

Why Is Multilateralism Losing Ground in Audiovisual Services in the WTO?¹

O. Biryukova²

Olga Biryukova – PhD in International Economics, Associate Professor, Faculty of World Economy and International Affairs, Senior Research Fellow Centre for Comprehensive European and International Studies (CCEIS), National Research University Higher School of Economics (HSE University); 20 Myasnitskaya Ulitsa, Moscow, 101000, Russia; Olga.Birjukova@mail.ru
ORCID iD – <https://orcid.org/0000-0002-4845-6897>

Abstract

Trade in audiovisual services achieves economic goals and has an impact on the social values of host countries. That is why this area, in which the opposing approaches of the U.S. and the European Union (EU) collide, has traditionally been one of the most difficult issues in the negotiations of the World Trade Organization (WTO). The author shows that measures related to cultural policy can form protectionist trade barriers to support national companies. The rapid development of technology has expanded the possibilities for the transmission and distribution of audio and video content. At the same time, existing multilateral trade rules, as well as the applicable classification of audiovisual services, are becoming increasingly irrelevant. The article concludes that, on the one hand, the growing market for audiovisual services requires clearer rules for cross-border trade; however, on the other hand, the trend toward the formation of regional blocs with specific rules complicates negotiations (or even a general understanding) on the rules of trade in audiovisual services within the WTO.

Keywords: audiovisual services, liberalization, GATS, technological neutrality, trade barriers

Acknowledgments: support from the Research Program of the Faculty of World Economy and International Affairs at HSE University is gratefully acknowledged.

The author thanks Ms Ruozi Zhang, counsellor of Trade in Services and Investment Division of the WTO Secretariat, for the inspiring discussions of services classification issues.

For citation: Biryukova O. (2023) Why Is Multilateralism Losing Ground in Audiovisual Services in the WTO? *International Organisations Research Journal*, vol. 18, no 1, pp. 107–126 (in English). doi:10.17323/1996-7845-2023-01-04

Introduction

Audiovisual services (films, slide presentations, television programmes, cinema services and corporate conferences) have traditionally been one of the most contentious issues in the World

¹ This article was submitted 02.12.2022.

² About the author: Olga Biryukova is the author of many works on international trade issues, including regulation in services. She participates in fundamental research and expertise on trade policy issues for the Government of Russia and the Eurasian Economic Commission. 2018–2022—Russian lead negotiator of e-commerce, services trade and investment at the WTO, Geneva, Switzerland.

Trade Organization (WTO). An important role in the development of trade in audiovisual services is played by national policy in the field of culture, science, and education. Audiovisual services always carry double content. On the one hand, the companies operating in this area are commercial enterprises that seek to make a profit. On the other hand, many countries consider such companies as conductors of a foreign social, political, and economic culture in their national markets. This dual nature of audiovisual services has largely influenced approaches to their regulation in international trade and has led to the great caution that many countries adopt regarding attempts to liberalize these services.

At present, under the plurilateral joint initiative format, 87 WTO members carry out negotiations on e-commerce. The members, including many developing countries, participate in this initiative to develop baseline rules to govern the global digital economy. In particular, members seek common disciplines to facilitate remote transactions and strengthen trust in digital markets while helping to tackle digital trade barriers [WTO, 2023]. Future arrangements will affect the regulation of digital services with audiovisual content (Internet access, voice over Internet protocol, video on demand, distribution of content through online services, intelligent network services, and so on). This requires a careful understanding of how the existing WTO rules regulate trade in audiovisual services and also of the policy approaches taken to these issues by members.

The urgency of this topic is linked to the arrival of large online platforms, which represent an unprecedented change in production, distribution, broadcasting, and consumption of audiovisual content [Nieborg, Poell, 2018]. The presence of these intermediaries in the everyday lives of citizens and consumers is raising major policy issues [Mansell, 2015].

The purpose of this article is to review existing WTO rules that affect audiovisual services, as well as to assess the prospects for negotiating new deals in this fast-moving and technologically sophisticated sector. The article analyzes how WTO rules (primarily the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS)) govern trade in audiovisual services and explores how the normative dichotomy between “free trade” and adherence to “cultural exceptions” influences U.S. and EU priorities on the global audiovisual policy agenda. The special role of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention in opposing these approaches is noted. Examples of barriers in international trade in audiovisual services are given. The article then analyzes the evolution of regulations in the EU as a key exporter of audiovisual services and concludes that there are no strong prerequisites for achieving a multilateral trade deal on audiovisual services in the near future.

Regulation of Audiovisual Services in GATT and GATS Rules

The problem of regulating the trade of motion pictures existed while GATT was being drafted in 1947. Fearing the aggressive expansion of the American film industry, Great Britain and France proposed Article IV “Special Provisions Relating to Cinematograph Films” for GATT. This provision permits the use of screen quotas for films of domestic origin. Based on this article, Great Britain, Germany, France, and Japan subsequently allocated part (about a third) of screen time for showing national films, a third for American films, and a third for films from other countries.

In the early nineties of the last century GATT was institutionalized in the form of the WTO, which extended its action to areas of trade other than in commodities. In 1995, GATS came into force—the first multilateral agreement covering trade in service sectors, including audiovisual services. It was predicated upon the notion that secure access to markets and pro-

gressive liberalization could stimulate the growth of services trade in the same way as GATT has done since 1947 for trade in goods. GATS allows for the possibility of exercising domestic regulatory and policy autonomy through various avenues: an issue of key relevance in the case of a sector, such as the audio-visual one, which carries particular importance for the culture and identity of WTO members [Zampetti, 2003].

As with the creation of the WTO, GATT, which regulates trade in goods (including its Article IV on films), was preserved and GATS, regulating services, was added, so a twofold situation could arise when interpreting WTO members' obligations in relation to such a category as motion picture films. On the one hand, they are subject to the national treatment obligations spelled out in Article III of GATT. On the other hand, they can be scheduled in the commitments on audiovisual services under GATS.

The GATS approach implies flexibility with regard to liberalization, that is, members' schedules of specific commitments are individualized. As a result, members such as the EU, Canada, and Switzerland did not include the audiovisual services sector in their services commitments in order to be able to maintain national regulatory measures related to cultural policy [Graber, 2006].

The flip side of the compromise was that all WTO members had to agree to the objective of pursuing progressive liberalization under GATS.³ Consequently, the issue of opening the film and television markets was to reappear on the agenda of future trade negotiations. However, during the Doha development round, where the services sector was also addressed, no agreement was reached on market access in audiovisual services.

Today, films are rarely considered to be physical goods, which are subject to tariffs. Therefore, if a member has No commitments under GATS with respect to audiovisual services, it is free to impose market access and national treatment restrictions on the production, distribution, and exhibition of films, including subsidies for national films. However, even if films are treated as physical goods, challenging subsidies to the national film industry under GATT is difficult. In such a case, a complainant party must be able to prove that the subsidies provided to service providers affect competition between similar domestic and imported goods to the detriment of the imported goods.

Definition of the Audiovisual Sector in the WTO and Technological Neutrality

GATS does not contain any classification itself. In order to inscribe the commitments in services trade in their schedules, WTO members have mainly used the Services Sectoral Classification List [WTO, 1991]. This document contains references to the corresponding Central Product Classification (CPC) categories on the basis of the Provisional Central Product Classification—the version published by the United Nations in 1991). The list is not obligatory, but in practice many WTO members have followed its classification in their schedules of specific commitments. It should be noted that the list categories are supposed to be mutually exclusive [WTO, 2005a, para. 180]. According to this list, the audio-visual services sector is a part of the broader category of “communication services.”

The list has been repeatedly criticized for containing errors, shortcomings, and inaccuracies and for its inadequacy in capturing market realities. Moreover, many types of digital services did not previously exist and therefore were not classified in the UN document of that time; as a result, they are not indicated in the list. At the same time, there is No alternative document

³ GATS, Art. XIX:1; Marrakesh Agreement, preamble.

in the WTO, and all attempts to clarify the classification of services in the working bodies of the organization have been frozen in recent years. This is because the classification of services is a very sensitive and technically complex issue for members, since it is directly related to the interpretation of existing commitments and the definition of new types of services, often of high technological and commercial importance.

In the list, audiovisual services fall under item 2.D. Notably, it does not disclose two categories of audiovisual services (“others” and “sound recording”) because they do not have references to the CPC. It is also important that audiovisual services can be found not only in section 2.D, but also in other sections of the list; in fact, their scope is much wider and explicitly defined. Thus, for example, audiovisual services include the performance of live concerts (Section 10.A: Entertainment Services, CPC 9619), rental of videotapes (Section 1: Business Services, CPC 83202), and wholesale and retail of merchandise (Section 4: Distribution Services, CPC 62263), if we are talking, for example, about the wholesale of cinematographic films [WTO, 2010].

The list, having been developed more than 25 years ago, does not adequately reflect the technological changes that have taken place in the industry such as, for example, the fact that audiovisual content can now be transmitted through a much wider range of media. This means that, depending on how one distinguishes the main technical characteristics, over-the-top (OTT) video streaming services can be considered both as video services and as Internet services or as electronic data retrieval services, and thus be assigned to three different categories in the schedule of specific commitments of WTO members: audiovisual services, computer services, and telecommunications services [Kwak, Kim, 2020]. Accordingly, the legal categorization of OTT video streaming services will automatically determine the WTO member’s mandatory level of market access and national treatment commitments for foreign companies.

The development of technologies and business models has led to the fact that many services, which appeared relatively recently, are not explicitly mentioned in the list. These include, for example, cloud computing, web hosting, social networks, search engines, call centres, mobile applications, and online video or games. There is No definition of “new” services in GATS [Zhang, 2015]. Since the creation of the WTO, its members have not come to a common understanding of how to differentiate between a new service and an existing service provided with the use of new technologies. At the same time, this question is fundamental to the interpretation of members’ market access commitments and national treatment in trade in services. It is necessary to determine whether a country has obligations in trade in certain services or whether these are new services for which a WTO member has full room for maneuver with regard to their regulation.

In the context of digital transformation, one of the solutions to the question of the application of international law is often considered the principle of technological neutrality, which allows the use of accepted regulatory rules in relation to new technologies [Shadikhodjaev, 2021]. However, in the WTO agreements, the attitude toward this principle is ambiguous. For instance, Article 27 of the Trade-Related Aspects of Intellectual Property Rights Agreement contains an obligation on technological neutrality; the Technical Barriers to Trade Agreement uses advisory language, while the status of this principle is not clear at all in GATS [Gagliani, 2020].

The concept of technological neutrality was used in relation to GATS in the progress report adopted by the Council for Trade in Services under the Work Programme on Electronic Commerce on 19 July 1999 [WTO, 1999]. This report stated that GATS is technologically neutral in the sense that it does not contain provisions establishing a differentiation between the various technologies through which the delivery of services can be carried out. With regard to new technologies, this means that GATS extends to those that appeared after the creation of the agreement.

The technological neutrality of GATS has been addressed to some extent in WTO disputes. In the report on the case *U.S.-Gambling*, the panel pointed out that a market access commitment for mode 1 implies the right for other members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet, and so on, unless otherwise specified in a member's schedule. This statement, according to the panel position, is in line with the principle of technological neutrality that seems to be largely shared among WTO members. [WTO, 2004, para. 6.285.].

In the case of *China-Publications and Audiovisual Products*, the United States directly referred to the principle of technological neutrality, justifying its position that GATS does not limit the technologically possible means of delivery of a service [WTO, 2009, para. 4.476]. China, in turn, pointed out that the principle of technological neutrality was under consideration by WTO members at the time of the dispute, and the panel's conclusions on the principle in the case *U.S. Gambling* were not confirmed (considered) by the appellate body. Moreover, according to China's position, the U.S.' arguments on the principle of technological neutrality contradict the position that adding new services to the schedule of specific commitments is possible only through negotiations service [WTO, 2009, para. 4.477].

China also referred to the fact that the principle in question is irrelevant to the dispute under consideration [WTO, 2009, para. 4.478]. The panel concluded that it had No need to invoke a principle of technological neutrality in that dispute. At the same time, the wording applied to the principle "whatever its status within the WTO" is of interest [WTO, 2009, para. 7.1264]. That is, the panel left the question of the status of the principle open—it noted that under certain circumstances, the principle could be taken into account.

Thus, the relevance of technological neutrality depends on the context, and WTO law does not give a clear answer as to whether it is a guiding principle, a mandatory rule, or just one of several options for considering the situation.

EU and U.S. Negotiating Positions on Liberalization of Audiovisual Services in the WTO

The negotiating history demonstrates the existence of polar views on the liberalization of audiovisual services among two key members.

The U.S., driven by its significant export interests in the audiovisual industry, has strongly advocated liberalization over the past decades and insisted that the audiovisual services sector be subject to WTO negotiations. In its view, the fact that the audiovisual sector may have special cultural significance does not mean that the sector should not be subject to trade rules applicable to other services sectors, which may also have unique characteristics for social policies. GATS contains rather flexible rules on trade in services that take into account the specifics of individual sectors. For example, the GATS Annex on Financial Services gives regulators exclusive authority to adopt prudential measures to ensure, inter alia, the integrity of the financial system of WTO members [WTO, 2000].

During the Doha round, the U.S. proposed a major change in the classification of the audiovisual services sector in order to streamline the liberalization process. One of the most notable proposals was to break down the subcategory "motion picture and videotape production and distribution services" in the schedule into four sub-sectors: promotion or advertising services, motion picture or videotape production services, motion picture or videotape distribution services, and other services in connection with motion picture and videotape production and distribution [WTO, 2005].

In addition, a new classification called “other communication services” was proposed by the U.S. and is not on the list. The new classification was proposed to include cable services provided over a cable system; one-way satellite transmission of direct-to-home and direct broadcast satellite television services and digital audio services, programme and television broadcast transmission services, radio broadcast transmission services, and radio and television combined programme making and broadcasting services. The proposed approach to classification separated the broadcasting element from the content element in audiovisual services.

As for the position of European countries (France and Great Britain), they have strongly insisted on cultural exceptions since the conclusion of GATT in 1947. Subsequently, the European Union has consistently advocated the protection and development of the domestic media industry [Garrett, 1994], which is necessary to promote cultural diversity [EU, 2002]. Following this logic, Brussels has never made any commitments regarding audiovisual services in order to maintain maximum discretion in domestic cultural policy. Moreover, it has planned a number of exemptions for the granting of most-favoured-nation (MFN) status. This approach continues in the ongoing negotiations on e-commerce under the joint initiative [EU, 2019]. The EU, which advocates market access commitments in sectors related to digital trade, proposed the liberalization of computer and telecommunications services [Biryukova, 2022], while completely ignoring the audiovisual sector, despite their technological convergence. At the same time, Washington, which views cross-border data flows as an important objective, is willing to go further and advocates opening up a broader set of services sectors to facilitate digital trade. Overall, the EU’s cautious strategy does not do justice to its image as a leading developer of advanced rules in the field of e-commerce.

The Interplay of Cultural and Trade Issues

The standoff among WTO members regarding the regulation of audiovisual services was repeated on another forum—UNESCO [Voon, 2006]. In view of the potential tensions between trade and culture within the WTO, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted on 20 October 2005 at the 33rd General Conference of UNESCO is of paramount importance for interpreting the situation [UNESCO, 2005]. Of all the countries voting on the convention, 148 voted in favour, with opposing votes by Israel and U.S., and abstentions by Australia, Honduras, Liberia, and Nigeria.

The United States opposed the new document from the very beginning. The main reason for U.S. opposition was that it did not want UNESCO to be involved in trade policy. Washington insisted that the regulation of trade falls exclusively under the jurisdiction of the WTO. Besides criticizing the convention as an instrument of disguised protectionism, the United States claimed that the signatories to the convention violated their citizens’ rights to free expression and information [U.S.Mission to UNESCO, 2005].

The main objectives of the convention were to recognize the dual nature of cultural expressions as objects of trade and as artefacts of cultural value and to recognize the legitimate right of governments to formulate and implement cultural policies and to introduce measures to protect and promote cultural diversity. In fact, the convention, filling the existing gap in the regulation of cultural aspects in public international law, was intended to create a counterbalance to the WTO platform in future conflicts between measures of trade and protection of culture.

The convention is broad in scope and applies to the policies and measures adopted by the parties related to the protection and promotion of the diversity of cultural expressions (Article 3).

A number of provisions of the convention may be in dissonance with the obligations of WTO members. Article 6 states that the parties may adopt measures aimed at protecting and promoting the diversity of cultural expressions on their territory, such as public financial assistance, and to provide opportunities for the creation, production, dissemination, distribution, and enjoyment of domestic cultural activities, goods, and services. Another striking illustration is Article 8, which allows the application of measures to protect cultural expressions. It states that a party may determine that there are special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding. In such a situation, a party may take all appropriate measures to protect and preserve cultural expressions.

Other provisions of the convention may contradict the spirit of the MFN inherent in the WTO. Thus, Article 12 calls on parties “to strengthen bilateral, regional and international cooperation for the creation of conditions conducive to the promotion of the diversity of cultural expressions ... notably in order ... to encourage the conclusion of co-production and co-distribution agreements.”

Article 20.2 states that nothing in it shall be interpreted as modifying rights and obligations of the parties under any other treaties to which they are parties. This indicates that the convention as it stands cannot protect one WTO member from an apparent violation of WTO law by another member, even though Article 20.1 states that it is not subject to any other treaty.

On the one hand, the convention can be used to clarify various exceptions to the basic WTO rules and disciplines, such as national treatment and MFN in the regulation of cultural products. For example, Article XX(f) of GATT 1994 provides an exception to the basic WTO rules, such as national treatment, for measures to protect national treasures of artistic, historical, or archaeological value, subject to the chapeau of that article. In addition, the convention can be used to further the argument that cultural goods and services may be relevant to “public morals” (GATS Article XIV(a) and GATT Article XX(a)). In any event, however, such evidence would be considered on a dispute-by-dispute basis. But on the other hand, the appeal to the convention for interpretation may undermine some individual member’s understanding of the scope of rights and obligations in the sensitive field of audiovisual services.

In general, the convention is unlikely to be a defensive tool to justify violations of WTO agreements. However, in the context of potential tensions between trade and culture, the convention can be used to protect a country in matters of cultural expression.

International Trade and Domestic Regulations in Audiovisual Services

Statistics on international trade in audiovisual services have limitations, but nevertheless highlight certain key trends. Global export of audiovisual services is characterized by a high geographical concentration. The leaders are the EUM with a share of more than one third of the total, followed by the U.S., Canada, and the UK. The shares of other countries are less than 3%. The U.S. and the EU are also at the top of the world imports (see Table 1). Audiovisual services are highly concentrated and are provided by a small group of large, competing companies. In many cases, in this struggle, political, cultural, and educational processes remain far behind their commercial interests.

Table 1. Major Exporters and Importers of Audiovisual and Related Services (\$ Million, %)

Exporters	2020	2021	Share in 10 Economies in 2020	Importers	2020	2021	Share in 10 Economies in 2020
European Union	17071	19516	40.4	United States	21692	25370	46.7
Extra-EU exports	9203	10471	21.8	European Union	16942	18124	36.4
United States	15254	16695	36.1	Extra-EU exports	7717	7623	16.6
Canada	3688	4402	8.7	Canada	2965	3430	6.4
United Kingdom	2119	1821	5	Australia	886	1139	1.9
Japan	1041	1293	2.5	United Kingdom	787	953	1.7
Republic of Korea	810	1152	1.9	Russian Federation	768	1010	1.7
India	774	1132	1.8	Norway	662	1063	1.4
Singapore	691	720	1.6	Japan	627	1317	1.3
Australia	410	467	1	Republic of Korea	607	421	1.3
United Arab Emirates	408	490	1	Argentina	556	566	1.2
Above 10	42265	47690	100	Above 10	46492	53395	100

Source: WTO [2022].

The film and television market is the most important segment of the audiovisual services. The most competitive are the U.S. companies, whose financial and technical capabilities exceed those of their European rivals, not to mention companies in developing countries. American interests in the world clash with the collective European television and film industry. The European model is based on a system of subsidizing the activities of public television companies and film companies.

Multinational video on demand (VOD) platforms, such as Netflix or Disney Plus, associated with the advance of digital capitalism [Vlassis, 2021], are changing the dynamics of transnational video distribution. Although having subscribers and offices and commissioning content from many countries are obvious measures of these services' multinational status, the extent to which the distinct affordances of these services diminish the national lens through which all other international television trade occurs may be the most profound measure [Lotz, 2020].

The European audiovisual industry is an important integrated feature of the U.S. economy. The weight of U.S. interests in the top 100 European audiovisual companies increased to a 30% market share by the end of 2021 mainly due to the rise of the pure subscription video on demand (SVOD) players but also of the SVOD services of U.S.-backed broadcasters such as Sky, Paramount+, and Disney+. U.S. players tend to start prioritizing expansion through direct investments by launching SVOD platforms, acquiring European assets, and producing content locally [Ene, 2023].

There are numerous barriers to trade in audiovisual services that are specific to this sector. An important tool is content quotas, in which a certain share of television or radio broadcasting time or screen time in cinemas is reserved for internal content, be it music, television programmes, movies, or advertising.

For example, France continues to apply the Audiovisual Media Services Directive (AVMSD) and other content laws restrictively in order to promote the local industry. France requires that 60% of television programming in France be of EU origin, thus exceeding the AVMSD threshold (30%). In addition, 40% of the programming devoted to EU origin must include original content in French. These quotas apply to both regular and programme slots in prime time, while the definition of prime time varies from network to network [USTR, 2022].

Another actively used tool for promoting national producers of audiovisual services are subsidies (including in the form of tax benefits, grants, or loans on preferential terms). Subsidies usually relate to the film industry but are also used in other segments of the sector, especially in the production of television programmes. Subsidies are often provided on a discriminatory basis. Thus, almost all European funds, including EU and British ones, require satisfaction of nationality or establishment criteria related to the applicant [European Audiovisual Observatory 2019a].

There are No internationally comparable statistics on subsidies. Available information suggests that subsidies are a key feature of the film industry in both developed and developing countries, although in the former they are much higher. For example, in the EU, the share of public financing is 28% of the total cost of film production, followed by investments by producers and broadcasters (both types—18% each) [European Audiovisual Observatory, 2019b].

Among the widely used trade barriers in the sector, restrictions on foreign capital should be highlighted, especially in the areas of television and radio broadcasting.

Other tools include limits on the number of operators, the capacity of foreign channels, and restrictions on targeted advertising in the local market, as well as restrictions on the movement of personnel, for example, requirements that foreign investors hire a certain proportion of local personnel.

The audiovisual sector is undergoing significant change as a result of the technological revolution, which, for its part, is also driving the cross-border transfer of large amounts of content, reducing financial and time costs. New technologies have also made it possible to distribute content across different platforms and to exercise control over users [Warren, Hanson, Yuan, 2021]. Obviously, such technological changes pose a challenge not only for economic operators, but also for regulators. Developed countries prioritize their financial support for the production of audiovisual content available for digital distribution, while developing countries focus their financial support on the promotion of digital infrastructure [Biryukova, Matiukhina, 2019].

The EU Experience in Regulating Certain Aspects of Audiovisual Services

In the European Union, audiovisual services are generally governed by a wide range of state regulations due to the high social, cultural, and economic importance of the sector. Regulatory rules may relate, for example, to intellectual property protection, competition, protection against illegal or offensive content, advertising, and language requirements for subtitles and dubbing. States may also adopt measures to achieve cultural objectives, including the protection and promotion of the diversity of cultural expressions.

State-owned companies also play an important role in television and radio broadcasting, and they are usually regulated by special rules. Such operators are often given a mandate to provide public services to, for example, promote national cohesion. Governments sometimes propose or prescribe the type of content that public operators must provide to the public.

The field of audiovisual services is under the scrutiny of the European Commission and its regulation, following technological developments, is undergoing change.

EU broadcast quotas are derived from the 1989 Television Without Frontiers Directive. The document was a response to European weakness and American dominance of the broadcast market [Karpe, 1995]. Article 4 referred to a cultural quota, requiring European broadcasters to give most of the broadcast time to so-called “European works.”

The AVMSD 2007 also established minimum content quotas for broadcasting with which all EU states had to comply. At the same time, EU states could exceed this minimum quota for content from the EU.

In 2018, the EU adopted amendments to the AVMSD 2007 [EU, 2018], which were aimed at protecting the domestic market from foreign presence. The amendments included provisions that prescribe Internet video-on-demand providers a minimum 30% threshold for EU content in their catalogues and require them to pay special attention to EU content in their offerings. The AVMSD 2018 also gave states the ability to require so-called on-demand service providers that are not based in their territory but whose target audience is in their territory to contribute financially to European works based on revenues generated in that state. In addition, the new rules extended the scope of the AVMSD to video sharing platforms that systematize content, which can have an impact on the activities of social media platforms.

The 2018 AVMSD was presented by authors and broadcasters who lobbied for it as a framework for European audiovisual regulation and a means of distributing and promoting European works that provides “opportunity to promote European cultural content worldwide” [Society of Audiovisual Services, 2020].

For the development of the audiovisual industry, the Creative Europe 2021–27 programme plays an important role. Its budget is about 2.5 billion euros, an increase of 80% compared to the previous period (2014–20) [EC, 2021]. The programme is expected to promote European cooperation on cultural diversity and the competitiveness of the cultural and creative sectors.

On 23 April 2022, the Council of the European Union reached a political agreement with the European Parliament regarding the Digital Services Act (DSA) that will apply to all online intermediaries providing services in the EU [Council of the EU, 2022]. The DSA includes specific requirements for the protection of minors, online marketplaces, online platforms, and search engines, with stricter requirements implemented proportionately for “very large online platforms” and “very large online search engines.” The DSA also includes rules for the use of misleading interfaces, including dark patterns, and for transparency in the use of recommender systems. The agreement represents a step forward for the digital services package introduced by the European Commission in December 2020, which also included the Digital Markets Act (DMA). The package aimed to define a framework to address the challenges posed by large digital organizations and the protection of their users.

These regulations will shape, likely quite dramatically, the environment for doing digital business in Europe and beyond. They will have profound implications on the audiovisual service providers that are expected to adhere to regulatory requirements. The DMA and DSA could have severe, negative impacts on U.S. digital service providers through new compliance and operational costs and by forcing them to forego critical business opportunities. These immediate losses could be exacerbated by the dynamic effects resulting from the higher digital services costs incurred by European firms. [Suominen, 2022].

Decision-makers and lead negotiators need to think deeply and reflect about the practical implementation of the “digital package” to make sure that the rush to bring this to life does not unintentionally undermine the very rights that they were tasked to protect.

Conclusion

The regulation of audiovisual services has always attracted close attention from WTO members. Some key participants seek to protect their national culture and consider measures in this area as non-trade oriented. At the same time, instruments that aim to protect the commercial interests of national audiovisual companies are very difficult to separate from measures aimed at protecting national cultural and educational heritage. Audiovisual services have always been a sensitive area in the WTO's negotiations, where the EU and U.S. have taken diametrically opposed approaches.

Technological advances have a significant impact on the way audiovisual services are consumed, distributed, and traded. The WTO classification of services does not reflect the current structure of digital transmission and supply of digital content. Apart from some imperfections at the time of its creation, the GATS classification has become increasingly less reflective of new market realities over time, at least in some important services, as dramatic technological and commercial changes have taken place over the past two decades.

Technological convergence confronts governments with the challenge of reconciling previously distinct regulatory frameworks. In the past, each type of content had a dedicated network. Television content was delivered over one technology, but now, in addition to traditional broadcasters, the same content can be transmitted by cable, mobile, phone companies, or Internet access providers.

The WTO members' commitments on audiovisual services vary widely and are not universalized, so the findings of conflict situations may be case-by-case and could differ depending on the context.

The UNESCO convention was an attempt to fill the gap in public international law in reconciling the regulation of cultural property and economic liberalization. By ratifying this convention, the parties demonstrated their conviction that the protection of cultural diversity must be taken into account when ensuring the achievement of economic objectives.

The EU and U.S., being the main proponents of the joint initiative on e-commerce under the WTO, advocate the need to open market access in a number of services sectors in order to ensure the effective implementation of e-commerce rules in the future. However, these two WTO members, due to different priorities, have not settled among themselves the exhausted list of such services sectors to negotiate. It seems that the prospects for trade liberalization of audiovisual services in the context of the current e-commerce negotiations are extremely low.

In the EU, integration activities aimed at the creation of the European audiovisual space are increasing. The EU countries have made almost no commitments to audiovisual services in the WTO, but continue to develop supranational regulation in this area with an eye to tightening entry conditions for foreign companies and increasing the requirements for accountability of foreign investors, mainly of big tech companies.

Fragmentation of regulation, rather than multilateral liberalization, is at the forefront of trade policy in the field of digital services enabling and providing content. The formation of regulatory blocs in trade policy poses new challenges for participants in the multilateral trading system. The WTO is increasingly failing as a détente mechanism that could help level the playing field for market access and domestic regulation in audiovisual services. On the one hand, some might say that it is objectively too early to multilateralize technically complex issues for which regulatory policymaking is still in its active phase. On the other hand, strengthening regionalization with specific regulations for such important issues as cross-border trade in audiovisual services under the context of digitalization will make it difficult to develop universal rules in a multilateral format in the future.

One thing is obvious. The WTO members should invest significantly more in discussing this topical issue if they want to develop transparent, predictable, and non-discriminatory trade rules in this area—assuming they really want to get them.

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