the same time, diverse policies of Member States will only stimulate forum-shopping behaviours contrary to the objective of the AVMSD of preventing it.

For example, an interesting peculiarity of the German legislation is that Germany grants an exemption from the levy obligations if the audiovisual media service provider has to pay the same kind of a levy in the Member State of establishment. Accordingly, for example, a French company has to pay the levy on revenues from Germany only in France. In international taxation, it is only the Member State of establishment that has to implement the credit or exemption method. The reason for this approach is that, in the absence of an international consensus on the country that applied a relief mechanism, there is a higher probability of the situations of double taxation or *double non-taxation* of income.

To further prevent forum-shopping behaviours, the AVMSD could be supplemented by an explanatory guidance on which relief methods are the most effective in mitigating the risk of double imposition or non-imposition of financial obligations on audiovisual media service providers.

3.3. Interim conclusions

The AVMSD established a legal framework of "targeting rules" and the rules on preventing double imposition of the financial obligations for non-domestic audiovisual media service providers. Yet, the AVMSD does not provide legal certainty on specific methods to avoid distortions when determining the "targeted" Member State and double imposition of financial obligations.

One of the potential ways to enhance the coherence and effectiveness of the AVMSD and to maintain the least onerous compliance burden would be to develop additional specific criteria for "targeting". The Portability Regulation, VAT Implementing Regulation and the OECD Pillar One follow a similar approach for determining the place of supply. These rules could be the source of inspiration for the AVMSD. In addition, a harmonization of the rules on determining the place of supply can make the process of administration of financial obligations of media service providers and general taxes easier for authorities and for private parties.

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The implementation of a method for relief from double imposition of financial obligations by the Member State of establishment and the targeted Member State on the same revenue is another recommendation for the revision of the AVMSD or the provision of an additional guidance for the Directive. The credit and exemption methods are well-established methods in international taxation that could be borrowed by the AVMSD. An additional way to fully avoid double imposition of the financial obligations would be to limit the jurisdiction of the state of establishment to revenues that are generated in the territory of that state (territoriality principle). A mechanism for relief from double imposition included in the AVMSD itself will serve the purpose of a more harmonized and less distortive implementation of the audiovisual media regulations by Member States. A coherent strategy on avoiding the overlay of the financial obligations will facilitate a level playing field for businesses.

4. Film Funds Levy on the Digital Tax Agenda

4.1. National film funds levy is an earmarked tax

This section will address the issue that concerns the overall coexistence of the financial obligations on audiovisual media service providers and general taxes, such as VAT and corporate income tax. The first question in this regard is whether the levy to the national film funds of Member States can be indeed qualified as a tax.

Based on the existence of a specific purpose for collection, taxes can be distinguished as those used to finance general public needs with no ex ante determined designation and taxes collected for a definite expenditure. The latter type of taxes is labelled as earmarked taxes.

The financial levy to national film funds of EU Member States can be considered an earmarked tax collected for a designated purpose of financing the production and promotion of European works. Earmarking connotes "the act of allocating specific tax revenues to fund a specific public service within fiscal systems collecting multiple taxes applied for varied purposes".[97] Kotha and Telekar (2021) considered that earmarked taxes can be classified as "strong earmarking" and "weak earmarking".[98] "Strong earmarking" is present when the contributors are also the beneficiaries of the proceeds, whereas, in the case of "weak earmarking", the contributors cannot directly benefit from the earmarked tax – the tax revenues are used for other redistributive public policies. The implementation methods of Member States illustrate both these types of earmarking.

In France, non-domestic VOD service providers are not eligible for applying for grants or other forms of financial support from the film fund. The same situation is in Portugal and Spain; only independent producers have access to the support of the Portuguese Film Fund and the Spanish Institute of Classical Architecture and Art. VOD services can potentially only indirectly benefit from their contribution if a film fund makes investments in relevant qualitative works that can be released on VOD platforms.

In Germany, the possibility of applying for grants for film productions is limited to the actual production companies. Therefore, VOD service providers normally would not quali-

97. A.P. Kotha & P.S. Talekar, *Earmarked Taxes: An Indian Case Study*, 19 eJournal of Tax Research 1, p. 98 (2021) referring to J. Buchanan, *The Economics of Earmarked Taxes*, 71 Journal of Political Economy 5, pp. 457-458 (1963).
98. Kotha & Talekar, id., at sec. 2.2.

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fy for grants themselves, as long as they do not set up full in-house production capabilities or a fully-owned production entity. In addition, though, the support is restricted to theatrical films (i.e. films that get a theatrical release first, with further exploitation, e.g. on a VOD service, only at a later stage), which would usually not be the typical investment for a VOD service. A small portion of the funds is also dedicated to the support of release activities, including those in electronic VOD services. These funds would also be available for non-domestic VOD services, as long as they also contribute to the funds by paying the levy.

Restricted access of VOD services testifies to a confiscatory, rather than an investment, character of the levy. The fact that the obligation of paying the levy can stem from film and not tax regulations does not impact the classification of a compulsory contribution to the state revenue as a tax. In international taxation, the film levy has not been at the centre of debates. Yet, the application of the levy in cross-border situations raises several interesting questions, in particular, with respect to the substance of the tax, its nature and its place in international taxation.

4.2. Who pays the levy to national film funds? Direct or indirect nature and economic tax burden

Taxes can be broadly divided into two main groups: direct and indirect taxes. The two types of taxes have different international tax and trade law treatment. The discussion of whether the national film fund levy qualifies as a direct or indirect tax would be rather not unique. Similar concerns have been raised with respect to the introduction of the DST by several Member States, the advertisement-based tax in Hungary and the equalization levy in India. However, these considerations are also relevant in the present study in order to understand the true intention of the AVMSD.

The critical importance of the qualification of a tax as a direct income tax or indirect consumption tax in cross-border situations inter alia lies in the scope of the application of double tax treaties. There are tax treaties in force between all EU Member States and many third countries. With respect to the taxation of business income, tax treaties authorize a state to impose a tax on business income of non-residents only if the latter carries on business through a permanent establishment (e.g. office, branch, construction site, dependent agent, etc.).[99] In this respect, if the film funds levy is qualified as a direct income tax, the attempt of introducing the tax on foreign providers that do not have a permanent establishment in the targeted state would go in vain.

The second aspect of developing an appropriate qualification for the levy is the possibility of crediting the levy against the corporate income tax. In the EU Proposal on interim DST, the European Commission, for example, underlined that "crediting the [DST] (an indirect tax) against corporate income tax (a direct tax) (hereinafter – CIT) or vice versa would compromise the legal nature of the tax and impact double tax conventions".[100] In this manner, the Commission stressed the indirect nature of the DST and therefore its unsuitability to be credited against the CIT. An outcome of such an analysis would give an answer of whether the film funds levy could be credited against CIT liabilities in the residence state or in the

99. Art. 7 icw art. 5 *OECD Model* (2017).
100. European Commission, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 2018/0073, p. 56 (CNS).

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targeted state, provided that the market jurisdiction is allocated with taxing rights in line with the recent OECD and UN developments.

Nevertheless, the dividing line between direct and indirect taxes has not been that black and white. Even more controversial positions have been put forward with respect to the categorization of DSTs or similar revenue-based taxes. Yet, the long-standing practice of distinguishing direct from indirect tax demonstrates that the two following approaches are relevant: the categorization of direct and indirect taxes can be based either on a purely legal distinction or the economic tax incidence. The first approach is based on the formal criteria of the design of a certain tax, while the tax incidence approach attributes higher relevance to the effective allocation of the tax burden.

Atkinson (1977), for example, stipulated that "the distinction [between direct and indirect taxes] no doubt arose from the method of administration, in that the taxpayer handed over income tax directly to the revenue authorities, but only paid sales taxes indirectly via the purchase of goods. There is, however, no reason to expect any such administrative classification to have economic significance".[101] Hence, Atkinson found the difference between direct and indirect taxes in the method of administration of the tax collection. While this distinction can, in principle, be indicative with respect to the nature of a tax, it cannot be decisive. The predominant position in tax literature is that "the method of levying the taxes is equally immaterial: by direct assessment or by deduction at the source, in the form of surtaxes or surcharges, or as additional taxes".[102] Accordingly, for instance, the fact that the levy on audiovisual media content is not collected by the tax administration but film funds is not decisive towards its nature.

The other core qualifying elements of tax are the person subject to it and the tax base. For direct taxes, the taxable person or tax subject and the person that effectively pays the tax is the same, whereas, for indirect, the tax is shifted from the taxable person to another person in the price of goods or services.[103] It is also widely recognized in tax literature that when defining the taxable person, the intention of the legislator is decisive rather than which person effectively bears the burden of the tax.[104] The reason for that is that the level of shifting of the economic incidence of tax does not depend on its legal qualification as direct or indirect, but rather on the elasticity of demand and supply and particular market conditions.[105] From this perspective, the levy to national film funds can be qualified as a direct tax. The intention of the AVMSD was to make in-scope businesses contribute to the production of European works rather than to shift the levy's economic burden to consumers in the European Union.

101. A.B. Atkinson, *Optimal taxation and the direct versus indirect tax controversy*, 10 Canadian Journal of Economics 4, p. 591 (1977).
102. *See* Commentary on art. 2(2) *OECD Model* (2017) concerning taxes covered by the Model. *See also* P. Brandstetter, *"Taxes Covered"* sec. 1.1. (IBFD 2010), Books IBFD; and M. Riedl, *The Notion of "Tax" According to Article 2 OECD Model Convention 1982 and 2017*, in *Taxes Covered under Article 2 of the OECD Model* pp. 17-18 (G. Kofler et al. eds., IBFD 2021), Books IBFD.
103. J. Englisch, *VAT/GST and Direct Taxes: Different Purposes*, in *Value Added Tax and Direct Taxation: Similarities and Differences* sec. 3 (M. Lang, P. Melz & E. Kristoffersson eds., IBFD 2009), Books IBFD.
104. Id., at sec. II(1); V. Thuronyi, *Comparative Tax Law* p. 54 et seq. (Kluwer Law International 2003); and H. Cremer, P. Pestieau & J.C. Rochet, *Direct versus indirect taxation: the design of the tax structure revisited*, 42 International Economic Review 3, pp. 781-782 (2001).
105. K. Russo, *Superiority of the VAT to turnover tax as an indirect tax on digital services*, 72 National Tax Journal 4, pp. 857-880 (2019).

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At the same time, the levy on the distribution of audiovisual media content in the vast majority of Member States does not account for any differences in actual profits of audiovisual media service providers and their ability to pay the levy (*see* section 2.). In this regard, another widely accepted criterion of the distinction between direct and indirect taxes is that "a direct tax may be linked to manifestations of income, wealth or expenditure"[106] and "it can be adjusted to the individual characteristics of the taxpayer, whereas indirect taxes are levied on transactions irrespective of the circumstance of buyer and seller". The characteristic that direct taxes can be adjusted to the personal circumstances of the taxpayer defines their direct income tax nature, whereas indirect taxes are levied on consumption, which is an indirect indication of wealth. The OECD, for example, addressed "France's tax on the online and physical distribution of audiovisual content" as "a retail tax on the value of a number of defined transactions concluded with final customers, … [where] the taxable transactions include sales and rentals".[107] In light of this consideration, one can assume that the mentioned taxes were not intended to be levied on the wealth of VOD providers but to ensure the collection of additional revenue for the film industry. Sales revenue that effectively makes the base for the levy as an economic indicator is not informative regarding the wealth accrued by a VOD supplier.

The provided considerations allow the authors to make an interesting conclusion with respect to the nature of the levy to national film funds. On the one hand, by introducing the levy and stepping away from the principle of origin to the principle of destination, most probably the legislator did not intend to put the burden of the levy on EU consumers but to make VOD service providers contribute to the promotion of European culture. However, the design of the levy as a retail (consumption) tax does not account for the real wealth of VOD providers and, thus, has a high probability to be fully shifted to European consumers. For example, when, in 2018-2019, European countries began introducing a levy on revenues of foreign VOD suppliers, Netflix started increasing its prices in Europe, in particular in Germany, Austria and France by EUR 1 or EUR 2 for different plans.[108] This was the biggest Netflix price increase after 2015. In 2021, the service fee was further increased in France and Germany, which could be explained by different factors such as, the expansion of the content portfolio. At the same time, some news reporters expressed the following concerns: "We don't know if the fact that France wants to make Netflix (and other platforms) participate much more in the financing of European – and especially French – cinema has anything to do with it, but for the moment this increase seems to affect only France."[109] Having this in mind, the levy that might be effectively paid by European consumers indeed can generate additional revenue for the promotion of European culture, but, under such circumstances, is misrepresented by the Commission and Member States as a tax on foreign VOD providers and not on European customers.

Yet, it has to be emphasized that the possibility of shifting the tax burden to customers depends on the market power (i.e. number of users and lock-in effect) of a service provider; smaller providers might not be able to change the pricing without any substantial loss of

106. Englisch, *supra* n. 103, at sec. I; and Cremer, Pestieau & Rochet, *supra* n. 104.
107. OECD 2018 Interim Report, *supra* n. 19, at p. 146.
108. R. Briel, *Netflix increases pricing in Europe, starting in Germany*, BroadbandTVNews (11 Apr. 2019), available at https://www.broadbandtvnews.com/2019/04/11/netflix-increases-pricing-in-europe-starting-in-germany/ (accessed 17 Mar. 2023).
109. J. Carette, *Netflix has raised rates in France & Germany. What about Luxembourg?*, Delano (23 Aug. 2021), available at https://delano.lu/article/netflix-has-raised-rates-in-fr (accessed 17 Mar. 2023).

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their users. Hence, the introduction of the levy creates an additional barrier for smaller enterprises (that do not fall under the small and medium-sized enterprise exemption) to compete in the market, which can be counterproductive to the goal of promotion of European works. The reason for that is that smaller EU-based streaming platforms might lose in the competition with long-established, US audio-visual media enterprises since the former will have to bear the burden of the levy themselves.

Another conclusion to be drawn is that the tax incidence of the film levy can rest with a VOD provider or with ultimate customers. Hence, the distribution of the levy's economic burden cannot be informative with respect to the nature of the tax. The only static objective criterion to determine the direct or indirect nature of the levy is, thus, the intention of the legislator that adopted the levy. The AVMSD appears to define the audiovisual media service provider as an intended payor of the levy. In particular, the AVMSD provides that "Member States should be able to impose financial obligations *on audiovisual media service providers*" or that "*audiovisual media service providers* … are required to contribute to film funding schemes" [emphasis added].[110] Hence, for the AVMSD, the intended subject to tax is the same as the person that effectively pays the tax, which could give the grounds to address the levy as a direct tax on the income of audiovisual media service providers. Saying that, it has to be evaluated whether the levy could also fall into the scope of double tax treaties and the consequences arising therefrom.

4.3. Film levy and the scope of double tax treaties

In general, double tax treaties do not apply to indirect taxes; their scope is limited to direct taxes on income and capital. For the analysis of whether the taxes can fall into the scope of the double tax treaties, the notion of "income" has to be interpreted.

The core issue in considering whether the levy could be covered by the scope of double tax conventions lies in the analysis of whether "revenue" as the levy base can be qualified as "income" under the OECD or UN Models and hence double tax treaties designed based on these models. This question also has been subject to heated debates in policy and academia, in particular with respect to DSTs, which, however, did not result in any unanimous conceptual position.[111]

The reason for that is that the OECD and UN Models are incoherent in using the terminology in defining the scope of the conventions and the distributive rules. There are no clear definitions and approaches to determining the substance of "income",[112] which causes substantial deviations in the position on the substance of the taxes and their appropriate characterization under the Model. The widely accepted concept of income tax, though, follows the Haig-Simons definition, which refers to income as "money value of *net accretion*

110. Recital 36 Audiovisual Media Services Directive (2018/1808).
111. *See* D. Deak, *Hungary: Does the Hungarian Local Trade Tax Fall within the Substantive Scope of a DTC?*, in *Tax Treaty Case Law Around the Globe* pp. 43-57 (M. Lang et al. eds., Linde 2011); D. Hohenwarter et al., *Guest editorial: Qualification of the Digital Services Tax Under Tax Treaties*, 47 Intertax 2, p. 140 (2019); C. Jescheck, *Debate: Taxes on Digital Services and the Substantive Scope of Application of Tax Treaties: Pushing the Boundaries of Article 2 of the OECD Model?*, 46 Intertax 6/7, pp. 573-578 (2018); and C. Jescheck, *The substantive scope of tax treaties in a post-BEPS world: Article 2 OECD MTC (Taxes Covered) and the rise of new taxes*, 45 Intertax 5, pp. 382-390 (2017).
112. Art. 2(2) *OECD Model* (2017); and art. 2(2) *UN Model* (2017).

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of one's economic power during a certain period of time" [emphasis added].[113] Revenue does not represent net accretion of one's economic power and does not fall into this conventional understanding of income.

Nevertheless, as Hohenwarter et al. (2019), for example, argue, "the fact that a tax is levied on gross revenues would not disqualify it as an income tax if as a whole it seeks ultimately to charge net profits to income tax".[114] Along the same lines, Ismer and Jescjeck (2017) emphasize that "the fact that the tax is levied on the gross income of the service provider instead of net income does not make it a turnover tax".[115]

The hybrid nature of turnover taxes levied at destinations, such as a film levy, contradicts the general EU principle of legal certainty and prevents effective protection of taxpayers' rights. The principle of lawfulness and legal certainty under the guidelines for a model for a European taxpayers' code requires inter alia openness about the intention of tax laws, rules and procedures. The implementation of the film levy is not open with respect to the true intended taxpayer and consequences that arise from there. If the levy is designed as a designated tax on income of a special group of businesses, its application to foreign business has to respect the provisions of the double tax treaty concluded between the state of establishment of an audiovisual media service provider and a targeted Member State. Such provisions would include the possibility of taxation of business income of a foreign audiovisual media service provider only in the case when the audiovisual media service provider has a permanent establishment in the targeted Member State, a double tax relief mechanism and the principles of non-discrimination. Additionally, if the film levy is considered a direct tax on income, it should be allowed to be credited against corporate income tax responsibilities of audiovisual media service providers in the country where they are liable to pay CIT.

In the opposite scenario, namely, if the film levy is designed as an indirect tax on consumption, the AVMSD has to be open about the fact that the promotion of the European culture is the responsibility and additional expense of European consumers rather than audiovisual media service providers.

4.4. Interaction of the levy and investment obligations with the DST and OECD Pillar One

The last point of discussion about the place of the investment obligations and the film levy in international taxation is to assess their interaction with the other taxes on digitalized cross-border activities, such as the DST and the OECD Pillar One. A brief recap of the main milestones of the digital tax agenda will now be provided.

In October 2015, the OECD published an Action Plan in the Base Erosion and Profit Shifting Project where it underlined main tax challenges in front of the international tax system in the digital economy.[116] In 2018, the European Commission proposed a short-term solution to the digital tax problem. The solution provided a 3% gross-based tax on revenues of non-resident multinational enterprises from digital advertising, intermediation platforms and the transmission of data collected. After the EU proposal did not secure sufficient

113. W.T. Crandell, *Income and Its Measurement*, 10 The Accounting Review 4, pp. 380-400 (1935).
114. Hohenwarter et al., *supra* n. 111, at p. 141.
115. Jescheck, *supra* n. 111, at p. 385.
116. *OECD Action 1*, *supra* n. 58.

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votes of EU Member States to pass, several EU Member States adopted unilateral measures, among which are, for example, Spain, France, Austria and Italy. In 2019, the US government began to recommend imposing import tariffs on goods supplied from the Member States that adopted digital service taxes relying on the justification that the DST violates the US free trade agreements and unjustifiably, unreasonably or discriminatorily burdens US commerce.[117] One hundred and thirty-six out of 140 OECD Inclusive Framework Members agreed on a two-pillar solution to address the tax challenges arising from the digitalization of the economy. The OECD reached a consensus that the new pillars will be implemented by a multilateral convention that will "require all parties to remove all digital services taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future".[118]

Hence, the global consensus regarding the validity of the unilateral tax measures applied to digitalized businesses is that they should be removed as soon as the Inclusive Framework members implement a multilateral convention to address the tax challenges of digitalization. Yet, the investment obligations and levy for the promotion of European culture have not been challenged by the United States since and, unlike the DST, the measures equally apply to domestic and foreign service suppliers. A reason for that probably lies in the fact that the audiovisual industry historically has been a controversial issue in trade law starting from the GATT (1947), which contained "Special Provisions Relating to Cinematograph Films".[119] During the Uruguay Rounds (1986-1994), which is considered to be the main period of the "trade v. culture" battle, predominantly France and Canada – but also other countries – had been fighting for a so-called "exception culturelle" to WTO treaties.[120] Since then, albeit not carved in law, the cultural exception had status quo in WTO law and found its legal expression only in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. This high level of trade law protection demonstrates the cultural importance and special status of the audiovisual industry. Double tax treaties do not contain a cultural exemption. Therefore, the validity of its implementation is controversial in international taxation.

Both the DST and the OECD Pillar One allocate a portion of the taxable base of in-scope businesses to the country of service/goods destination similar to the film levy. The difference between the two frameworks is that the DST is calculated exactly in the same way as the film levy, i.e. by applying a tax rate to revenues generated in the destination state. The OECD Pillar One aims at taxing net profits (revenues – expenses) generated in the destination country based on a certain formula. The determination of the taxable base under the OECD Pillar One addresses taxes other than income taxes as operating expenses and, therefore, the film levy should decrease the base subject to the OECD Pillar One tax. Nevertheless, the decrease only marginally eliminates the burden of compliance with both the OECD Pillar One tax and the film levy.

117. C. Brandon Elliott, *Tax and Trade: DSTs and Tariffs*, Forbes (15 Dec. 2021), available at https://www.forbes.com/sites/taxnotes/2021/12/15/tax-and-trade-dsts-and-tariffs/?sh=e38fdec419b5 (accessed 17 Mar. 2023).
118. OECD/G20, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* p. 3 (OECD 2021), available at https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf (accessed 17 Mar. 2023).
119. M. Burri, *Trade versus culture: The policy of cultural exception and the WTO*, in *The Palgrave handbook of European media policy* p. 480 (K. Donders, C. Pauwels & J. Loisen eds., Palgrave Macmillan 2014).
120. Id., at p. 479.

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In the case of the DST, no coordinating mechanism exists to take the levy obligations under the AVMSD into account. As result, both taxes apply on the same base of foreign suppliers. For example, if the revenue of company X in country A is EUR 100 in year 1 and the profit is EUR 30 (30% profit margin), the rate of 3% of the DST and levy will leave company A with EUR 24 profits. Such an outcome does not look dramatic for high-profit-margin entities such as the one in the example.

However, if another competing company, Y, generates the same amount of revenue but has a profit margin of 10%, the remaining profit after the DST and the film levy would be only EUR 4. This amount is, in addition, subject to the corporate income tax in the country of establishment. If the corporate income tax in the country of origin is around 20%, then the remaining profit after all the tax obligations is only EUR 3.2. The overall effective tax burden for company Y amounts to 68%, whereas for company X in the first example, it is 20%.

For a company with the same amount of revenue but a profit margin of 5%, provided that the tax rates for the DST, film levy and corporate income taxes are the same, the tax burden would be EUR 7 and the effective amount would be 140% of the profit of the entity.

The absence of coordinating measures among the newly introduced taxes for digital companies and the existing tax responsibilities not only creates a disproportionately high effective tax burden for service providers but also significantly distorts the competition between them, leading to the survival of the fittest and market monopolization. Thus, such a system of uncoordinated measures operates as an additional market entry barrier preventing efficient functioning of the market economy forces, where the free competition results in lowering profit margins of competitors. In addition, without a system of crediting for different types of income taxes, double taxation is distortive towards investment decisions and neutrality. Thus, developing a solution of a neutral tax burden based on the principle of ability to pay and the real wealth of the entity must be in the interest of both film and international tax regulators.

It is not clear, whether in case of a successful implementation of the OECD Pillar One, the film levy should be revoked. Several Member States have already considered the conflict between the levy on streaming platforms and OECD Pillar One tax, in particular, Switzerland and Denmark. Hoke (2022) reported that Switzerland's 4% tax on streaming platforms survived a national referendum but offers controversies with respect to the upcoming agreement on the OECD Pillar One.[121] Hoke also stipulated that "an EU official told Tax Notes in February that cultural contribution requirements for streaming services under the Audiovisual Media Services Directive are not digital taxes because they aren't funneled into member states' budgets".[122] This statement demonstrated the intention to avoid the revocation of the film levies when adopting the OECD Pillar One. However, the statement is conceptually wrong since a mere change of the destination of the financial obligation cannot be used to deny the confiscatory, i.e. tax, nature of the levy. As discussed in section 4.1., a designated tax belongs to the category of earmarked taxes, which can include other types of taxes, e.g. *earmarking tax* revenues from carbon taxes for *environmental* purposes.

121. W. Hoke, *Switzerland's 'Lex Netflix' Tax Law Survives Referendum*, Tax Notes (16 May 2022), available at https://www.taxnotes.com/featured-news/switzerlands-lex-netflix-tax-law-survives-referendum/2022/05/16/7dhct (accessed 17 Mar. 2023).
122. Id.

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The Danish parliament and government agreed that the OECD/G20 two pillar agreement is not as important as a national 6% levy on digital streaming providers. Denmark considered that the digital levy is not in conflict with the stand-still or roll-back obligation and that the levy is coming into force in 2024, not conditional on whether Pillar One materializes or not.[123]

Apparently, Member States are testing the limits of the global tax deals on the taxation of digitalized businesses. Neither Switzerland nor Denmark justified their position for not including the levy on streaming platforms in the scope of the digital taxes to be revoked if and when Pillar One enters into force. Thereby, Member States adopt multiple layers of taxation of streaming platforms without any hierarchical mechanism of coordinating these layers.

4.5. Interim conclusions

The last section addressed the issue of how the financial obligations on audiovisual media service providers stemming from the industry-specific regulations are taken into account in international tax law. There are several important considerations put forward for the tax community.

First, the levy imposed under AVMSD has to be properly qualified. The authors concluded that the levy is an earmarked tax, i.e. a tax collected for a specific expenditure. The only element that could potentially save the levy from being characterized as a tax is the ability of audiovisual media service providers to benefit from the redistribution of proceeds by the national film funds of Member States. Yet, Member States frequently limit the possibility for foreign audiovisual media service providers to participate in the financing schemes run by the film funds.

Second, upon recognizing the levy as a tax, it is critical to identify its nature as direct or indirect and the international tax law implications, such as the (non-)applicability of double tax treaties on income and capital, the interplay with the forthcoming OECD Pillar One framework and with other types of financial levies imposed on income of audiovisual media service providers. Otherwise, Member States create systems that significantly distort the investment climate and the competition in the EU single market.

5. Overall Assessment and Conclusions

The purpose of this article was to show how the societal goal of promoting European culture by means of imposing financial obligations on audiovisual media service providers could be better balanced against the economic rights granted in the European single market and what international tax tools could help to implement a more proportionate system in relation to the attractiveness of the European Union for foreign investments.

A general recommendation for Member States should be to set the financial or investment obligation at the level that would make service providers contribute sufficiently to the national film industry's redistribution system while, at the same time, not imposing

123. N. Olivo, *Danish Streaming Levy May Test Global Tax Deal's Limits*, Law360 (1 Mar. 2022); and D. Abbatescianni, *Denmark approves a 6% levy on streaming services, sparks debate and chaos among the industry*, Cineuropa (16 June 2022), available at https://cineuropa.org/en/newsdetail/426844/ (accessed 17 Mar. 2023).

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requirements that would interfere with business decision-making and deprive undertakings of their right to conduct a business freely. The burden of investment obligations and/or levies should also comply with the principle of proportionality; they should not go beyond what is necessary to achieve the legislative goals of the AVMSD, and they should be the least restrictive to the fundamental rights and freedoms while still being effective. For these reasons, first, the authors suggested that Member States conduct an economic assessment of the needs of the national film industries and the audiovisual market to establish the level of investment obligations and levy that could satisfy these needs.

The second element to be considered when making a decision on an appropriate financial or investment obligation is to take due account of the principle of ability to pay and ability to reinvest. In a nutshell, respecting ability to pay and ability to reinvest would require Member States to design their financial obligations in a way that they take into account the differences between the real microeconomic indicators of audiovisual media service providers competing in the market (e.g. profit levels, loss situations, returns on investments). It is argued that a proportional way to define an appropriate obligation is to apply lower rates if the base for financial obligations is revenue and higher rates if that base is profits. Additionally, the principle of ability to pay and the suggested benchmark of ability to reinvest require Member States to exempt from the financial obligations the audiovisual media services which are in a loss situation.

In section 3., the authors suggested including several international tax tools in the AVMSD, which have proven to be effective in mitigating distortions to cross-border investment and trade, in particular the revenue-sourcing rules and the rules on relief from double imposition of financial obligations by two Member States with competing financial claims. The purpose of these rules is to maintain a level playing field for audiovisual media service providers from different Member States, as well as to prevent forum-shopping behaviours. The current text of the AVMSD acknowledges the relevance of the revenue-sourcing rules and the necessity to avoid double imposition of financial obligations. Yet, the AVMSD lacks specific effective mechanisms to achieve those goals, which may lead to significant distortions to the economic activity of audiovisual media service providers in the EU single market.

Finally, the authors addressed the issue of the characterization of the mandatory contributions to national film funds in international taxation, in particular the law of double tax treaties and the recent developments on the DST and OECD Pillar One (section 4.). The principal recommendations advanced by the authors are to recognize that the levy is an earmarked tax and, therefore, has to be scrutinized from a tax perspective. This means that a proper qualification of the levy as a direct or indirect tax is in order, which will determine the international tax consequences for the levy charged by targeted states on foreign service providers. In this respect, the authors demonstrated that, in the absence of measures coordinating different taxes and financial charges imposed in the audiovisual industry, there are significant distortions to free competition and the investment climate in the internal market.

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