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**On-demand services
and the material scope
of the AVMSD**

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On-demand services and the material scope of the AVMSD

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Foreword

Providers of VoD services originate from almost all links of the audiovisual value chain. They come from the traditional worlds of television channels and telecom operators, but also from film producers and distributors, content aggregators, video sharing platforms and even from audiovisual archives and public support funds.¹ This complexity brings together business models with new actors and new roles, also in addition to the provision of new services and new consumption habits.

The implications of this in legal terms are at the centre of the current debate on the revision of the Audiovisual Media Services Directive (AVMSD). It is namely only a certain type of VoD services that currently qualify as AVMS, based on specified criteria: a) they must be TV-like; and b) they must fall under the editorial responsibility of an audiovisual media service provider. This must be assessed on a case-by-case basis, and if the criteria are not satisfied the service is likely to fall under a different regulatory framework, namely the E-Commerce Directive.

The question of which regulatory framework applies – either the AVMSD or the E-Commerce Directive – is not without relevance: where the AVMSD foresees an objective responsibility for any content made available in a catalogue, also by third parties, the E-Commerce Directive entails a liability exemption and the provider has to intervene only when asked to do so. Falling under the scope of the AVMSD also brings a set of obligations that the E-Commerce Directive does not entail, such as promotion obligations for European works and *ex ante* control over the content with respect to protection of minors or human dignity. This of course presents the whole question under a special light and, as it all depends on how a service is qualified, the classification exercise becomes particularly important.

On this topic, the European Audiovisual Observatory published a report in 2013, just a few years after the expiry of the deadline for the implementation of the AVMSD by the member states. The IRIS *Plus* “What is an on-demand service” addressed the various criteria set by the AVMSD for the assessment of a service in terms of being “TV-like” and explored the most recent national developments in this regard.²

Now that the offer of audiovisual services has developed in many areas and that the consumption habits of the viewers have changed as well, the field has become unstable and the debate on the material scope of the AVMSD is relatively heated.

Various institutions are becoming involved, and many contributions have been offered since the preparatory activities for the revision exercise started with the publication of the “Inception impact assessment” by the European Commission in October 2015.³ Many options have been scrutinised in the last months, and have been examined in light of a set of studies commissioned by

¹ See Fontaine G. and Grece C., “On-demand Audiovisual Markets In The European Union - Developments 2014 and 2015”, a report prepared for the European Commission by the European Audiovisual Observatory, Strasbourg 2016, http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=14346.

² See in particular the lead article by Cabrera Blázquez F.J., “On-demand services: made in the likeness of TV?” in IRIS *Plus* 2013-4, “What is an on-demand service”, Nikoltchev S. (Ed), European Audiovisual Observatory, Strasbourg 2013, www.obs.coe.int/documents/205595/264635/IRIS_plus_2013-4_text_EN_%28with_cover%29_BAT_optim.pdf.

³ European Commission, “REFIT Evaluation and Impact Assessment of the EU Audiovisual Media Services Directive 2010/13/EU (AVMSD)” (Inception Impact Assessment), http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_cnct_006_cwp_review_avmsd_ia_en.pdf.



the European Commission under the REFIT exercise:⁴ maintenance of the status quo; clarification of the scope via Commission guidance; broadening of the scope to encompass services that are currently outside the definition of AVMS (basically “non-TV-like” services) and/or providers that fall outside its geographical scope but are targeting EU audiences (with a significant presence in the EU in terms of market share); assessment of the role of platforms and intermediaries foreseen by the Digital Single Market strategy.

Based on these preparatory activities, on 25 May 2016 the European Commission issued a new proposal for a Directive amending the AVMSD⁵ in order to reflect these market, consumption, and technological changes. One of the main focuses of this was the material scope of the Directive and the nature of the rules applicable to all market players.

This publication aims to provide a guide to the latest developments in the debate on the material scope of the AVMSD for on-demand audiovisual services, following the usual structure of our new IRIS *Plus* reports: Chapter 1 sets the scene by providing a description of the most recent market developments concerning the offer and the consumption of services available on-demand and briefly outlines the main underlying regulatory issues; Chapter 2 recalls the history behind the adoption of the AVMSD, and sets out the criteria set by the directive for the qualification of the regulated services; Chapter 3 touches upon national implementation of the AVMSD and provides examples of guidelines adopted in selected countries which were aimed at helping operators in the qualification process; Chapter 4 sets out a selection of self- and co-regulatory systems put in place in a certain number of member states for the regulation/registration of on-demand services; Chapter 5 explores the approaches taken in European and national case-law to the concrete assessment of the criteria set by the AVMSD for the qualification of on-demand services falling within its scope; Chapter 6 concludes with a reflection on the state of play of the on-going revision process of the Directive and looks into future regulation.

If at the end of your reading you are left with more questions than answers, this would be an accurate reflection of the state of the art on this issue. But we also hope that this IRIS *Plus* will work as a handy orientation tool across the multiples layer of documents produced so far.

We would like to extend a special thank you to Nico van Eijk, Jean-François Furnémont, Emmanuelle Machet, Francesca Pellicanò, Juraj Polak and Tony Prosser for helpful input during the drafting process.

Strasbourg, June 2016

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⁴ See studies commissioned by the European Commission under the REFIT exercise and published on 4 March 2016, <https://ec.europa.eu/digital-single-market/news/avmsd-refit-commission-publishes-preparatory-documents>.

⁵ European Commission, 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 concerning the provision of audiovisual media services in view of changing market realities, 25 May 2016, COM (2016) 287, <https://ec.europa.eu/digital-single-market/en/news/proposal-updated-audiovisual-media-services-directive>.



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1. Setting the scene

1.1. Divergence and convergence

1.1.1. Introduction

The television paradigm is threatened with disruption by several structural changes in terms of technology, usages and business models. The concept of “convergence” is often used in that context, in relation to the growing interconnection between content and networks; between the telecommunications and the audiovisual sector. The ultimate acceptation of the concept would be integrated communication groups producing television programming to be distributed over its own networks.

However, “divergence” may be the most accurate way to qualify the emerging transformation of the audiovisual industry. Television has followed a relatively stable model over the recent decades: half-hour and one-hour as the main format for programmes; mass-advertising based on simple audience analytics; transmission networks closely managed by operators; distributors packaging bundles of television channels. The new scene brings together a multiplicity of usage patterns; new players entering the market from different industries; competition for advertising with the adjacent Internet market; innovation as a key competitive advantage. This new complexity may be merely part of the transition phase; it may also become a permanent characteristic of a sector.

In this regard, convergence has another meaning: new and traditional forms of content; legacy television channels and on-demand services; managed television networks and the open Internet to a large extent all compete on the same markets for the viewers’ time, attention and entertainment expenses.

1.1.2. Usages: the end of the “couch-potato” model?

Television is often described as a collective, “lean-back”, “big screen” experience. Whereas there is little doubt that television will be the perfect way to watch, comment and celebrate together live and important events for the foreseeable future, each of these strong factors is weakening this:

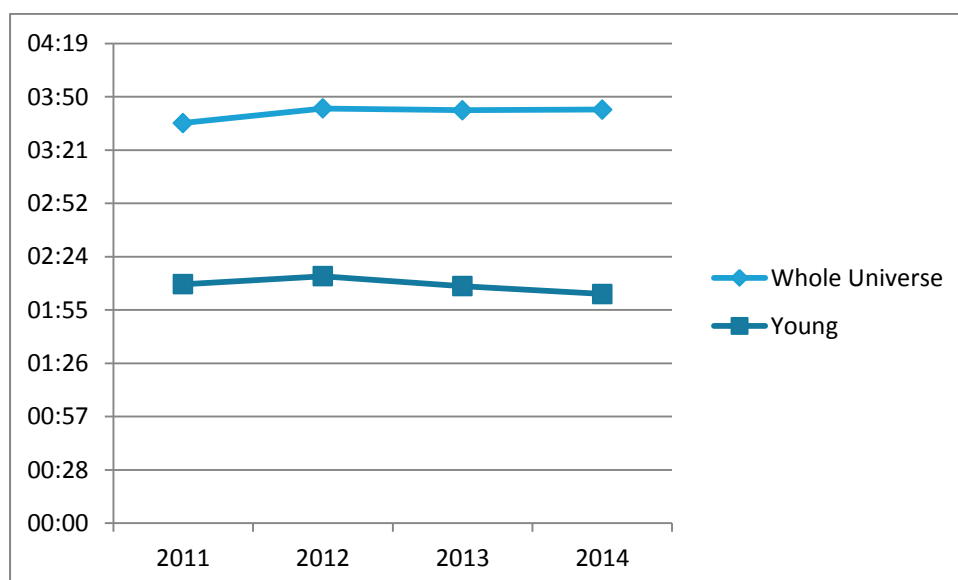
- in most advanced countries, the number of persons per household is decreasing; the “two parents-two kids” scheme decreasingly represents the reality of “families”;



- the abundance of programmes available, delivered on-demand, returns some power to the consumer to choose his/her video consumption, even if recommendation algorithms may play the role once devoted to television programmers;⁶
- more screens, generally smaller than the TV set, are available for watching videos, and these screens (laptop, tablets, smartphones) are not only mobile (or at least portable) but more importantly individual.

Linear television remains by far the main media used to access video. But its average audience has reached a plateau in Europe, and as time-shifted television viewing has been increasingly included in television audience measurement, this stability implies that live television viewing has actually declined. Opinions differ as to whether on-demand consumption will extend the global time spent watching audiovisual content, if it will increasingly but slowly compete with television, or substitute it in the medium-term.

Figure 1: Average television viewing in the EU – 2011-2014 (hh:mm)



Source: European Audiovisual Observatory based on Eurodata TV Worldwide

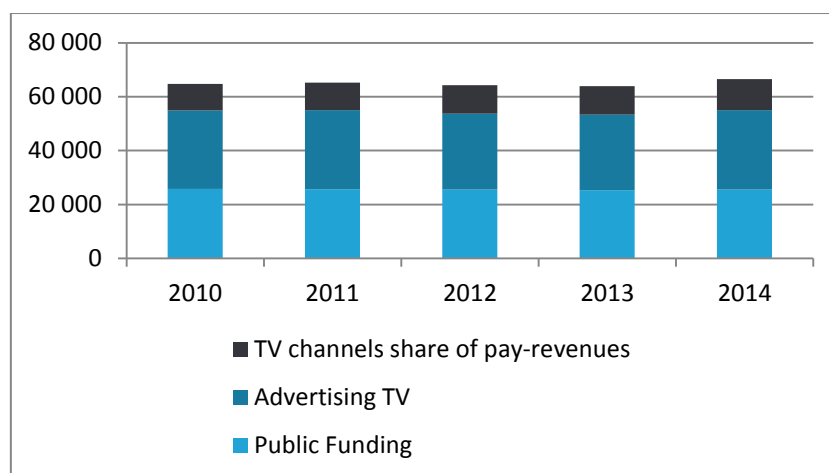
1.1.3. Revenues: linear Euros and on-demand cents?

Two of the three main sources of legacy revenues for European broadcasters have entered a phase of stagnation at most since 2010: advertising is slowly recovering from the 2008 downturn; public funding is under pressure due to the States' budgetary constraints; Pay-TV, on the contrary, is still growing, and so are the fees distributed by the pay-TV service providers to broadcasters or the subscription revenues directly collected by TV channels. However, in 2015, early signs showed that pay-TV may also soon face the end of its long growth period.

⁶ On the role of algorithms, see for instance the interview of Carlos Gomez-Urbe, VP of product innovation and personalization algorithms and Xavier Amatriain, engineering director at Netflix in Wired, 4 August 2013, http://www.wired.com/2013/08/qq_netflix-algorithm/.



Figure 2: Evolution and breakdown of broadcasters' revenues in the European Union (mEUR)



OBS estimates, WARC, EBU/MIS, Company reports

Competition is growing in the areas where legacy revenues are threatened. Digital television has led to a spectacular increase in the number of television channels in Europe competing for advertising.⁷ This has resulted in a segmentation of audiences: in most European countries, the television viewing market share of the four main television channels has constantly decreased over the recent years.⁸ Greater competition has resulted in decreasing advertising tariffs and as a result decreasing revenues. As a probable consequence, fewer new channels have launched over the past years.

A new phase is beginning, where on-demand services provide a large variety of free and paid-for content. The challenge for broadcasters is to benefit from these new opportunities without destroying the value of their legacy services. The “killer-application” for free quality programming is probably catch-up television, which is now widely offered by broadcasters. Whereas catch-up television can bring additional audiences, related advertising revenues do not compare to their previous revenues in the linear world. The phrase “linear Euros and on-demand cents” may describe the painful transition from mass to targeted advertising.

In the pay-TV market, subscription video-on-demand services may in certain countries expand the global market.⁹ In others, such low-cost services will probably distract subscribers from the incumbent players or force them into a price war.

1.1.4. Services: linear or on-demand, or linear and on-demand?

Linear and on-demand were created as two successive generations of services. But the distinction between linear/incumbent services and on-demand/new entrant services may become obsolete, as

⁷ According to the MAVISE database of the European Audiovisual Observatory, over 11 000 TV channels were active by the end of 2015.

⁸ Source: Yearbook of the European Audiovisual Observatory, based on Mediametrie/Eurodata TV data.

⁹ The level of development of the pay-TV in Europe strongly varies between countries: the annual spent per household varies from less than 50 EUR to close to 400 EUR (Source: Yearbook of the European Audiovisual Observatory, based on Eurostat and IHS data).



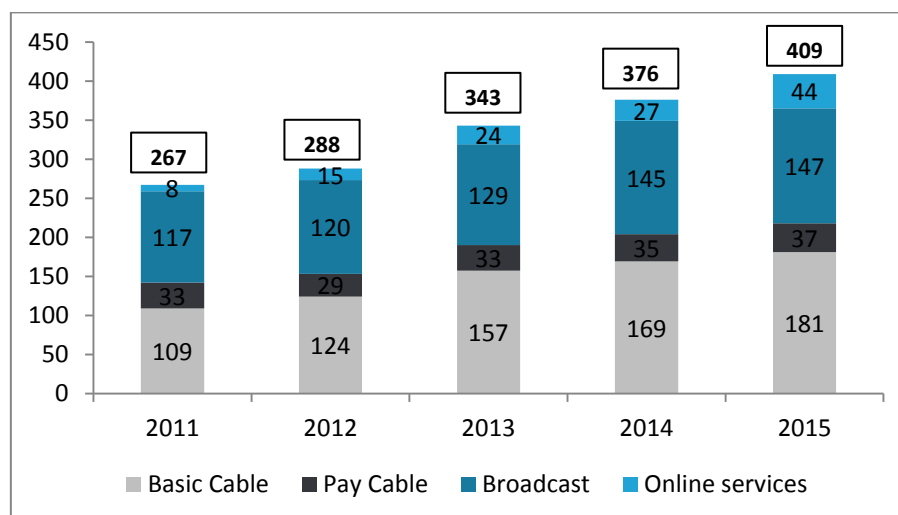
linear channels make their programmes available on an on-demand basis and as on-demand services may attract large audiences and trigger nation-wide “conversations”,¹⁰ once the privilege of legacy media. Further subtle differences between the catch-up service of a television channel and a subscription on-demand service may also become irrelevant: from the users’ point of view, they provide a relatively similar service. Moreover, certain television channels’ catch-up television services include programmes which have not been previously broadcast on the channel. The chances are that the future of a “television service” may thus be the combination of live events and on-demand programmes under the same brand.

1.1.5. The competition for original content

1.1.5.1. More investments in programming

The launch of new on-demand services has led to an increase of the amount of content made available to consumers. Whereas a viewer subscribing to a large package of TV channels could choose between 200 programmes, an on-demand service can provide up to 5000 programmes at one given time. The appetite of the new services for large quantities of programmes was first relied upon catalogues of previously broadcast shows. But the competition between on-demand services and between on-demand services and legacy players requires exclusive and fresh content. As a result, and at least in the United States, investments in original programming have steadily increased. More than 400 different TV series are being produced during the 2015-2016 US TV season: a golden age for television or a serious indication that the “bubble” of investment in original content will burst.¹¹

Figure 3: Number of Scripted original series produced in the US – 2011-2015



Source: FX Networks Research

¹⁰ For instance, the Netflix documentary “Making a murderer”, released in December 2015, triggered a national debate in the US regarding the investigations and justice procedures.

¹¹ See for instance the speech of FX Networks CEO John Landgraf at the 2015 Television Critics Association summer tour, quoted in the Hollywood Reporter, 7 August 2015, <http://www.hollywoodreporter.com/live-feed/fx-chief-john-landgraf-content-813914>.



1.1.5.2. New short formats

Short video formats were created in the classical television era, notably in the form of music videos. Video platforms such as YouTube were then instrumental to the development of “User Generated Content”, that could be more adequately labelled “User Recorded Content”, as one of the prime sources for video uploaded to YouTube was television content. Nevertheless, the ease of distributing video content through an Internet platform led to the professionalization of the production of short formats and to the emergence of a new generation of audiovisual content producers. The advent of social networks (e.g. Facebook), and the proliferation of smartphones as the primary device to access them further increased the justification for professional short format videos.

Even if these short format videos are not essentially intended for TV, many crossovers exist. As mentioned above, TV is one of the primary sources of the content, possibly re-edited, posted on video platforms or social networks; web-only formats can be derived from the concept of a TV programme; and concepts born on the web can be transposed to TV with additional production funding.

1.1.6. Changes in the value chain

1.1.6.1. Distribution: disintermediation and reintermediation

Previously television services were distributed only through dedicated, “managed” television networks: analogue and digital terrestrial television, cable, satellite and ADSL or fibre-based IPTV. Certain networks operators progressively ascended through the value chain, from the position of providers of transmission capacities to the role of service providers, i.e. the packaging and the commercialisation of television channels.

Distributing video content “over-the-top”, on the “open Internet” has become increasingly feasible, due notably to the roll-out of broadband networks. Beyond PCs and smartphones, the TV set itself can be addressed through smart televisions or stand-alone adapters. This presents new opportunities for audiovisual service editors to bypass their distributors and to follow a “self-distribution” model. Stakes are high as the commercial distributor retains control of the subscribers’ portfolio and gains a significant share of the subscription as a distribution fee.

If legacy commercial distributors face the risk of disintermediation, new players have entered the market, and act as “aggregators” of content. The notion of “aggregator” can include the provision of a technical platform to store and retrieve content, which may or may not include a device (or its operating system); the management of advertising, transactional or subscription sales related to the content; the recommendation of content proposed to the user, often supported by algorithms. Within the platforms, specific sections may be managed by “media brands”, which upload their own content and use the tools provided by the platform to promote and monetise it.

These aggregators differ from traditional distributors as in principle, they do not pre-arrange a package of content acquired from right holders, but massively store all content uploaded to the platform by third-parties and give to any user the theoretical possibility to retrieve it. In that sense, their key function would be to enable the distribution of content, providing on the one side tools to the content producers, and on the other side a “one-stop-shopping” destination for users.



1.1.6.2. Production: consolidation and integration

The European production landscape was a combination of broadcasters' in-house production and small independent producers, in different proportions depending on the country. 2014 and 2015 have seen a wave of deals concerning audiovisual production companies in Europe,¹² but also some acquisitions of US producers by European television groups. Three main factors can explain this unprecedented consolidation period:

- already strong exporters of programmes to the European market, US-based media groups seek to diversify their activities by directly funding European works or facilitating US-Europe coproductions;
- broadcasters, facing the deceleration of the linear television market, intend to develop in the TV production segment of the value chain to secure the rights and exploit them on any platform;
- independent producers look for scale, to invest in new projects, better balance their activities between different genres of programming, better pre-finance TV shows thanks to a worldwide presence, and gain market power in their negotiations with broadcasters.

Table 1: Examples of deals in the audiovisual production sector (2014-2015)

Year	Groups involved	Target production company
2014	Discovery, Liberty Global	Joint acquisition of All3Media
2014	Discovery	Purchase of Raw TV
2014	21st Century Fox, Apollo Global Management	Merger of Endemol, Shine and Core Media
2014	Sky	Purchase of Love production
2014	ITV	Purchase of Leftfield, Big Talk, The Garden, So TV
2014	Canal+	Purchase of Red Production
2015	NBCU, RTL, TF1	Agreement for the joint production of TV series in the US
2015	LOV Group, De Agostini	Merger of Banijay and Zodiak
2015	ITV	Acquisition of Twofour Group and Talpa media

Source: European Audiovisual Observatory

1.2. Regulatory challenges

So far audiovisual broadcasting and on-demand services have fallen under the regulatory framework set by the Audiovisual media services directive (AVMSD), as developed from the Television Without Frontiers Directive (TVWFD).¹³ The Directive has set as its material scope both linear and non-linear services, but the question is if, in the light of the constant development of new market models as

¹² See for example the analysis of the UK production sector consolidation process case in section 7 of a presentation to OFCOM by Oliver & Olbham: "Trends in TV production", December 2015: http://stakeholders.ofcom.org.uk/binaries/broadcast/reviews-investigations/tv-production-sector-review/O_O_Annex_Trends.pdf.

¹³ See Chapter 2 for further details on the regulatory developments concerning audiovisual services.



described above, these services are exhaustively meeting the definition provided by the AVMSD and fitting the concept of editorial responsibility. Naturally, the most controversial issues concern on-demand services and not traditional broadcasting, and it is therefore on these services that the present publication focuses.

Considering that the national regulatory authorities are particularly involved in the application of the AVMSD in terms of establishing whether the services fall within its scope, it is very helpful to consider their input to the debate. Two organisations exist in this respect:

- the European Platform of Regulatory Authorities (EPRA),¹⁴ an informal cooperation platform established in 1995 between 52 national regulatory authorities from all over Europe based on the exchange of information and best practices, with the explicit statutory exclusion of the adoption of common positions or declarations;
- the European Regulators Group for Audiovisual Media Services (ERGA),¹⁵ the EU group of audiovisual regulators set up by the European Commission in 2014 with an aim to “advise and assist the Commission, in its work to ensure a consistent implementation in all Member States of the regulatory framework for audiovisual media services”.

In its Report on Material Jurisdiction in a Converged Environment,¹⁶ ERGA states that the changes in the market do not call the relevance of the goals of the AVMSD into question. Whereas this might be the case, the new media environment as described indeed poses at least two problematic questions in relation to the material scope of the Directive:

- Which services should be regulated (i.e. qualify as audiovisual media services (AVMS))?
- Is a differentiated regulatory intensity still needed?

Concerning this issue, the European Platform of Regulatory Authorities (EPRA) identified in 2012 a number of services that are considered particularly difficult to classify by NRAs, such as newspapers’ websites providing video content, professional channels on user generated platforms, and download-to-own/download-to-rent services.¹⁷

1.2.1. Which services should be regulated?

The philosophy behind the regulation of on-demand audiovisual media services in the AVMSD comes from a twentieth-century, traditional broadcasting mind-set. It is perpetuated by the idea expressed in the AVMSD that the form and content of a programme ought to be comparable to the form and content of television broadcasting, and it is understandable to a certain extent given the state of the technology at the time the AVMSD was negotiated. Moreover, as provided in the AVMSD, the concept of “programme” should be interpreted dynamically, taking into account developments in television broadcasting. This results in the regulation of a twenty-first-century medium being

¹⁴ www.epra.org

¹⁵ <https://ec.europa.eu/digital-single-market/audiovisual-regulators>

¹⁶ ERGA report on material jurisdiction in a converged environment, 16 January 2016, <https://ec.europa.eu/digital-single-market/en/news/erga-report-material-jurisdiction-converged-environment>.

¹⁷ See Comparative Background paper (EPRA/2012/02a) prepared by Emmanuelle Machet, EPRA Secretariat for the Plenary session: “New Services and Scope: What’s in, What’s out Revisited”, 35th EPRA Meeting, Portorož, 30 May – 1 June 2012. (Public version), available at: http://epra3-production.s3.amazonaws.com/attachments/files/2011/original/Plenary_1_overview_responses_questionnaire_publicversion.pdf. See chapter 5 for further details.



dependent upon how a twentieth-century medium evolves. In theory, this approach could lead to services being classified differently over time, which may not be conducive to legal certainty.¹⁸

The vagueness of the notion of “TV-likeness” affords regulators an option to include or exclude a great amount of services for pragmatic reasons. But are on-demand services really “TV-like”, or are they rather “video rental store-like”?

According to Recital 24 AVMSD, on-demand services compete for the same audience as television broadcasts. However, the user experience has a greater resemblance to the renting of a DVD to watch at a convenient time. One of the main characteristics of a TV programme is the fact that the user cannot choose when to watch it.¹⁹ This leads to a certain standardisation of what people may watch.

Moreover, the interactive nature of web technologies and the technical possibilities available to millions of people through digital devices and software enable a great flexibility in the form and method of publishing audiovisual content, so that the boundaries between commercial and private content are increasingly blurred. The fact that new ways of monetising private content have appeared makes this distinction between commercial and private content even more unclear.

The ERGA Report suggested that the Commission should revisit the definition of an audiovisual media service in a revised AVMSD and review the “TV-likeness” criterion. In doing so, the Commission should be mindful of the underlying goals of the Directive (e.g. the need for fair treatment of competing services, controlling the impact on society, democracy and culture, audience protection) and the principle of proportionality. It suggested that the Commission considers (in collaboration with ERGA) the development of a set of guidelines that will help to provide greater clarity and a more consistent application of the definition.²⁰ It also affirmed that the “TV-likeness” criterion is unavoidably subjective and that there are several different national interpretations. On this issue, in its proposal for a Directive amending the AVMSD, the Commission has extended the scope to include video-sharing platforms, removed the “TV-likeness” criterion, and expanded the examples of covered programmes to include short videos.²¹

Another question is whether the future AVMSD should cover services that currently fall outside its scope because they do not comply with the requirement of editorial responsibility. According to the ERGA Report, these new players may directly influence or control the content on offer and the choice of the consumer. The question is whether a new AVMSD should extend beyond the current focus on editorially responsible audiovisual media service providers and introduce a new set of rules for certain online platforms in order to secure certain public policy goals. This question is key to the modernisation of the AVMSD, and is actually one of the major changes to the issue of scope introduced by the Commission in its proposal amending the Directive.

In addition, there is still the question of what actually constitutes a platform. In its Public Consultation on the regulatory environment for platforms, online intermediaries, data and cloud

¹⁸ See Valcke, P., Lefever, K., Ausloos, J. (2012) “Audiovisual Media Services 2.0: (Re)Defining the Scope of European Broadcasting Law in a Converging and Connected Media Environment.” In: Donders, K., Pauwels, C., Loisen, J., Palgrave Handbook on European Media Policy (forthcoming).

¹⁹ There is always the option of videotaping a programme for later viewing, but that is an exception rather than the rule.

²⁰ See Chapter 6 for further details on the state of play of future regulatory developments.

²¹ European Commission, 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 concerning the provision of audiovisual media services in view of changing market realities, COM (2016) 287, <https://ec.europa.eu/digital-single-market/en/news/proposal-updated-audiovisual-media-services-directive>. For a more comprehensive description of the proposed amendments, see paragraph 6.3. of this publication.



computing and the collaborative economy,²² the Commission proposes a rather broad definition of the term "online platform":

"an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers."

This definition includes information society services according to the E-Commerce Directive, but also includes on-demand AVMS. Among what the Commission refers to as "audio-visual and music platforms", it lists as examples Deezer, Spotify, Netflix, Canal play and Apple TV. Whereas the latter provides a platform for both own and third-party services, Netflix and Canalplay provide only content for which they are editorially responsible.

1.2.2. Is a differentiated regulatory intensity still needed?

As will be addressed in Chapter 2 of this publication, the AVMSD introduced a graduated regulatory approach, with a set of more stringent rules for television and softer rules for on-demand AVMS in certain specific areas, such as the protection of minors, the promotion and distribution of European works, or advertising and teleshopping, based on the different degree of control exercised by users on both services and the different impacts they have on society.

Given that in the new media environment described above the boundaries between traditional and new services are increasingly blurred, the question arises whether such a differentiated regulatory intensity is still needed and, more importantly, to what extent such a regulation can be effectively imposed on an increasing number of new services. Consider for example the protection of minors. Until recently, audiovisual content reached homes exclusively through the TV set. Both broadcast and home video content were heavily regulated and relatively easy to control by primary carers. Now audiovisual content is also available through very different channels. In an online environment, controlling access to content that might impair the development of minors is a much more difficult task for both regulators and parents. It is relatively easy for a regulator to prohibit the TV broadcast of audiovisual content if it infringes upon fundamental rights, and a responsible parent will be able to monitor what their children watch on TV at home. However, the same content will in most cases be available on the Internet without any restrictions, and children may access it from their personal computers, smartphones, and tablets. Regulating this environment seems to be virtually impossible.

This is precisely one of the conclusions reached by the Commission, as reflected in the proposal for a Directive amending the AVMSD; the Commission considers that in view of these new challenges, video-sharing platforms should be required to take appropriate measures to protect minors from harmful content and all citizens from content containing incitement to violence or hatred.²³

²² Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy,

<http://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>.

²³ For further details see paragraph 6.3. of this publication.





2. European framework

2.1. A short history of the AVMSD

2.1.1. The origins of the “Television without Frontiers” Directive

The first efforts to harmonise the European regulatory framework applicable to audiovisual media can be traced to the early 1980s,²⁴ when the Council of Europe’s Steering Committee for the Mass-Media (CDMM)²⁵ prepared several recommendations, in particular one on Principles on Television Advertising²⁶ and another on the Use of Satellite Capacity for Television and Sound Radio.²⁷ These two recommendations were adopted by the Committee of Ministers of the Council of Europe in 1984. Both were driven by the emergence of satellite broadcasting, which was expected to facilitate the transcending of national borders by TV channels and radio.

In the same year the European Commission produced its Green Paper on “Television without Frontiers”,²⁸ which aimed to facilitate the realisation of a common market for television services within the European Economic Community. It is worth mentioning that preceding the release of the Green Paper, the Commission had been invited by a resolution of the European Parliament to tackle the issue.²⁹ The Commission adopted a common market approach, identifying obstacles to the free circulation of services granted by the Treaty and proposing a legal instrument with the aim of coordinating national rules where necessary, in order to ensure the free circulation of programmes. The Commission also stressed the political role which an enhanced exchange of information between member states could play as a catalyst of European integration in general. Likewise the Commission underlined the benefits of transfrontier advertising specifically for economic integration.

²⁴ Nikoltchev S., Ed., *Audiovisual Media Services without Frontiers – Implementing the Rules*, IRIS *Special*, European Audiovisual Observatory, Strasbourg, 2006,

www.obs.coe.int/documents/205595/2284366/Iris_spe_2006-2_EN_optim.pdf/2f8d0f2c-4ea1-4fe4-aa82-1754e439ac4c.

²⁵ Since 2005 the CDMM has been renamed the “Steering Committee on the Media and New Communication Services” (CDMC).

²⁶ Recommendation No R (84) 3 of 23 February 1984,

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=603454&SecMode=1&DocId=681954&Usage=2>.

²⁷ Recommendation No R (84) 22 of 7 December 1984,

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=604477&SecMode=1&DocId=684646&Usage=2>.

²⁸ COM (84) 300 Final of 14 June 1984, http://ec.europa.eu/green-papers/pdf/tv_without_frontiers_green_paper_table_com_84_300.pdf.

²⁹ Resolution on Broadcasting and Television in the European Community, OJ C87 of 5 April 1982,

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1982:087:FULL>.



Although the Green Paper was not unanimously welcomed,³⁰ the European Parliament welcomed the Commission's initiative. One year later the European Council of Heads of State and Governments welcomed the Commission's White Paper on the Internal Market,³¹ a strategic document which was intended to revitalize the European integration process. A directive on the broadcasting sector was part of the political priorities listed in the White Paper. In 1986, the Commission finally tabled its proposal for a directive.³²

The negative attitude of several EC member states towards the Commission's Green Paper on Television without Frontiers and its subsequent proposal for a directive, as well as the reaction of several other countries, brought a new incentive to the work of the Council of Europe. In December 1986, the 1st European Ministerial Conference on Mass Media Policy in Vienna mandated the CDMM with the drafting of a Convention on transfrontier television. It was the beginning of a race between the two European organisations. While all EC members were at the same time members of the Council of Europe, some of them were, however, among the strongest advocates for passing a legal instrument within the framework of the Council of Europe.³³

The organisations each had a different legal background and a different institutional framework. While at the Council of Europe the CDMM started to draft a convention from scratch, the EEC Council of Ministers and its working group dealt with the proposal of the Commission and the amendments proposed by the European Parliament. Although work on both instruments proved to be very hard, with paralleled discussions and experts attending both sets of negotiations, the instruments started to converge, not only in the wording, but also in the major areas of political concern. The European Convention on Transfrontier Television (ECTT) was finally ready to be adopted on 5 May 1989.³⁴ Meanwhile the European Council had decided that the Directive should be aligned with the Convention whenever this could help to resolve the outstanding issues.

On 3 October 1989, the Directive was also adopted.³⁵ Member states had two years to transpose it into national law, i.e. until October 1991.

The ECTT only entered into force on 1 May 1993, when it had been ratified by 7 States. The process had been long and difficult, but it is fair to say that the parallel drafting also had very positive effects. It allowed non-EC member states to participate in the process, and it also helped to overcome some major differences in the positions of EC member states and the Commission.

³⁰ Many actors did not agree with the general approach adopted by the Commission, and considered that broadcasting was essentially a cultural rather than an economic activity. The European Communities' competency for dealing with cultural issues was questioned.

³¹ Communication of the European Commission of 14 June 1985 (COM(87) 203 final), http://aei.pitt.edu/1523/1/internal_market_2nd_report.pdf.

³² Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, OJ C 179 of 17 July 1986, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.1986.179.01.0004.01.ENG&toc=OJ:C:1986:179:TOC.

³³ The composition of both organisations was different from that of today. At the end of 1986 the European Communities comprised 12 member states, Portugal and Spain had just acceded in that year, Austria, Finland and Sweden were not yet members. The Council of Europe had 21 member states; the non-EC members were Austria, Cyprus, Iceland, Liechtenstein, Malta, Norway, Sweden, Switzerland and Turkey. Hence the majority and all the biggest members of the Council of Europe (with the exception of Turkey) were also member states of the EC. This imbalance did not, however, play in favour of the latter. Some of the EC members favoured Strasbourg and caused work in Brussels to slow down.

³⁴ European Convention on Transfrontier Television, Strasbourg 5 May 1989, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007b0d8>.

³⁵ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31989L0552>.



2.1.2. The AVMSD and the ECTT

The European Convention on Transfrontier Television, as amended in 1998³⁶ to align to the revised TWF Directive 97/36/EC,³⁷ remains unchanged.³⁸ Indeed, plans for a further update to the Convention were halted in 2011, after objections from the European Commission that it alone had exclusive competence in this field as regards EU Member States, i.e. EU member states are not allowed to become party to the Convention on their own. However, there is an asymmetric regulatory framework across Europe, with 28 EU members bound by the AVMSD as amended in 2007, and the other 15 European countries that are parties to the Convention³⁹ remaining under rules of 1998. In the current situation, these countries are prevented, in a constantly changing media environment, from having an updated legal instrument, with a consequent risk of standards diverging.⁴⁰

The Parliamentary Assembly of the CoE⁴¹ called in 2014 for a resumption of the revision of the Convention. However, the position of the European Commission remained unchanged and, in September 2014,⁴² the Committee of Ministers of the Council of Europe replied that:

“one of the main achievements of the Convention was to set binding legal standards in relations between European Union member States and non-European Union member States which are parties to the convention. It considers the discontinuation of the revision of the convention as a serious step back from this perspective, but sees no possibility to continue this work at the present stage, since it has been informed by the European Union delegation that most issues covered by the convention fall under the exclusive external competence of the European Union and that the European Union does not have any intention to become party to the convention. As the draft revised convention contains a number of provisions which might not necessarily be in line with the European Union acquis, individual European Union member States would not be able to become party to the revised convention if it were to be adopted.” In this context, the Committee of Ministers informed the Parliamentary Assembly that “(it) has not allocated any resources to work on the European Convention on

³⁶ Protocol amending the European Convention on Transfrontier Television, Strasbourg 1 October 1998,

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f2cd>.

³⁷ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31997L0036>.

³⁸ For an outlook of the issues discussed by the Standing committee on transfrontier television, see the Report by Andreas Grünwald on possible options for the review of the European Convention on Transfrontier Television, <https://rm.coe.int/CoERMPublicCommonSearchServices/sso/SSODisplayDCTMContent?documentId=09000016805949d7&ticket=ST-283469-UKSKvvob5vxtbBmiOpv9-cas>. Undoubtedly the discussions carried out under the umbrella of the Council of Europe on different types of media services and new media paved the way for the on-demand differentiation in the AVMSD.

³⁹ Andorra, Armenia, Azerbaijan and Monaco are members of the CoE but not Parties to the ECTT.

⁴⁰ In its proposal for a Directive amending the AVMSD of 25 May 2016, COM (2016) 287, the European Commission states that “to the extent that some of the existing AVMSD rules are less strict than the Convention rules, implementation of the AVMSD rules by EU Member States which are contracting parties to the Convention could already result in some differences between EU Member States depending on whether they are contracting parties to the Convention in respect of their international obligations. This will also be the case for some amendments contained in this proposal, which could introduce in the AVMSD further rules that are less strict than the Convention rules”. The Commission notes that “For the matters covered by the AVMSD the Union has acquired exclusive competence to enter into international agreements. Any changes of the obligations stemming from the Convention would thus require action on the part of the Union.”

⁴¹ Parliamentary Assembly Recommendation 2036 (2014) on the Revision of the European Convention on Transfrontier Television, 31 January 2014, www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=20507&lang=en.

⁴² Committee of Ministers Reply to the Parliamentary Assembly, 23 September 2014, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21152&lang=en>.



Transfrontier Television over the last three years and sees no reason to review its position for the time being”.

2.1.3. Latest developments from the Council of Europe

In 2011 the Committee of Ministers of the Council of Europe adopted a Recommendation on a new notion of media that requires a graduated and differentiated approach.⁴³ The Recommendation identifies a set of criteria for identifying what is to be qualified as media and related indicators:

Table 2: Media criteria and indicators of the Council of Europe

Criterion	Indicators				
Intent to act as a media	Self-labelling as media	Working methods which are typical for media	Commitment to professional media standards	Practical arrangements for mass communication	
Purpose and underlying objectives of media	Produce, aggregate or disseminate media content	Operate applications or platforms designed to facilitate interactive mass communication	With underlying media objective(s)	Periodic renewal and update of content	
Editorial control	Editorial policy	Editorial process	Moderation	Editorial staff	
Professional standards	Commitment	Compliance procedures	Complaints procedures	Asserting prerogatives, rights or privileges	
Outreach and dissemination	Actual dissemination	Mass-communication in aggregate	Resources for outreach		
Public expectation	Availability	Pluralism and diversity	Reliability	Respect of professional and ethical standards	Accountability and transparency

Source: CM/Rec(2011)7 on a new notion of media

⁴³ Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, <https://wcd.coe.int/ViewDoc.jsp?id=1835645>. A determining input to this recommendation was given by at the time chair of the Steering Committee on the Media and New Communication Services (CDMC), Karol Jakubowicz, in his Keynote speech prepared for delivery during the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services held in Reykjavik on 28-29 May 2009, www.cmfe.eu/docs/CoE_Reykjavik_Karol_Jakubowicz_Keynote.pdf. This built on Jakubowicz K., “A new notion of media? Media and media-like content and activities on new communication services”, Council of Europe, Strasbourg, 2009, http://providus.lv/article_files/2119/original/Jakubowicz_-_New_Notion_Media.pdf?1343212306. See also McGonagle T., “Conference of Ministers responsible for Media and New Communication Services”, IRIS 2009-8/2, <http://merlin.obs.coe.int/iris/2009/8/article2.en.html>.



2.2. The scope of the AVMSD

2.2.1. The public policy goals of the AVMSD

The overarching objective of the AVMSD is to create a single market for audiovisual media services, with a view to providing transparency and predictability in markets and reducing barriers to entry, notably by ensuring that basic principles of the internal market, such as fair competition conditions and equal treatment, are respected. But audiovisual media services are as much cultural services as they are economic services and they have, as such, a growing importance for societies, democracy, education and culture. In this context, the Directive also aims to ensure some audiovisual public policy goals, which are articulated in a number of specific objectives including:

- to ensure freedom of information, diversity of opinion and media pluralism,⁴⁴ and to preserve and promote the diversity of Europe's cultures;
- to encourage the activity and development of European audiovisual production and distribution,⁴⁵ and to stimulate new sources of television production, especially the creation of small and medium sized enterprises;⁴⁶
- to protect and empower consumers (audiences), in particular minors⁴⁷ and people with a visual or hearing disability,⁴⁸ and to promote media literacy;⁴⁹
- to ensure wide access by the public to television coverage of events of major importance to society.⁵⁰

The AVMSD provides for a minimum harmonisation of certain aspects of national legislation related to audiovisual media services. The member states are free to apply more detailed or stricter rules in the fields coordinated by the AVMSD to providers under their jurisdiction, as long as those rules are consistent with the general principles of EU law.⁵¹

As is well known, the main rationale for the regulation of audiovisual media services at EU level has been the Internal Market, with the "country of origin" principle at its core. According to this principle, which remains in the Commission's proposal, audiovisual media service providers have to abide only by the rules of the one member state with jurisdiction over them, but can operate in all member states. This does not prevent member states from establishing higher standards at national level. However, a receiving member state with stricter rules than those laid down by the AVMSD cannot restrict the reception of services from another member state on the basis of those stricter rules. Exceptions apply in specific circumstances, set out in the AVMSD.

⁴⁴ Recital 5 AVMSD.

⁴⁵ Recital 66 AVMSD.

⁴⁶ Recital 68 AVMSD.

⁴⁷ Recital 104 AVMSD.

⁴⁸ Recital 46 AVMSD.

⁴⁹ Recital 47 AVMSD.

⁵⁰ Recital 49 AVMSD.

⁵¹ It is interesting to note that in the new Article 28 a, paragraph 5, of the amendment proposal of the AVMSD of 25 May 2016, COM (2016) 287, the European Commission extends the scope of the AVMSD to video-sharing platforms and provides for a maximum harmonisation approach in relation to the providers of these platforms. For further details on the scope see paragraphs 2.2.3.8. and 2.2.4.3 of this publication



2.2.2. In and out of the scope of the AVMSD

The AVMSD applies to editorially responsible providers based in EU member states, which offer linear TV channels and video on-demand services that are deemed to offer content comparable to broadcast TV programmes (“TV-like”). The Directive provides in Article 1 a list of definitions that clarify to a certain extent its scope. The recitals of the Directive further explain the meaning of the definition of AVMS. Article 1(1)(a) AVMSD defines an “audiovisual media service” provided by an audiovisual media service provider⁵² as either one of the two following cases:

“(i) a service as defined by Articles 56 and 57 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

(ii) audiovisual commercial communication.”⁵³

The technology-neutral approach of the AVMSD means that the same services are regulated in the same manner, irrespective of the device on which they are consumed. However, the AVMSD distinguishes between television broadcasts (linear programmes) and on-demand services (non-linear), based on the much higher degree of consumer control in on-demand services, justifying less stringent regulation in certain areas. According to the AVMSD, linear and non-linear services are defined as follows:

- "Television broadcasts" are AVMS "provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule" (Article 1(1)(e) AVMSD).
- On-demand AVMS (i.e. non-linear AVMS) are "provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider" (Article 1(1)(g) AVMSD).

2.2.3. The seven criteria for qualifying as an on-demand AVMS

The AVMSD does not provide further guidance as to what constitutes a catalogue or what is meant by ‘at the moment chosen by the user and at his individual request’. The definition of an on-demand

⁵² Article 1 (1) (d) of the Directive further details that “media service provider” means the “natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised. In addition, paragraph (e) defines “television broadcasting” or “television broadcasts” as “an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule”.

⁵³ The definition of AVMS provided by the amendment proposal of 25 May 2016 remains substantially the same, but also includes also “dissociable” sections of a service: “a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph” (emphasis added).



AVMS contains the following seven cumulative criteria, many of which remain substantially unchanged in the Commission's proposal of 25 May 2016, with the exception of "TV-likeness":

1. That it be a service
2. That a media service provider has editorial responsibility
3. That its principal purpose is the provision of programmes
4. That the provided programmes are "TV-like"
5. That the purpose of the programmes is to inform, entertain or educate
6. That the target audience of the programmes is the general public
7. That the programmes are delivered over electronic communications networks.

2.2.3.1. The service

Article 57 of the Treaty on the Functioning of the European Union (TFEU) defines a "service" as "normally provided for remuneration". Recital 21 AVMSD recalls that this definition covers any form of economic activity, including that of public service enterprises, but does not cover activities which are primarily non-economic and which are not in competition with television broadcasting. This excludes on-demand offerings of a private nature and no commercial relevance, such as private websites and blogs, as well as user-generated content hosted on dedicated platforms, such as YouTube.

2.2.3.2. The editorial responsibility

According to Article 1(1)(c) AVMSD "editorial responsibility" means, in the case of on-demand audiovisual media services, the exercise of effective control both over the selection of the programmes and over their organisation in a catalogue. A "media service provider" is the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised (Article 1(1)(d) AVMSD). This definition excludes natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties, such as UGC platforms.⁵⁴

2.2.3.3. The principal purpose of a service

Recital 22 AVMSD defines the "provision of programmes as principal purpose" by excluding all services where the audiovisual content provided is merely incidental to the service and not its principal purpose. Examples of this are websites that contain animated graphical elements, short advertising spots, or information related to a product or non-audiovisual services. The definition excludes games of chance involving a stake that represents a sum of money, as well as online games and search engines, but not broadcasts devoted to gambling or games of chance. The definition also excludes any form of private correspondence, such as emails sent to a limited number of recipients.

⁵⁴ Recital 26 AVMSD.



2.2.3.4. The provision of a “TV-like” programme

According to Article 1(1)(b) AVMSD, “programme” means:

“a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama.”⁵⁵

According to Recital 23 AVMSD, the term “audiovisual” includes silent films but excludes radio services or other types of audio transmission. The definition also covers any text-based content that accompanies programmes, such as subtitles and EPGs, but excludes stand-alone text-based services like teletext.

Only programme services “the form and content of which are comparable to the form and content of television broadcasting” shall be subject to the AVMSD. The intention of the EU legislator is to cover only on-demand and broadcast television audiovisual media services which are “television-like”, i.e. “that [...] compete for the same audiences as television broadcasts and the nature and the means of access to the service would lead the user to reasonably expect regulatory protection within the scope of the Directive” (Recital 24 AVMSD). It follows from this Recital that the concept of “programme” has to be interpreted in a dynamic way, taking into account developments in television broadcasting in order to prevent disparities as regards free movement and competition.

2.2.3.5. To inform, entertain or educate

The AVMSD does not provide any guidance as to the definition of these concepts. They are so vague and general that they can apply to virtually any type of audiovisual content.

2.2.3.6. The general public

According to Recital 21 AVMSD, the AVMSD covers audiovisual media services (television broadcasting and on-demand services) that are “mass media”; that is, intended for reception by a significant proportion of the general public and able to have a clear impact on it.

2.2.3.7. The delivery over electronic communications networks

Electronic communications networks are defined in Article 2(a) of Directive 2002/21/EC⁵⁶ as “transmission systems and, where applicable, switching or routing equipment and other resources,

⁵⁵ Under the Commission’s proposal of 25 May 2016, the reference to “TV-likeness” is repealed: “(b) ‘programme’ means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider, including feature-length films, *videos of short duration*, sports events, situation comedies, documentaries, children’s programmes and original drama” (emphasis added);

⁵⁶ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive),

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0021:EN:NOT>.



including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed". This definition excludes certain traditional forms of distributing audiovisual works, such as exhibition in cinemas and the selling and renting of DVDs or BluRays (even if the sale or rental is made through a website).

2.2.4. Different regulatory intensity

In order to fulfil its aim, the AVMSD introduced a two-tier regulatory approach,⁵⁷ with common coordinated rules applying to all audiovisual media services and stricter rules for linear services.⁵⁸ At the time of adoption of the AVMSD this lighter approach to on-demand AVMS was considered justified by the difference in choice and control that users can exercise, as well as by the different impact the services have on society. The differences in regulatory intensity appear smaller under the Commission's proposal of 25 May 2016.

2.2.4.1. Common rules for all AVMS

The common rules applying to all audiovisual media services aim to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area. Such rules are contained in Chapter III AVMSD and concern:

- the obligation of media service providers to identify themselves (Article 5);
- the prohibition of any incitement to hatred based on race, sex, religion or nationality (Article 6);
- the encouragement of media service providers to make services accessible to people with a visual or hearing disability (Article 7);
- the prohibition of transmitting cinematographic works outside periods agreed with rightsholders (Article 8); and
- general qualitative rules concerning audiovisual commercial communications (Article 9), sponsoring (Article 10), and product placement (Article 11). These include the prohibition of surreptitious advertising, subliminal techniques, discrimination, tobacco or alcoholic beverages advertising directed at minors, the advertising of medicine available only on prescription or advertising that encourages behaviour prejudicial to health and environment or physical or causes moral detriment to minors. Furthermore, commercial communications must be identifiable as such, and shall not prejudice respect for human dignity. Codes of conduct regarding "unhealthy" food are also to be established (Article 9).

⁵⁷ Recital 11 AVMSD.

⁵⁸ See Nikoltchev S. (Ed.), *What Is an On-demand Service ?*, IRIS Plus 2013-4, European Audiovisual Observatory, 2013, http://www.obs.coe.int/documents/205595/264635/IRIS_plus_2013-4_text_EN_%28with_cover%29_BAT_optim.pdf/590f6689-b63f-4048-9c32-84d1dd9f5b68.



2.2.4.2. More stringent rules for television broadcasting

Television broadcasts have to comply with stricter rules on the protection of minors (Chapter VIII AVMSD) and on the promotion and distribution of European television programmes (Chapter VI AVMSD), whereas in these two areas on-demand AVMS have to abide by “softer” rules (Chapter IV AVMSD). More specifically, regarding the protection of minors, the AVMSD imposes distinct obligations for broadcast and on-demand services: content which “might *seriously* impair the... development of minors” cannot be broadcast but can be offered on-demand when access controls are in place (“to ensure that minors will not normally hear or see..[it]”). Content which is “likely to impair...” can only be shown on broadcast services when access controls are in place, but can be shown unrestricted on on-demand services.⁵⁹ Under the proposal of the amended AVMSD of 25 May 2016, the rules on protection of minors are facing a levelling up in the case of non-linear services and a levelling down in the one of linear services under the common notion of content “which may impair”.⁶⁰

Concerning the promotion of European works, there are currently no common rules that apply to all audiovisual media services, but different provisions for linear and non-linear services. For linear services, Article 16 AVMSD provides that Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve a majority proportion of their transmission time for European works (excluding the time allotted to news, sport events, games, advertising, teletext services and teleshopping). Article 17 AVMSD stipulates that broadcasters must reserve 10% of their transmission, or at least 10% of their programming budget, for European works created by independent producers. Article 18 AVMSD provides an exemption for local broadcasters. Under the proposal of the amended AVMSD of 25 May 2016 these provisions remain unchanged.

For non-linear services, Article 13 AVMSD stipulates that on-demand audiovisual media service providers promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes.⁶¹ Under the proposal of the amended AVMSD of 25 May 2016 freedom of choice is replaced by the double obligation of a 20% share in the catalogue and to ensure prominence. Member states can also impose financial obligations, and this option is extended, under certain conditions, also to non linear providers that target these states while they are established in other member states.⁶²

⁵⁹ See Cabrera Blázquez F.J., Cappello M., Lépinard A., and Valais S., “The protection of minors in a converged media environment”, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015,

<http://www.obs.coe.int/documents/205595/8261963/The+protection+of+minors+in+a+converged+media+environment.pdf>.

⁶⁰ The new Article 12 under the Commission’s proposal of 25 May 2016, COM (2016) 287, provides: “Member States shall take appropriate measures to ensure that programmes provided by audiovisual media service providers under their jurisdiction, *which may impair* the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them. Such measures may include selecting the time of the broadcast, age verification tools or other technical measures. They shall be proportionate to the potential harm of the programme. The *most harmful content*, such as gratuitous violence and pornography, shall be subject to the strictest measures, such as encryption and effective parental controls” (emphasis added).

⁶¹ See Grece C., Lange A., and Valais S., “The role of providers of VoD services and distribution platforms in the financing of film and audiovisual production”, Section IV in Grece C., Lange A., Schneeberger A. and Valais S., The development of the European market for on-demand audiovisual services, European Audiovisual Observatory, Strasbourg, 2014, p. 243 ss, http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=9273. See also Cabrera Blázquez F., Cappello M., Grece C., Valais S., Territoriality and its impact on the financing of audiovisual works, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015, <http://www.obs.coe.int/documents/205595/8261963/IRIS+plus+2015en2.pdf>.

⁶² The new Article 13 under the Commission’s proposal of 25 May 2016, COM (2016) 287, provides: “Member States shall ensure that providers of on-demand audiovisual media services under their jurisdiction secure at least a 20% share of European works in their catalogue and ensure prominence of these works. Member States may require providers of on-demand audiovisual media services under



Furthermore, television broadcasts have to comply with specific rules and time limits on teleshopping and television advertising.⁶³ In particular, Article 19(1) AVMSD stipulates that TV advertising must not only be recognisable but also distinguishable from editorial content. Additionally, a number of restrictive provisions on the possibility to insert advertising during TV programmes aim to protect the integrity of the audiovisual programme (Article 20 AVMSD). Furthermore, the Directive provides more detailed rules on the minimum duration of teleshopping windows and on hourly advertising. Under the proposal of the amended AVMSD of 25 May 2016 there is a certain relaxation of these rules, including the replacement of the hourly limit with an average daily limit of 20% from 7h to 23h, the reduction of the interval between each advertising break from 30 to 20 minutes, and the admissibility of product placement as a rule.⁶⁴

With regards to the rules concerning events of major importance to society and short reporting,⁶⁵ and the right of reply,⁶⁶ which apply only to linear services, the proposal of the amended AVMSD of 25 May 2016 does not include any alterations.

2.3. Intersections between AVMSD and other regulatory fields

The AVMSD undoubtedly has several points of contact with adjacent regulatory frameworks. With the only purpose being to investigate possible intersections that might have an impact on the overall assessment of a service when it comes to its qualification as an audiovisual media service, the following paragraphs aim to set out the definitions employed in the various regulatory fields.

2.3.1. AVMSD and the E-Commerce Directive

The inclusion of audiovisual services available on-demand under the legal framework of the AVMSD seemed to be a major achievement when the directive was adopted in 2007. This inclusive solution had finally solved the tension between the two sides of audiovisual regulation, according to which:

- “television broadcasting” fell under the regulatory framework established by the Television without Frontiers Directive (89/552/EEC);
- “video-on-demand” was caught under the E-Commerce Directive (2000/31/EC67) via the reference to the definition of “information society services” as enshrined in the Transparency Directive (2015/153568).

their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contributions to national funds. Member States may require providers of on-demand audiovisual media services, targeting audiences in their territories, but established in other Member States to make such financial contributions. In this case, the financial contribution shall be based only on the revenues earned in the targeted Member States. If the Member State where the provider is established imposes a financial contribution, it shall take into account any financial contributions imposed by targeted Member States. Any financial contribution shall comply with Union law, in particular with State aid rules.”

⁶³ Chapter VII AVMSD.

⁶⁴ See Articles 11, 19, 20 and 23 of the Commission’s proposal of 25 May 2016, COM (2016) 287.

⁶⁵ Chapter V AVMSD.

⁶⁶ Chapter IX AVMSD.

⁶⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031>.



This two layer approach was expressed through disconnection clauses, clearly separating the two regulatory frameworks: television broadcasting was not qualified as an information society service because it was not provided at individual request, whereas VoD, which was transmitted point to point, qualified as information society service. This also meant that in both cases the country of origin applied to content related issues, such as protection of minors or actions in the fields of human dignity and hate speech, as the derogation from the principle of the internal market applied only to the list of exceptions laid down in the Annex to the E-Commerce directive (as copyright infringements).

This exact two-sided approach came to an end in 2007 with the adoption of the AVMSD, which included on-demand services in its scope, though imposed a lesser degree of regulation on these types of services, and explicitly stated that in the event of a conflict with a provision of the E-Commerce Directive, the AVMSD should prevail. The new two-layer approach saw the following regulatory distribution:

- an on-demand service that is TV-like and that falls under the editorial responsibility of a media provider is regulated by the AVMSD;
- all other on-demand audiovisual content provided by Internet-based services, such as content hosted by online video-sharing platforms or by intermediaries, continues to be qualified as an information society service and falls under the E-Commerce directive.

Now that the offer of audiovisual services has developed in many directions and that the consumption habits of the viewers have changed as well, the way in which the various services should be qualified seems uncertain. As falling under the scope of the AVMSD brings a set of obligations that the E-Commerce does not entail, such as promotion obligations for European works and ex ante control on the content with respect to the protection of minors or human dignity, this naturally presents the whole question in a particular light and explains why the debate is particularly heated⁶⁹.

2.3.2. AVMSD and the SatCab Directive

Another discussion of a possible expansion to the online world concerns the so-called SatCab Directive.⁷⁰ Even though this directive concerns copyright clearance, the SatCab Directive is nonetheless qualified as supplementary to the AVMSD. Since there is an on-going debate on a possible widening of its material scope, it is therefore worth recalling the main points.

Under its current wording, which has remained the same since its adoption in 1993, the only concerned services are the linear ones, both in terms of satellite broadcasting and cable retransmission. The public consultation⁷¹ carried out during the second half of 2015 concerned the

⁶⁸ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L1535>.

⁶⁹ See Sections 2.2.3.8. and 2.2.4.3. for further details on the scope of the AVMSD, and Section 6.3. for further details on the proposal amending the AVMSD.

⁷⁰ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993L0083>.

⁷¹ Public consultation of the SatCab directive 93/83/EC, <https://ec.europa.eu/digital-single-market/en/news/consultation-review-eu-satellite-and-cable-directive>.



possible inclusion of online services into its scope, and touched upon both catch-up services and on-demand services. For example, it explicitly mentioned the impact of direct injection of terrestrial broadcasting into a cable network or IPTV transmissions as cases where technological developments have overcome the regulatory framework. There are no new definitions mentioned in the public consultation questionnaire, so it is to be assumed that the term of reference is the AVMSD when it comes to what is intended with the term “VoD”.

This is the second attempt to review this directive after the public consultation of 2003.

2.3.3. AVMSD and the E-Communications package

The E-Communications package as amended in 2009⁷² did not make the transition into the online world when it came to the discussion of audiovisual services, but to some extent became involved with the audiovisual under the must-carry provisions. These were introduced for reasons of general interest in the Framework directive and when referring to fundamental rights in the Universal Service Directive.

In the amended Framework directive⁷³ provides in Article 9 that *“the promotion of cultural and linguistic diversity and media pluralism, for example by the provision of radio and television broadcasting services”* is one of the objectives of general interest that can lead member states to decide to introduce restrictions when managing radio frequencies. No mention is made of on-demand services, or of audiovisual content, but this is clearly due to the context of a frequency spectrum which does not allow for interactive services.

The revised Universal Service Directive contains no mention of media, but more generally a reference to access to services and applications over electronic communications networks.⁷⁴ Article 1(3) states that *“National measures regarding end-users’ access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy and due process, as defined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”*. As the wording is very broad, all kinds of audiovisual content are deemed to be included.

“Content”, without specifying which type thereof, is on the other hand mentioned in the Telecom’s single market regulation⁷⁵ adopted at the end of 2015, which set out rules on technologically neutral Internet access. When providing in Article 3 that *“End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the*

⁷² Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0140>.

⁷³ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), consolidated version, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02002L0021-20091219>.

⁷⁴ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), consolidated version, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02002L0022-20091219>.

⁷⁵ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open Internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R2120>.



location, origin or destination of the information, content, application or service, via their internet access service”, the regulation does not provide any definition, so it is to be assumed that every type of audiovisual content is included within this framework.

2.3.4. AVMSD and Unfair Commercial Practices Directive

With the aim of providing enhanced consumer protection in the field of commercial communications, the Unfair Commercial Practices Directive⁷⁶ amended a set of sector-specific directives in 2005, retaining a clear disconnection clause to make clear that it is without prejudice to the AVMSD (*rectius* TVWFD).

Interestingly, in its annex listing commercial practices that are to be considered unfair by definition, there is mention of instances of *“Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 89/552/EEC”*. The reference here is to “editorial content” which is included in commercial content. At the same time there is no reference as such to the responsibility of the provider – who would have, incidentally, to keep the two types of content separate under the AVMSD framework.

2.3.5. AVMSD and consumer protection

In its harmonisation activity the AVMSD touches upon the special nature of the viewers as consumers, and it is therefore quite natural that there are some intersections with the consumer protection regulatory field.

The closest reference to the media field in the Directive on Consumer Rights⁷⁷ are the expressions “digital content” and “online platform”.

Digital content is expressly defined under Article 2(11): *“digital content’ means data which are produced and supplied in digital form”* and Recital 19 provides as examples *“computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.”*

Online platforms are not defined, but are referred to under recital 20: *“The notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform.”* The reference to a

⁷⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32005L0029>.

⁷⁷ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0083>.



third party seems to reflect the intermediary nature of the platform with respect to the trader, who is subject to the directive, but no definition is provided.

The AVMSD (*rectius* TVWFD) is explicitly mentioned in the Consumer Protection Cooperation Regulation,⁷⁸ which states that it “*shall be without prejudice to Community law relating to television broadcasting services.*” Articles 10-21 of the TVWFD (i.e. the provisions on advertising) are included in the cooperation framework of the national enforcement authorities covered by the Regulation.

⁷⁸ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004R2006>.





3. National framework

3.1. Examples of national implementation

Most member states have transposed more or less literally the provisions of the AVMSD.⁷⁹ Nevertheless, the vagueness of such provisions has prompted some national regulatory authorities (NRAs) to adopt regulations and release guidelines and recommendations to explain how they will interpret the rules of the AVMSD.

The present chapter presents five examples of national transposition of the AVMSD (United Kingdom, Italy, the French-speaking community of Belgium, Slovakia and the Netherlands) with special consideration given to the regulations, guidelines and recommendations issued by NRAs in these countries. These models are examples of how both national legislators and regulators had to find ways to compensate for the broad rules of the AVMSD, thereby showing a great deal of legislative creativity. See for instance the Italian solution to introduce a threshold of EUR 100,000 for classifying services as on-demand AVMS, which draws a distinction between services that are considered to be in competition with traditional broadcasting and those which are not. Another example of interpreting the rules of the AVMSD in an innovative way is the Belgian distinction between on-demand AVMS provided on an open platform and those provided on a closed platform. The same applies for the fixation that some regulators have with regard to particular aspects of the AVMS definition (e.g. “TV-likeness” in the UK and Slovakia).

3.1.1. United Kingdom

Until very recently, the UK had an interesting co-regulatory system for non-linear AVMS. Although the Communications Act 2003 conferred functions to the Office of Communications (Ofcom) for the regulation of on-demand programme services (ODPS), it allowed Ofcom to delegate certain functions to an ad hoc co-regulatory authority. On 18 March 2010, Ofcom delegated some of its functions and powers in relation to the regulation of ODPS to the Authority for Television On Demand Services (ATVOD), which became the independent co-regulator for the editorial content of UK VoD services that fall within the statutory definition of ODPS. ATVOD was in principle responsible for determining whether a service falls under the statutory definition of OPDS, but Ofcom, as regulatory authority, had the final say in these matters, so that appeals could be brought to the Ofcom against ATVOD’s decisions.

⁷⁹ See the Observatory’s AVMSDatabase, which allows interactive searches across the national transpositions of the AVMSD in the 28 EU member states, <http://avmsd.obs.coe.int/cgi-bin/search.php>.



Following a review, Ofcom announced on 14 October 2015 that as of 1 January 2016 it will act as sole regulator of these services.⁸⁰ The reasons put forward by Ofcom are that this move will create operational efficiencies and will allow editorial content of VoD to sit alongside Ofcom's existing regulation of broadcast content. Advertising content on VoD services will continue to be subject to a process of co-regulation involving the Advertising Standards Authority.

3.1.1.1. Legislative transposition

Section 368A(1) of the Communications Act 2003⁸¹ defines "on-demand programme service" (ODPS) as a service with the following characteristics:

- (a) its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
- (b) access to it is on-demand;
- (c) there is a person who has editorial responsibility for it;
- (d) it is made available by that person for use by members of the public; and
- (e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive.

3.1.1.2. The ATVOD co-regulatory system

In 2013 ATVOD published a guidance paper⁸² as an aid to the interpretation of the types of services that may fall within the definition of ODPS. It also helped with the determination of the provider of a relevant service. This guidance was not legally enforceable, and only provides non-determinative, interpretative guidance as to how ATVOD is likely to apply the legislation on this matter. The paper provided guidance on the qualification of a service as an "on-demand programme service" within the meaning set out in section 368A of the Act and on the notion of "editorial responsibility" for that service within the meaning of section 368A(4) of the Act.

According to ATVOD, a service would be an ODPS if it meets all of following criteria:

- a) It includes TV-like programmes;
- b) It is a VoD service;
- c) There is editorial responsibility;
- d) It is made available to the public.

⁸⁰ Ofcom, Press release, 14 October 2015, <http://media.ofcom.org.uk/news/2015/1520333/>.

⁸¹ Communications Act 2003, as amended by the Audiovisual Media Services Regulations 2009 and the Audiovisual Media Services Regulations 2010 which came into force on 19 December 2009 and 18 March 2010 respectively, www.legislation.gov.uk/ukpga/2003/21.

⁸² ATVOD Guidance on who needs to notify - Application and Scope of the Regulations for Video On Demand (VOD) services. Edition 3.3. Published 23 May 2013. See also Ofcom, Procedures for the handling of appeals of ATVOD decisions in relation to what constitutes an On-Demand Programme Services, 1 October 2013, <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>.



For ATVOD the decision as to whether programmes are TV-like had to be taken considering all relevant information, including the availability of comparable programmes in linear broadcast services and the nature of the service as a whole. A programme would not be considered to be TV-like if it was clearly distinguishable from those that were normally included in television programme services.

A programme which had been shown on linear TV would normally be considered “TV-like” unless its broadcast was wholly exceptional, but prior broadcast would not be a pre-condition of TV-likeness. Programmes which had not been broadcast on linear TV, but which matched the form and content of programmes shown on linear TV, would be considered TV-like unless such linear broadcasting was wholly exceptional. The duration of concrete audiovisual content in a service should not, on its own, determine whether that content is TV-like (e.g. short music videos may satisfy the test).

With regard to the on-demand aspect of the service, ATVOD took into consideration all relevant materials available including, for example, the way the service was marketed and presented to users. The “principal purpose” of the service was fundamental in this regard, and in particular in cases where services formed part of a broader consumer offering. Such cases might be considered to be a distinct on-demand service if they were “grouped together in a distinct area and presented as a catalogue of viewing options” (e.g. an online newspaper with a distinct section of its website providing TV-like programmes which have no clear and direct link to the newspaper). This would not be the case if the audiovisual content was included as an “integral and ancillary element of the broader offering” (e.g. a video used to provide additional material relevant to a text-based news story).

Another side of the on-demand criterion is the means of delivery. For example, a DVD sent through the post having been ordered online would not be seen as ODPS, but the selection, downloading and viewing of a movie via the Internet, paid for using a voucher bought over the counter in a shop, would be an ODPS.

ATVOD excluded UGC service providers from the definition of ODPS since they do not exercise editorial responsibility in the selection of programmes. However, if UGC services were used by commercial entities as a means of distributing relevant content then such content might fall within the meaning of an ODPS.⁸³

The “general public” criterion included subscription services, provided that the subscription is open to members of the public, as well as services that were made available only to the population of a particular geographic area.

ATVOD provided a non-exhaustive list of:

- types of service which are likely to be considered to be ODPS;⁸⁴
- types of services that are not likely to be considered to be ODPS;⁸⁵

⁸³ See paragraph 5.2.2.

⁸⁴ Types of services that according to ATVOD were likely to be considered as ODPS:

- a) a ‘catch-up service’ for a broadcast television channel whether programmes are made available from the broadcaster’s own branded website, an online aggregated media player service, or through a ‘television platform’ to a set top box linked to a television (whether using broadcast ‘push’ technology, or ‘pull’ VOD);
- b) a television programme archive service comprising less recent television programmes from a variety of broadcasters and/or production companies, made available by a content aggregator exercising ‘editorial responsibility’ over all the programmes, whether via a dedicated website, online aggregated media player service, or through a television platform; and
- c) an on-demand movie service, provided online via a website or using other delivery technology by a provider exercising ‘editorial responsibility’ over the content.



- types of services that may not be considered to be ODPS depending on the particular circumstances.⁸⁶

3.1.1.3. No more co-regulation from 2016

On 17 December 2015 Ofcom published a document summarising, “for the convenience of providers and consumers of ODPS”, arrangements which apply from 1 January 2016.⁸⁷ This document also consults on two substantive proposals; one introduces new procedures for investigating breaches of rules concerning on-demand programme services to replace the Interim Breach Procedures, and to align more closely with the position for linear television broadcasting. The other is a proposal not to charge fees under section 368A of the Act. This document makes clear from the outset that the statutory framework for the regulation of ODPS has not changed, and that Ofcom is not gaining any new functions as a result of the ATVOD’s demise.

Ofcom has also published a document providing guidance on which services need to notify an ODPS.⁸⁸ This document is closely based on former ATVOD’s guidance. Ofcom has removed references to various previously decided cases and has updated references, and made some minor changes for reasons of clarity and precision. However, these changes do not reflect a change in Ofcom’s interpretation of who needs to notify an ODPS. Further changes include a new form for notifying an ODPS, new practical guidance on how such notifications should be made, advice on Ofcom’s website to people wishing to complain about video on-demand services, and non-material updates on the pre-existing Ofcom document on sanctions procedures for ODPS.

⁸⁵ Types of services that according to ATVOD were likely not to be considered as ODPS:

- a) Services that are primarily non-economic, and which are therefore not in competition with television broadcasting (Recital 16 of the Directive). In this context, ‘economic’ is interpreted in the widest sense to encompass all forms of economic activity, however funded, and may include public service material, free to view content, as well as advertising-funded, subscription, pay per view and other transactional business models;
- b) services comprising on-demand content that are not “mass media in their function to inform, entertain and educate the general public” (Recital 18 of the Directive);
- c) “games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services”, “on-line games” and “search engines” are all stated to be excluded on grounds that their principle purpose is not the provision of ‘TV-like’ programmes (Recital 18 of the Directive); and
- d) electronic versions of newspapers and magazines (excluding any on-demand programme services offered by newspapers and magazines) (Recital 21 of the Directive).

⁸⁶ Types of services that according to ATVOD might not be considered to be ODPS depending on the particular circumstances:

- a) video content posted by private individuals onto video sharing sites (where the content has been self-generated and is not posted as part of an ‘economic’ purpose on the part of the individual);
- b) video content produced by professional bodies, trade unions, political parties, or religious organisation, where the content is very narrowly focused and is primarily about the dissemination of information about the organisation to members, rather than for consumption by the general public;
- c) video content embedded within a text-based editorial article, such as a written news story on a web site that contains an illustrative video clip; and
- d) video content on corporate websites, where the purpose is to disseminate information about the company’s own operations, products or financial performance (e.g. a video of an AGM, but excluding a standalone service providing access to videos of many companies’ AGMs on a commercial basis, which could fall within scope).

⁸⁷ Ofcom, Future regulation of on-demand programme services, 17 December 2015,

http://stakeholders.ofcom.org.uk/binaries/consultations/vod_procedures/summary/Future_regulation_of_on-demand_programme_services.pdf.

http://stakeholders.ofcom.org.uk/binaries/consultations/vod_procedures/summary/Future_regulation_of_on-demand_programme_services.pdf.

⁸⁸ Ofcom, Who Needs to Notify - Guidance notes on who needs to notify an on-demand programme service to Ofcom, 18 December 2015, http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Guidance_on_who_needs_to_notify.pdf.



3.1.2. Italy

The AVMSD was transposed into Italian legislation by Legislative Decree no. 44/2010 ("Decree").⁸⁹ The Decree reproduces verbatim the definition of on-demand AVMS included in the AVMSD. On 25 November 2010 the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - Agcom) adopted a regulation on the authorisation of non-linear audiovisual media services (Deliberation no. 607/10/CONS) which further explains how AGCOM implemented the Decree.⁹⁰

According to the AGCOM regulation, the authorisation for the provision of on-demand AVMS is required for catalogues accessible to the general public. This excludes catch-up TV services provided by an already authorised AVMS linear provider, and content which does not belong to a catalogue which is autonomously accessible to the public but is part of a general catalogue already offered and authorised. These two types of services are considered ancillary to already authorized services and do therefore not require a new authorisation.

In addition to the activities mentioned by the Directive as not being within its scope,⁹¹ the AGCOM regulation considers only services with yearly revenues exceeding EUR 100,000 to be on-demand AVMS. This threshold is introduced in order to determine presumptively which economic activity is in real competition with broadcasting. Only revenues deriving from typical television activities are taken into consideration. These are:

- All revenues, with the exclusion of the commission's fee and sales, income from any commercial communication, including advertising, sponsorship, teleshopping and product placement;
- Revenues from the public service broadcasting fee;
- Revenues from pay TV subscriptions or pay-per-view offers.

⁸⁹ Decreto Legislativo 15 marzo 2010, n. 44 "Attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive", published in Gazzetta Ufficiale of 29 March 2010, no. 73, www.camera.it/parlam/leggi/deleghe/10044dl.htm.

⁹⁰ Agcom deliberation no. 607/10/CONS, Regolamento in materia di fornitura di servizi di media audiovisivi a richiesta ai sensi dell'articolo 22-bis del Testo unico dei servizi di media audiovisivi e radiofonici, www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlodu&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=854396&_101_INSTANCE_kidx9GUnlodu_type=document

⁹¹ Types of services that according to AGCOM do not qualify as on demand audiovisual media services:

- any form of private correspondence, such as e-mails sent to a limited number of recipients,
- all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose,
- all activities which are primarily non-economic and which are not in competition with television broadcasting,
- services based on the upload of audiovisual content generated by private users, as long as there is no editorial responsibility by the media service provider on the selection of the content, but only aggregation activity of content uploaded by private users for the purposes of sharing and exchange within communities of interest;
- on-demand catalogues composed only of programmes already offered on a linear basis, such as catch-up TV or archive services, and catalogues that are not autonomously accessible by the general public, such as those inserted inside a catalogue accessible only from a bouquet offered by a different provider;
- online and electronic versions of newspapers and magazines, websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance.



In 2014 Agcom held a public consultation⁹² on possible amendments to the VoD regulation, mainly in order to remove the threshold of EUR 100,000 of yearly revenues. The reason for these proposed changes was that the VoD market in Italy is no longer at a start-up phase. The amendments also intended to clarify that the majority of the provisions of the regulation refer to AVMS providers independently of being those holding an authorisation. No amendments have been formally adopted at the date of the present publication.

3.1.3. Belgium (Federation Wallonia-Brussels)

In the French-speaking community of Belgium, the AVMSD is transposed by the *Décret coordonné sur les services de médias audiovisuels* (Decree on audiovisual media services - 'the Decree').⁹³ In March 2012, the Belgian *Conseil Supérieur de l'Audiovisuel* (CSA), as the NRA responsible for the regulation of the audiovisual sector in the Federation Wallonia-Brussels, published a recommendation concerning the scope of AVMS.⁹⁴

The most interesting regulatory innovation introduced by the Decree is the distinction between on-demand AVMS provided on an open platform and those provided on a closed platform (*plateforme de distribution fermée*).⁹⁵ An open platform is one which is freely accessible (e.g. on the Internet) whereas a closed platform is accessible only with the permission of the distributor of the said platform (e.g. cable networks). Services offered through an open platform are less strictly regulated by the Decree than those offered on closed platforms. This is due to the fact that the choice of services available on open platforms is much greater than the choice provided by closed platforms. The Recommendation provides guidance, among others, as to which activities are considered of economic nature. The concept of "remuneration" is interpreted in a broad way (*contrepartie*), and is not restricted to pecuniary payment (the provision of a service in return would also be a remuneration). The Recommendation lists the persons (both natural and legal) that can provide this remuneration,⁹⁶ and in cases where this remuneration is not evident, the service may be considered an AVMS if it shows an ambition to compete with other AVMS.

With regard to the "editorial responsibility" criterion, the Recommendation provides a list of services for which the CSA considers that, in principle, there can be no editorial responsibility.⁹⁷ In

⁹² Delibera n. 152/14/CONS, consultazione pubblica sullo schema di modifiche e integrazioni al regolamento in materia di fornitura di servizi di media audiovisivi a richiesta di cui alla delibera n. 607/10/CONS,

www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_kidx9GUnlodu&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_kidx9GUnlodu_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_kidx9GUnlodu_assetEntryId=1421492&_101_INSTANCE_kidx9GUnlodu_type=document.

⁹³ A consolidated version is available at: www.csa.be/documents/1440.

⁹⁴ Recommendation relative au périmètre de la régulation des services de médias audiovisuels, <http://csa.be/documents/1713>.

⁹⁵ The Decree defines a closed platform as "a platform distributing audiovisual media services, where the access by a content service provider requires prior approval by the distributor responsible for the platform. In case the service provider is its own distributor, the audiovisual media services it provides and distributes are considered to be supplied through a closed platform if the access to electronic communications network requires prior agreement of the network operator or the obtaining of capacity on radio networks". (Translation from the French by the authors).

⁹⁶ The public: it pays a subscription, through a pay per view system or, by providing personal data that can be reused by the service provider; Advertisers: they pay advertisement space (advertising, sponsorship, teleshopping and product placement); Donors and fans: they provide funds for the production or transmission of an audiovisual work; Government: they provide funding for public service media.

⁹⁷ Types of services that according to CSA (Belgium) do not imply editorial responsibility:



the case of "hybrid" services, that is, where both audiovisual and not-audiovisual content are available, the CSA takes into consideration the proportion of audiovisual content (this will only be considered when audiovisual content is obviously influential), the ergonomics of the service (i.e. how content is presented and whether some content is privileged in its presentation), and the purpose of the service (that is, its business model or "core business").

As to the "mass media" criterion, the CSA explains that the number of real users of a service has no impact as to its classification as AVMS; it is rather the number of potential users, the provider's intention to offer the service to the general public, and its ambition to be in competition with other AVMS, that matters. A service will be deemed to target the general public based on an assessment of its content and mode of distribution (e.g. services accessible through a code/decoder that anyone can obtain through registration and/or payment).

The CSA interprets the notion of "programme" in a broad way. Audiovisual content might not be considered a programme if it is not aimed at the general public (e.g. videos of private holidays or videos made for the training purposes of a company).⁹⁸

3.1.4. Slovakia

The transposition of the AVMSD in Slovak law was made through an amendment (No. 498/2009 Coll.)⁹⁹ to Act No. 308/2000 Coll. on Broadcasting and Retransmission ('the Act').¹⁰⁰

The definitions are very similar to the ones in AVMS Directive. However, the Act does not contain a definition of AVMS but rather refers to two separate concepts: "on-demand AVMS" and "programme service", the latter being the definition of a linear AVMS. The Act defines on-demand AVMS in section 3(b) as a "service of primarily economic nature for viewing of programmes at the moment chosen by the user and at his individual request provided through electronic communications on the basis of a catalogue of programmes selected by the service provider the principal purpose of which is the provision of programmes in order to inform, entertain or educate the general public; the provision of audio recordings shall not be deemed an on-demand audiovisual media service".

-
- UGC platforms (eg Youtube, Dailymotion) these platforms exercise only a control ex post so they are not considered to fall under the AVMSD. However, a platform does not necessarily imply a single service. Services provided through these platforms that form a coherent and independent catalogue of content which is selected and organised by the publisher (eg "branded channels" hosted on YouTube) may be considered on-demand AVMS.
 - Services providing a VoD database through a search engine (e.g. Google video).
 - Services offering simultaneous and unaltered retransmission of video and/or audio without any editorial intervention (e.g. broadcasting of surveillance cameras).

⁹⁸ With regard to providers offering similar contents via different means of transmission, the Recommendation provides the following rules:

- if the content is provided on both a linear and a non-linear basis, there will be two separate services.
- if the content is provided on both an open and a closed platform, there will be two separate services.
- if the essence of the service is the same and the only difference is the mode of transmission, there might be only one service (e.g. an app for a smartphone and another for a tablet might be the same service).

⁹⁹ Zákon č. 498/2009 Z. z., ktorým sa mení a dopĺňa zákon č. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách v znení neskorších predpisov a o zmene a doplnení niektorých zákonov.

¹⁰⁰ Zákon č. 308 zo 14. septembra 2000 o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách. A consolidated version is available at: <http://www.culture.gov.sk/legdoc/11/>.



The Council for Broadcasting and Retransmission of the Slovak Republic (the Council) has issued guidelines concerning the scope of AVMS.¹⁰¹

The criterion of “primarily economic nature” has been applied in a few instances. There was a case of two services provided on the Internet but operated and run by universities. Even though they received some one-time sponsorship payments from commercial companies the Council stated they fell outside of the scope of the Act. This is mainly due to the fact that these services were evidently created with the intention to provide opportunities for students and to convey specific content to the students and not with the intention to make any economic profit. In addition, some services that were financed exclusively from European funds were also ruled out. It was however stated that such services may fall under the scope of the Act if in the future the service starts to have an economic nature e.g. through advertising.

The criterion of “editorial responsibility” with regard to UGC services was applied by the Council when it assessed services in a few borderline cases where the providers claimed that the content was added by users themselves. Nevertheless there were some indications that the provider of the service was “tuning” his service by adding some content. Ultimately the Council decided not to act unless there was a very clear indication that a considerable amount of content is added by the service provider himself. As for the decision of who possesses the editorial responsibility in cases of shared duties (choosing the content and its organisation) the Council prefers the “choosing the content” over the “organisational” approach. The Council believes that without any content nothing can be organised. However, without proper organisation you can still have an on-demand service.

The biggest challenge faced by the Council concerned the video sections of the Internet version of newspapers.¹⁰² During the first period of the assessment of these “video sections” the Council found that most of them are rough, unprofessional videos, with a strong correlation to the journalistic topic, and that the accompanying written text and the “video” section usually only gives the user the possibility to find all videos in one place (which means the videos were normally placed within the article). Therefore no e-version of newspaper was considered an on-demand service. However there were significant doubts about the TV section of the newsportal www.sme.sk which was probably more of a borderline case.¹⁰³

¹⁰¹ Rozsah posobnosti zakona č. 308/2000 Z. z. v súvislosti so zmenami zakona účinnými od 15. decembra 2009, <http://tinyurl.com/3egura2>.

¹⁰² Types of assessments according to which the Slovak Council qualifies newspapers’ sections as AVMS:

- How is the section organized: does the provider himself present or promote this section as independent service or does it appear to the user as integral part of the whole e-version of the newspaper?
- what is the correlation between the video and written text: does the video accompany written article or is a standalone video, does it simply show the facts that are written in the article or there are some new facts that the user is able to receive only through the video?
- what is the nature of the videos: is the content of the video related to common journalistic topics? How professional these videos seem to the viewer (do the creators, hosts, moderator try to identify themselves with the service – logos, labelled mikes, equipment etc.)?
- is there a special section for the videos: if yes does it simply collect videos from all sections or are all videos exclusively in this section?

¹⁰³ See paragraph 5.2.1.2. of this publication.



3.1.5. The Netherlands

In the Netherlands the Act of 10 December 2009, which amended the Media Act and the Tobacco Act for the implementation of the Audiovisual Media Services Directive, transposed the AVMSD into Dutch law.¹⁰⁴

Section 1.1, paragraph 1, of the Media Act 2008 defines an on-demand AVMS as a “media service consisting of an offer of content which is delivered upon individual request and can be watched at a moment freely chosen by the user”. An on-demand AVMS has to fulfil the following criteria:

- it is distributed via a public electronic communication network;
- it is based on a catalogue;
- it consists of videos and has the principal purpose of offering videos;
- it falls under the editorial responsibility of the provider (with regard to selection and organisation of the video content);
- it has a mass media character;
- it can be seen as an economic service.

In September 2011, the Dutch *Commissariaat voor de Media* (Media Authority – the ‘CvdM’) published a Regulation containing guidelines for the definition of “commercial media on-demand services” under the Dutch Media Act.¹⁰⁵ The CvdM does not focus on the “TV-likeness” of an on-demand service, and uses the term “video” instead of “programme”.¹⁰⁶ With regard to the “principal purpose” criterion, the CvdM takes into account the functionality and presentation of a service and its prominence in the case of hybrid services.¹⁰⁷ The CvdM also states that audiovisual services offered by private persons are not considered an economic service unless they are offered for payment or are of a clear commercial nature.

3.2. EC assessment on the national application of the AVMSD

According to Article 33 of the AVMSD, the Commission is invited to regularly submit a report on the application of the Directive to the European Parliament, the Council and the European Economic and Social Committee.

¹⁰⁴ Wet van 10 december 2009 tot wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten, <https://zoek.officielebekendmakingen.nl/stb-2009-552.html>.

¹⁰⁵ Regeling van het Commissariaat voor de Media van 22 september 2011 houdende beleidsregels omtrent de classificatie van commerciële mediadiensten op aanvraag zoals bedoeld in artikel 1.1, eerste lid, van de Mediawet 2008 (Beleidsregels classificatie commerciële mediadiensten op aanvraag 2011), <http://www.cvdM.nl/wp-content/uploads/2013/08/Beleidsregels-classificatie-commerci%C3%A4le-mediadiensten-op-aanvraag-2011.pdf>.

¹⁰⁶ The reason for this is that the term “programme” in the Media Act 2008 applies to TV broadcasting services. The main distinction between “video” and “programme” is that the former is offered as part of a catalogue, while the latter is included in a schedule.

¹⁰⁷ The CvdM classifies e.g. a stand-alone video service of a newspaper as an on-demand audiovisual media service if it meets all criteria of the definition.



The First Report on the application of the AVMSD for the period 2009-2010 was issued in May 2012.¹⁰⁸ The report explored retrospectively the implementation of the AVMSD, including evaluation of the effectiveness of qualitative advertising rules in a sector where the offer of programmes and individuals' responses to advertising are changing. The report found that there were areas for improvement and called for more effective means. It also addressed the potential influence of important technological changes on the regulatory framework in the context of convergence and announced an interpretative communication of the Commission on certain provisions on televised advertising in 2013 and a public consultation on Connected TV.¹⁰⁹

For broadcasting services, the Commission also has to report every two years on the application of the provisions concerning European works and independent productions on the basis of statistical data provided by the member states (Articles 16 and 17 AVMSD).¹¹⁰ With regard to the promotion of European works in EU on-demand services (Article 13 AVMSD), the Commission has to report every four years.

In 2012 the Commission issued the First Report on the application of Articles 13, 16 and 17 AVMSD for the period 2009-2010, in relation to the promotion of European works on EU television and on-demand services.¹¹¹ The report found that most member states had been complying with the rules on the promotion of European works and that the proportion of European works on both television and on-demand services was satisfactory (although it is worthwhile noting that during the reference period of the report, the state of development of the on-demand service market was very uneven in the EU).¹¹² The report also showed that the majority of European works promoted on national television and on-demand services were domestic works and it stressed that the proportion of independent productions on television was declining.

The Commission has already announced that the Second Application Report and the biennial Report on Article 16 and 17 AVMSD will be subsumed by the REFIT exercise and will therefore be part of the final REFIT conclusion.

¹⁰⁸ European Commission, First Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2010/13/EU "Audiovisual Media Service Directive" Audiovisual Media Services and Connected Devices: Past and Future Perspectives, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012DC0203>.

¹⁰⁹ <https://ec.europa.eu/digital-single-market/node/51287#gp-audiovisual>.

¹¹⁰ In July 2011, the Commission issued revised guidelines intended to help Member States with the monitoring of the implementation of Articles 16 and 17¹¹⁰. These guidelines were drawn up in the framework of the "Contact Committee" set up under Article 29 AVMSD. Their aim is to clarify certain definitions and thus avoid differences of interpretation which could lead to the Directive being implemented in different ways, available at: http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=6384.

¹¹¹ European Commission, First Report to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Article 13, 16 and 17 of Directive 2010/13/EU for the period 2009-2010, Promotion of European Works in EU scheduled and on-demand media services, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012DC0522>.

¹¹² According to the European Commission, nine national reports did not contain any information due to belated transposition of the AVMSD or late enforcement of the national legislation implementing the Directive. In addition, five member states reported the absence of registered or recognised on-demand services during the reference period. Amongst the member states that had implemented the Directive (i.e. imposed the obligation to promote European works in on-demand services), only six reports indicated that their legislation specified concrete measures.



4. Self and co-regulation

The national implementation of the provisions of the AVMSD concerning its material scope has mainly been set by primary law or bylaws of regulatory authorities. There are however some interesting examples of self- and co-regulatory tools that are worth exploring due to their impact on the issue of their scope.

As seen in Chapter 3, until 31 December 2015 the UK had established a co-regulatory system for on-demand AVMS, with the ATVOD¹¹³ responsible for the notification procedures of on-demand services and for the handling of complaints concerning these types of services. Other examples of self- and co-regulatory initiatives can be found, notably in Finland, Germany, Hungary and Ireland.¹¹⁴

4.1. Finland

Since 1 January 2014 the provision of on-demand AVMS in Finland is registered at the newly established National Audiovisual Institute (KAVI), which merged the previously established Media Education and Audiovisual Programmes Centre and the National Audiovisual Archive, and is subject to the Ministry of Education and Culture.¹¹⁵ A specific department, the Department for Media Education and Audiovisual Media (MEKU), is responsible for the supervision of the provision of audiovisual programmes (classification of films and protection of minors) and the coordination and promotion of national media education.¹¹⁶ The functions of this co-regulatory body are set out in the Act on Audiovisual Programmes.¹¹⁷

All AVMS providers are required to register with the provider registry of KAVI, by submitting a notification upon the commencement of provision of the service for economic purpose and on a regular basis. Following the notification, on-demand providers shall pay an annual supervision fee of

¹¹³ www.atvod.co.uk, now redirecting to the Ofcom landing page <http://consumers.ofcom.org.uk/tv-radio/on-demand-landing/>.

¹¹⁴ As a general reference see Machet E., "Exploring Regulatory Boundaries between Traditional and new Media", Background document for the 33rd EPRA meeting, Ohrid, 26-27 May 2011, <http://www.epra.org/attachments/ohrid-plenary-1-exploring-regulatory-boundaries-background-document>; Machet E., "Towards a Paradigm Shift? New Services and Scope: "What's in, what's out Revisited", Comparative background paper for the 35th EPRA meeting, Portorož, 31 May-1 June 2012, cit, www.epra.org/attachments/portoroz-plenary-1-new-services-and-scope-what-s-in-what-s-out-revisited-paper--2; de Bueger G., "Supervising On-demand Audiovisual Media Services: Best practices and Methodology", Comparative background document for the 38th EPRA meeting, Vilnius, 2-4 October 2013, <http://www.epra.org/attachments/vilnius-plenary-session-1-supervising-vod-services-final-comparative-document>.

¹¹⁵ <https://kavi.fi/en/>. Law no. 675 of 13 September 2013, <http://www.finlex.fi/sv/laki/alkup/2013/20130675>, repealed Law no. 711 of 17 June 2011, <http://www.finlex.fi/sv/laki/alkup/2011/20110711>, governing the previously competent Media Education and Audiovisual Programmes Centre, which at the time replaced the State film centre set up by Law no. 776 of 25 August 2000.

¹¹⁶ <https://kavi.fi/en/media-education-and-audiovisual-media>.

¹¹⁷ The functions of KAVI are set by Act no. 710 of 17 June 2011, Law on Audiovisual Programmes, <http://www.finlex.fi/fi/laki/kaannokset/2011/en20110710.pdf>.



400 EUR, based on the method and locality of offering.¹¹⁸ Whilst the registration and fee payment obligations do not apply to occasional providers, as organisers of an individual provision of an audiovisual programme or a bus operator showing audiovisual programmes in charter buses, all other regulations of the law, such as the obligation to classify and label, and to abide by the age limits, apply to occasional presentations as well.

4.2. Germany

Under the principle of "regulated self-regulation", the German Commission for the Protection of Minors (KJM) certifies voluntary self-regulation organisations, and controls whether their decisions are taken within their scope of assessment. The *Jugendmedienschutz-Staatsvertrag* (Interstate Treaty on the Protection of Minors - JMStV)¹¹⁹ regulates a specific procedure for the establishments of such bodies:

"(1) Organisations of voluntary self-regulation may be established for broadcast services and for telemedia¹²⁰ services.

(2) Under their statutory remit, certified organisations of voluntary self-regulation shall monitor adherence to the provisions of this Interstate Treaty and the statutes and guidelines issued thereunder by the affiliated providers."¹²¹

If a voluntary self-regulation organisation exceeds the scope for legal assessment, KJM can take legal measures. In addition, KJM develops statutes and directives which the self-regulation organisations must adhere to.

Even though restricted to the field of the protection of minors, the assessments have an impact on the issue of the scope, as they are restricted to services falling under the material scope of the AVMSD.

4.3. Hungary

A specific mention of self- and co-regulatory bodies and procedures has been made in the Law on Media Services and Mass Communication implementing the AVMSD in Hungary.¹²² This act provides

¹¹⁸ KAVI (Finnish media co-regulator), Instructions for providers of on-demand services of audiovisual programmes in Finland, 8 January 2016, https://kavi.fi/sites/default/files/documents/ohje_vod_en.pdf.

¹¹⁹ KJM (German self-regulatory body for the protection of minors), 13th Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia, 1 April 2010, http://www.kjm-online.de/fileadmin/Download_KJM/Recht/JMStV_Stand_13_RStV_mit_Titel_english.pdf.

¹²⁰ According to Art 2 (1) of Germany's Interstate Treaty on Broadcasting and Telemedia, "Telemedia" means "all electronic information and communications services, as far as they are not telecommunications services pursuant to Article 3 no. 24 of the Telecommunications Act, which consist entirely in the conveyance of signals across telecommunications networks or telecommunications-supported services pursuant to Article 3 no. 25 of the Telecommunications Act, or broadcasting pursuant to sentences (1) and (2)." See *Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV)* (Interstate Broadcasting Treaty), in the version of the 18th Amendment to the Interstate Broadcasting Treaties, available at: http://www.kjm-online.de/fileadmin/Download_KJM/Recht/18_RAendStV_01-01-2016.pdf.

¹²¹ KJM, Interstate treaty, cit, Article 19.

¹²² Act CLXXXV of 2010, Act on Media Services and Mass Communication, http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf



the legal basis for the provision of audiovisual media services and explicitly recognises the relevance of self- and co-regulation in complementing the law:

“The professional self-regulatory bodies comprising the media service providers, publishers of press products, intermediary service providers and media service distributors, as well as the various self- and co-regulatory procedures applied play an important role in the field of media regulation and in the application of and compliance with the provisions of this Act. Such bodies and procedures shall be respected in the application of this Act.”¹²³

4.4. Ireland

In 2014 a self-regulatory body named On-Demand Audiovisual Services Group (ODAS) was set up in Ireland with the specific function of developing a Code of Conduct further to the requirements of the Statutory Instrument implementing the AVMSD in 2010.¹²⁴

ODAS includes representative bodies of the advertising industry, broadcasters, telecommunications companies and other on-demand service providers, and is responsible for drafting the rules applicable to on-demand audiovisual media services, to be approved by the Irish broadcasting authority (BAI). The code was adopted in 2011 and sets out the minimum standards required of service providers, provides a complaints mechanism for consumers, and complies with European directives.¹²⁵ The BAI compliance committee and the Advertising Standards Authority for Ireland (ASAI) are responsible for the handling of the complaints.

As to the services, it is up to BAI to qualify the services as AVMS and ODAS has no role in the notification process, as on-demand AVMS providers are required to notify their activities before starting them. The notification process does not involve self-regulatory entities, but only public bodies:

“Audiovisual Media Service providers of on-demand audiovisual media services shall notify the Minister/Regulatory authority of their intention to provide or continue to provide such services in the manner specified by the Minister/Regulatory authority.”¹²⁶

¹²³ Act CLXXXV of 2010, cit, Article 8.

¹²⁴ Statutory Instrument (SI) No. 258 of 2010, www.bai.ie/wordpress/wp-content/uploads/SI-258-2010.pdf.

¹²⁵ ODAS (Irish media self-regulator), Code of Conduct On-Demand Audiovisual Media Services, www.bai.ie/?ddownload=5753.

¹²⁶ ODAS, Code of conduct, cit, part. 3.





5. Case law

Despite the great variety of topics being discussed in the current public debate around the issue of the material scope of the AVMSD, when exploring the specificities of the decisions actually taken by the CJEU and by national regulators, there seems to be a certain uniformity as to the topics being considered.

A first issue relates to the classification of newspaper websites providing video content. Most newspapers offer their readers an electronic version available online (either advertisement supported or on a subscription basis). In addition to the usual text-based journalistic reporting and commenting, these services are often enhanced by audiovisual content. The difficulty in these cases lies in assessing whether the provision of such audiovisual content is the principal purpose of the service or not, and whether a video section of a newspaper is a service distinct from the text-based service offered by the newspaper.

Another debated issue concerns UGC platforms/professional channels on UGC. It is commonly agreed that user-generated content platforms are host providers and should therefore be excluded from the scope of the AVMSD. Most user pages cannot be considered services (since they are not provided for remuneration) and therefore are also not regulated by the AVMSD. Professional channels on UGC, however, may in some cases fulfil all criteria necessary in order to be classified as on-demand AVMS.

A discussion that has apparently not yet led to any concrete case is that of download-to-own/download-to-rent services. These services (e.g. iTunes, Canalplay) usually offer the opportunity to download a digital audiovisual file that can be watched either on a temporary or permanent basis. Such services fall prima facie under the scope of the AVMSD; however some NRAs tend not to classify them as on-demand AVMS.¹²⁷

¹²⁷ See Machet E., “Towards a Paradigm Shift? New Services and Scope: “What’s in, what’s out Revisited”, Comparative background paper for the 35th EPRA meeting, Portorož, 31 May-1 June 2012, cit, www.epra.org/attachments/portoroz-plenary-1-new-services-and-scope-what-s-in-what-s-out-revisited-paper--2, which notes the divergence of opinions among NRAs concerning the legal classification of these two models, especially with regard to download-to-own services. Only the NRAs of Cyprus, Czech Republic, Hungary, Luxembourg, the Netherlands, Norway, Slovak Republic and the Belgian CSA expressed their view that they would tend to classify such services as on-demand AVMS. However, this does not necessarily mean that other NRAs would not classify such services as on-demand AVMS on a concrete case, it just shows that they have not made up their minds on this question yet.



5.1. The “material scope” in European case-law

5.1.1. Relevant cases from the CJEU

Research across the case-law of the CJEU on the material scope of the AVMSD brings very few results. Among all cases dealt with by the Court during more than 25 years of European audiovisual regulation, only two of them concern the material scope of the AVMSD, despite the fact that this should probably be the focal point of any interpretative issue concerning the application of a directive.

This implies that either the drafting of the rules has not created any real interpretative concern, also considering the absence of any interpretative communication from the European Commission in this domain and the relatively few guidance notes issued at national level,¹²⁸ or that member states have so far preferred to solve all interpretative issues internally without involving the only competent body in this regard, namely the CJEU. Now that the most heated debates seem to concern exactly the scope of the AVMSD, this state of affairs is indeed quite surprising.

5.1.1.1. Looking backwards while thinking about the future

The jurisprudence concerning the TWF Directive, as of 1989 and its revision in 1997, saw the Court contributing to the debate on the scope while dealing with the definition of broadcasting services¹²⁹ only in the *Mediakabel* case.¹³⁰ The judgment had a very significant impact on the debate on the definition of television services before the revision of the TVWFD in 1997, and there are some *obiter dicta* that might still be of significance under the current framework.

The case concerned a service called *Mr Zap*, which allowed the reception of a number of television broadcasts supplementing the programmes transmitted by the network supplier, in return for a monthly subscription, using a decoder and a smart card. If a “Mr Zap subscriber” wished to order a film from the catalogue, called *Filmtime*, he could make that order separately using his remote control or telephone and, after identifying himself using a personal identification code and paying by automatic debit, he would receive an individual key allowing him to view one or more of the 60 films on offer each month, at the times indicated on the television screen or in the programme guide. The determining features were that:

“Such a service consists of the broadcast of films intended for a television viewing public, and therefore does concern television programmes broadcast for an indeterminate number of potential television viewers.”¹³¹

These aspects meant the service in question fell under the definition of television broadcasting, considering that:

¹²⁸ See Chapter 3 of the present publication.

¹²⁹ The searches on the CJEU portal http://curia.europa.eu/jcms/jcms/i_6/, led to 34 hits concerning or at least mentioning the TVWFD, of which only one, Case C-89/04, concerned the definition of the material scope of the directive.

¹³⁰ CJEU, *Mediakabel BV v Commissariaat voor de Media*, Case C-89/04, Judgment of 2 June 2005, <http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0089&lang1=en&type=TXT&ancre=>. See Rossini M., “European Court of Justice: Case *Mediakabel BV / Commissariaat voor de Media*”, IRIS 2005-7/3, <http://merlin.obs.coe.int/iris/2005/7/article3.en.html>.

¹³¹ *Mediakabel*, cit, para 36.



“A service comes within the concept of ‘television broadcasting’ referred to in Article 1(a) of Directive 89/552 if it consists of the initial transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. The manner in which the images are transmitted is not a determining element in that assessment.”¹³²

What is noteworthy is the irrelevance of the manner in which the images are transmitted, an aspect that remains significant also for later jurisprudence when it comes to the definition of the service concerned.

The *RTL Belgium* case was a lost opportunity to provide some useful indication as to the concept of “editorial responsibility”, which is indeed one of the cornerstones of the definition of the services concerned by this directive.¹³³ Here the Court was asked by the Belgian Licensing and Control Authority of the Broadcasting Authority if the notion of effective control includes:

*“a company established in a Member State and licensed by the government of that Member State to provide an audiovisual media service [which] does in fact exercise such control, even though it delegates, with an option to subdelegate, to a third company established in another Member State, against payment of an indeterminate sum equal to the total advertising revenue generated by the broadcasting of that service, the actual production of all the programmes specific to that service, the communication to the public of programme scheduling information and the provision of financial and legal services, human resources, the management of infrastructure and other personnel-related services, and even though it is apparent that it is at the head offices of that third company that decisions are taken and implemented concerning the putting together of programmes and any deletions from or changes to the programming schedule in response to current events”.*¹³⁴

But the Court never addressed the issue, as the preliminary ruling had been raised by a body who could not legitimately raise the question to the CJEU as “a ‘court or tribunal’ for the purposes of Article 267 TFEU”.

5.1.1.2. The New Media Online Case

Anticipated as a possible deal-maker in one of the most heated discussions when it comes to the application of the AVMSD – namely the borders between press (excluded from the scope) and audiovisual services – the judgment of the CJEU in the *New Media Online* case¹³⁵ closed the chapter concerning newspapers’ portals and is, currently, the only case concerning the material scope of the AVMSD.¹³⁶

¹³² *Mediakabel*, cit, para 33.

¹³³ CJEU, *RTL Belgium SA*, Case C-517/09, Judgment of 22 December 2010, <http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0517&lang1=en&type=TXT&ancre=>.

¹³⁴ *RTL Belgium*, cit, para 30.

¹³⁵ CJEU, *New Media Online v Bundeskommunikationssenat*, Case C-347/14, Judgment of 21 October 2015, <http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0347&lang1=fr&type=TXT&ancre=>. See Ó Fathaigh R., “New Media Online v. Bundeskommunikationssenat”, IRIS 2015-10/3, <http://merlin.obs.coe.int/iris/2015/10/article3.en.html>.

¹³⁶ The searches on the CJEU portal http://curia.europa.eu/jcms/jcms/i_6/, led to seven hits concerning the AVMSD, of which only one, Case C-347/14, concerned the definition of the material scope of the directive.



5.1.1.2.1. The referring case from the Austrian court

On 9 May 2012 the Austrian media regulator KommAustria requested the Austrian company New Media Online to file a notification as AVMS provider for the Internet video section (<http://video.tt.com>) of the portal of the Austrian newspaper Tiroler Tageszeitung (www.tt.com). Following the refusal of the company to notify the service, claiming that it did not qualify as an AVMS, on the following 9 October 2012 KommAustria adopted a formal decision stating that the service met all the criteria set by current legislation to be considered an on-demand service.¹³⁷

This decision was appealed by New Media Online but upheld by the Bundeskommunikationssenat, which confirmed that the video section is a non-linear AVMS, considering that current legislation does not impose any minimum duration of the video clips present in a catalogue.¹³⁸ The company appealed this decision as well, this time to the Federal Administrative Court, which decided to suspend the procedure and request a preliminary ruling from the CJEU.¹³⁹

5.1.1.2.2. The ruling of the CJEU

In addressing the preliminary question raised by the Austrian judges, the CJEU included, as a matter of principle, video sections of newspapers' portals within the material scope of the Directive, reversing the opinion of the Advocate General.¹⁴⁰ Where the Advocate General meant that the need to interpret the notion of "programme" in a dynamic way would lead to the exclusion of web portals from its definition, considering the specific architecture of its multimedia content, the Court pointed to the fact that "a compilation of short videos can be compared to a complete schedule or a catalogue established by a traditional broadcaster", being that no provision of the AVMSD contains any requirement as to the length of a programme.

On the crucial issue concerning the assessment of the "incidentalness" of the concerned audiovisual services and their "complementarity" to the provision of press articles, the Court held that this should be done on a case-by-case basis, with the view of avoiding a situation where operators providing AVMS "might be able to use a multimedia portal in order to evade the legislation which is applicable to them in that area". For this reason the Court held that:

*"It is for the referring court to examine whether the service offered in the video subdomain has form and content which is independent of that of the written press articles of the publisher of an online newspaper. If so, that service falls within the scope of Directive 2010/13. If, on the other hand, that service appears to be indissociably complementary to the journalistic activity of that publisher, in particular as a result of the links between the audiovisual offer and the offer in text form, it does not fall within the scope of that directive."*¹⁴¹

¹³⁷ KommAustria (Austrian media regulator), Decision of 9 October 2012, http://www.rtr.at/en/m/KOA195012048/29200_KOA_1.950-12-048.pdf.

¹³⁸ Bundeskommunikationssenat (Austrian Federal Communications Senate), Decision of 13 December 2012, <http://www.bundeskanzleramt.at/DocView.axd?CobId=49930>.

¹³⁹ Verwaltungsgerichtshof (Austrian Federal Administrative Court), Decision of 26 June 2014, http://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2013030012_20140626X00/JWT_2013030012_20140626X00.pdf.

¹⁴⁰ *New Media Online*, Case C-347/14, Opinion of the Advocate general of 1 July 2015, <http://curia.europa.eu/juris/celex.jsf?celex=62014CC0347&lang1=fr&type=TEXT&ancre=>. See Ó Fathaigh R., "Advocate General considers newspaper website containing video not covered by AVMS Directive", IRIS 2015-8/3, <http://merlin.obs.coe.int/iris/2015/8/article3.en.html>.

¹⁴¹ *New Media Online*, cit, para 34.



In the concrete case, as explained by the referring Court, the website of the “Tiroler Tageszeitung online”¹⁴² featured articles from written press and included a video section¹⁴³ where it was possible to search a catalogue of video clips, which very often had no connection to the press articles published on the newspaper’s website. Commenting on this specific situation, the Court concluded that:

“Those factors tend to show that the service at issue in the main proceedings could be regarded as having form and content which is independent of that of the journalistic activity of the appellant in the main proceedings and, therefore, as constituting a distinct service from the other services offered by that appellant. Such an assessment is a matter for the referring court.”¹⁴⁴

The strong emphasis placed by the Court on the substantive approach¹⁴⁵ has a clearly stated anti-circumvention purpose:

“When carrying out the analysis, the fact that the audiovisual offer at issue is presented in the principal domain of the website concerned or in a subdomain of that website cannot be the decisive factor, so as not to open the way for the rules of Directive 2010/13 to be circumvented by designing that website to that end.”¹⁴⁶

With this caveat in mind, the Court created the conditions for avoiding the creation of a “an automatic ‘get out of gaol free’ card for newspaper proprietors”¹⁴⁷ but at the same time did not consider more specific issues, such as how to deal with “videos by certain bloggers or vloggers, for example, [which] could be classified as on-demand audiovisual media services, particularly if they conduct economic activity on a certain scale and target their programmes to the general public”¹⁴⁸ or “tolerated YouTube channels” depending on the approach of the national authorities.¹⁴⁹

5.1.1.2.3. The final decision of the Austrian court

Following the reasoning of the CJEU and sharing the conclusions drawn on the concrete case, the referring Federal Administrative Court decided on 16 December 2015 to reject the appeal of New Media Online, in this way confirming the original assessment of KommAustria that the video section of this newspaper portal is in fact to be considered an on-demand AVMS considering that the video clips are mostly unrelated to the press articles of the newspaper and constitutes therefore an autonomous activity.¹⁵⁰

¹⁴² The online newspaper “Tiroler Tageszeitung online” is accessible from <http://www.tt.com>.

¹⁴³ The video section allowing access to a catalogue of video clips was accessible from <http://video.tt.com>, which leads now to a blank page. The videos are currently embedded in the main page of the portal, and have no separate web address.

¹⁴⁴ *New Media Online*, cit, para 37.

¹⁴⁵ See Apa E. and Bellezza M., “Corte di Giustizia: verso un level playing field tra servizi di media audiovisivi e giornali online”, *MediaLaws*, 26 October 2015,

<http://www.medialaws.eu/corte-di-giustizia-verso-un-level-playing-field-tra-servizi-di-media-audiovisivi-e-giornali-online>.

¹⁴⁶ *New Media v Bundeskommunikationssenat*, cit, para 35.

¹⁴⁷ See Woods L., “Audiovisual Media Services Regulation and The ‘Newspaper Exception’”, *EU Law Analysis*, 15 October 2015, <http://eulawanalysis.blogspot.fr/2015/10/audiovisual-media-services-regulation.html>.

¹⁴⁸ See Kuchta R., “When the Internet competes with television”, *New Technologies*, January 2016, <http://www.wardynski.com.pl/biuletyn-nowych-technologii/2016-01/B10-EN-When-the-Internet-competes-with-television.pdf>.

¹⁴⁹ See Ruttig M., “Kontrollieren die Landesmedienanstalten bald das Internet?“, *Legal Tribune Online*, 21 October 2015, <http://www.lto.de/recht/hintergruende/h/eugh-urteil-c-34714-videos-onlinezeitung-anzeigespflichtig-audiovisueller-mediendienst>.

¹⁵⁰ Verwaltungsgerichtshof (Austrian Federal Administrative Court), Decision of 16 December 2015,



In the meantime the video section of the Tyrolean newspaper online edition is no longer operational, so there is likely to be no effect from the judgment, but the statement indeed remains important for future cases.

5.1.2. Intersections with the Court of Human Rights

Even if not in the same terms as the CJEU, the recent case-law of the European Court of Human Rights (ECtHR) has provided an interesting contribution to the debate when it comes to the classification of online services and of the pertaining responsibilities of online platforms.

5.1.2.1. The *Delfi* case

On 16 June 2015, the Grand Chamber of the European Court delivered a long-awaited final judgment in the case of *Delfi AS v. Estonia*, deciding on the liability of an online news portal for the offensive comments posted by its readers below one of its online news articles.¹⁵¹ It was the first case in which the ECtHR had been called upon to examine, from the perspective of the right to freedom of expression, a complaint about liability for user-generated comments on an Internet news portal.

The Court confirmed the findings of the Estonian domestic courts that the Delfi news platform was to be considered a provider of content services, rather than a provider of technical services, and that therefore it should have effectively prevented clearly unlawful comments from being published. The Court agreed that the Information Society Services Act transposing the E-Commerce Directive into Estonian law, including the provisions on the limited liability of ISPs, did not apply to the present case, since the latter related to activities of a merely technical, automatic and passive nature, while Delfi's activities reflected those of a media publisher running an Internet news portal. The Court emphasised that the case concerned a large, professionally-managed Internet news portal run on a commercial basis, which published news articles of its own and invited its readers to comment on them. The Grand Chamber agreed with the Chamber's finding that Delfi must be considered to have exercised a substantial degree of control over the comments published on its portal.

5.1.2.2. The MTE case

On 2 February 2016 the ECtHR held that a self-regulatory body (Magyar Tartalomszolgáltatók Egyesülete, MTE) and an Internet news portal (Index.hu Zrt) were not liable for offensive comments posted by their readers on their respective websites.¹⁵² Anonymous users of MTE and Index.hu had posted vulgar and offensive online comments criticising the misleading business practices of a real

http://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2015030004_20151216X00/JWT_2015030004_20151216X00.pdf. See Iacino G., "Administrative Court classifies video offering of Tyrol daily newspaper as audiovisual media service", IRIS 2016-3/4, <http://merlin.obs.coe.int/iris/2016/3/article4.en.html>.

¹⁵¹ ECtHR, Case of *Delfi AS v. Estonia*, 16 June 2015, [http://hudoc.echr.coe.int/eng?i=001-155105#{"itemid":\["001-155105"\]}](http://hudoc.echr.coe.int/eng?i=001-155105#{). See Voorhoof D., "Delfi AS v. Estonia (Grand Chamber)", IRIS 2015-7/1, <http://merlin.obs.coe.int/iris/2015/7/article1.en.html>.

¹⁵² ECtHR, Case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, 2 February 2016, [http://hudoc.echr.coe.int/eng?i=001-160314#{"itemid":\["001-160314"\]}](http://hudoc.echr.coe.int/eng?i=001-160314#{).



estate website. The ECtHR found that by holding MTE and Index.hu liable for the comments, the Hungarian courts had violated the right to freedom of expression. The present judgment is the first in which the principles set forth in the *Delfi* judgment were tested.

Referring to the *Delfi* judgment, the ECtHR considered that under Hungarian law a media publisher running a large Internet news portal for economic purposes (Index.hu) and a self-regulatory body of Internet content providers (MTE) could, in principle, be held liable for unlawful comments of third-parties. The Court confirmed that Internet news portals, in principle, must assume duties and responsibilities. However, because of the particular nature of the Internet, these duties and responsibilities may differ to some degree from those of a traditional publisher, notably as regards third-party content.

5.2. Decisions of regulatory authorities

5.2.1. Newspaper websites providing video content

The *New Media Online* judgment closed a chapter that has seen many member states become involved in the discussion of how to mark the borders between the expression of free press and regulated AVMS. Apart from Austria, as already explored, the most significant decisions so far have been adopted in Slovakia, Sweden and UK.

5.2.1.1. Slovakia

With quite a different sequence of events compared to the Austrian case, in which the proceedings started on the initiative of the media regulator, on 8 February 2010 the Slovak media regulator RVR received a notification from the company Petit Press as AVMS provider for the news portal www.sme.sk. On 13 April 2010 the regulator decided that the provided services did not fulfil the requirements necessary to qualify as an AVMS, because the video clips were essentially accompanying the press articles and could not be considered an autonomous service.¹⁵³

An opposite conclusion was reached two years later, when on 10 July 2012 RVR decided on a new notification received on 28 May 2012 from the same company, Petit Press, but this time concerning video services provided on the different web address (www.tv.sme.sk). Considering the different nature of the service, which now exclusively consisted of audiovisual content also made available on Samsung's Smart TVs, unrelated from the press articles and "TV-like", RVR qualified them as on-demand AVMS.¹⁵⁴

¹⁵³ RVR (Slovak media regulator), Decision no. 10-07/439 of 13 April 2010, <http://www.rvr.sk/sk/spravny?aktualitaId=1014>.

¹⁵⁴ RVR (Slovak media regulator), Decision no. 12-14/43.680 of 10 July 2012, <http://www.rvr.sk/sk/spravny?aktualitaId=1626>. See Polak J., "tv sme Considered On-demand Audiovisual Media Service", IRIS 2012-9/38, <http://merlin.obs.coe.int/iris/2012/9/article38.en.html>.



5.2.1.2. Sweden

As in Austria, the Swedish media regulator (Granskningsnämnden för radio och TV) took initiative and launched investigations on the audiovisual services provided on the online portals of some of the leading Swedish newspapers.¹⁵⁵

One of the first cases concerned an investigation into a possible case of product placement in cooking programmes made available on the service “24HD Play” provided by the Swedish newspaper Helsingborgs Dagblad on the website www.hd.se/24hd, a sub-domain of the newspaper’s portal www.hd.se. While deciding that the case was of no commercial relevance from the point of view of the application of advertising rules, the regulator decided that the service qualified as AVMS, considering that the provided audiovisual service was autonomous from the press articles.¹⁵⁶ This website is currently no longer operational, but has been replaced by www.hd.se/webb-tv, explicitly recognising its nature as web-tv.

Another investigation case concerned compliance with the rules on commercial communications in video games programmes, made available on the webpage www.aftonbladet.se/webbtv hosted on the webportal of the Swedish leading newspaper Aftonbladet. While concluding a case of a breach of sponsoring rules, the regulator qualified the service as AVMS also in the light of the autonomous character of the editorial decisions concerning the webtv.¹⁵⁷ In the meantime the website has been changed to <http://tv.aftonbladet.se/abtv/>, moving from a subdomain of the newspaper portal to a first level domain.

A third case also concerning compliance with advertising rules, but this time in a programme showing a gala prize ceremony made available on the video section www.dn.se/webbtv of the webportal of the Swedish newspaper DN (Dagens Nyheter). The media regulator concluded that the service actually qualified as an AVMS but did not violate the rules on commercial communications, also considering the autonomous budget of the audiovisual activities.¹⁵⁸

Also, in a fourth case, concerning two short videoclips of less than three minutes published on the website www.norran.se/norrantv of the Swedish newspaper Norran, the media regulator concluded that the service qualified as an AVMS, but without exploring the issue of the length of the programmes, the determining issue being that the videos had an autonomous character.¹⁵⁹

5.2.1.3. United Kingdom

During its time of operation¹⁶⁰, the co-regulatory body ATVOD intervened on various occasions on the topic of video sections on newspapers’ webportals. This caused a heated debate in the press¹⁶¹ and appeals to the media regulator Ofcom.

¹⁵⁵ See Ullberg E., and Plogell M., “Radio and Televisions Act Applies to Newspapers’ Web TV Services”, IRIS 2013-1/35, <http://merlin.obs.coe.int/iris/2013/1/article35.en.html>.

¹⁵⁶ Granskningsnämnden för radio och TV (Swedish media regulator), Decision no. 12/00777 of 29 October 2012, <http://www.radioochtv.se/CaseDecisions/206404.pdf>.

¹⁵⁷ Granskningsnämnden för radio och TV (Swedish media regulator), Decision no. 12/00778 of 29 October 2012, <http://www.radioochtv.se/CaseDecisions/206405.pdf>.

¹⁵⁸ Granskningsnämnden för radio och TV (Swedish media regulator), Decision no. 12/00779 of 29 October 2012, www.radioochtv.se/CaseDecisions/206406.pdf.

¹⁵⁹ Granskningsnämnden för radio och TV (Swedish media regulator), Decision no. 12/00780 of 29 October 2012, www.radioochtv.se/CaseDecisions/206407.pdf.

¹⁶⁰ See paragraph 3.1.3.3. of this publication.



Most cases – involving The Sun, Sunday Times Video Library, Telegraph TV, the Independent Video, FT Video, Guardian Video, Guardian YouTube, News of the World TV and Elle TV – were withdrawn because Ofcom requalified the video content as ancillary to news stories and features, and not as a “TV-like” standalone service.

Ofcom’s decision in *The Sun Video* case,¹⁶² while stating that the service provided could not as such be qualified as an AVMS because of the lack of “TV-likeness”, included some forward-looking remarks applicable should the features of the service evolve differently:

“Even if it is not doing so now, News Group’s provision of audio visual material might develop further still. Though by no means an exhaustive indication, that provision would be more likely to fall within the scope of regulation if, for example:

- a. it continues to be a separate collation or catalogue of audio visual material available on its own section of The Sun’s website;*
- b. it is presented to users as a distinct television service;*
- c. there are fewer access and content links between the written content and the audio visual material; and*
- d. more of the audio visual material was of greater duration and/or included complete programmes of the kind broadcast on linear television programme services.”¹⁶³*

This means that services so far considered to fall outside the scope of the AVMSD could be requalified according to the evolution of their features and consequently be addressed differently.

5.2.2. Professional channels on UGC platforms

5.2.2.1. United Kingdom

During ATVOD’s five years of activity significant attention was paid to the question of how to deal with professional channels hosted on platforms devoted to UGC.

In 2013 Ofcom overturned the conclusions of ATVOD in the *BBC Food YouTube* case concerning two short cooking video clips made available on a section of YouTube (www.youtube.com/user/BBCFood).¹⁶⁴ After considering both the form and the content of the provided audiovisual material, the provision of which is its principal purpose, Ofcom concluded that it “is not comparable to the form and content of linear television programme services” arguing that:

“These differences, in our view, would lead users to clearly distinguish between this type of web content and the linear catch-up service offered by the BBC on which viewers would

¹⁶¹ See Butterworth S., “Why video may kill self-regulation of the press”, *The Guardian*, 7 March 2011, <http://www.theguardian.com/law/2011/mar/07/video-self-regulation-press>.

¹⁶² Ofcom (UK media regulator), *The Sun Video*, Decision published on 21 December 2011, <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf>. See Sweney M., “The Sun wins appeal to stop its videos being monitored by regulators”, *The Guardian*, 21 December 2011, <http://www.theguardian.com/media/2011/dec/21/the-sun-video-regulator>.

¹⁶³ Ofcom (UK media regulator), *The Sun Video*, cit, para 186.

¹⁶⁴ Ofcom (UK media regulator), *BBC Food YouTube*, Decision published on 18 January 2013, <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/bbc-food-youtube-decision.pdf>. See Goldberg D., “ATVOD’s Rulings on What is a “Video-on-Demand” Service Overturned”, IRIS 2013-4/14, <http://merlin.obs.coe.int/iris/2013/4/article14.en.html>.



*watch full-length BBC Food programmes. Users would not, in Ofcom's view, be likely to regard the Service as amongst their competing options when they want to watch television programmes. Ofcom also considers this position likely to reflect the expectations of audiences with regard to regulatory protection.*¹⁶⁵

A similar conclusion was reached in the *Top Gear YouTube* decision concerning two short motor show video clips made available on a section of YouTube (www.youtube.com/user/TopGear).¹⁶⁶

Ofcom also overturned ATVOD's decision in the *Channel Flip* case, concerning short video clips made available on the Internet (www.channelflip.com).¹⁶⁷ After examining both the form and content, Ofcom held that:

*"Taken as a whole, the form and content of Channel Flip material at the relevant time was not sufficiently comparable with that of programmes normally included in (linear) television programme services. It was, consequently, relatively unlikely to be associated by users with linear television and would not, therefore, compete for audiences with such services."*¹⁶⁸

¹⁶⁵ Ofcom (UK media regulator), *BBC Food YouTube*, cit, para 52.

¹⁶⁶ Ofcom (UK media regulator), *Top Gear YouTube*, Decision published on 18 January 2013, <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/top-gear-youtube-decision.pdf>. For further details on this decision, see Cabrera Blázquez F.C., "On-demand services: Made in the likeness of TV?" in IRIS Plus 2013-4, "What is an On-demand Service?", www.obs.coe.int/documents/205595/264635/IRIS_plus_2013-4_text_EN_%28with_cover%29_BAT_optim.pdf.

¹⁶⁷ Ofcom (UK media regulator), *Channel Flip*, Decision published on 14 December 2012, http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Channel_Flip_scope_appeal.pdf. See Prosser T., "Decision of Co-Regulatory Body on Scope of 'On-demand Programme Service' Overturned", IRIS 2013-2/27, <http://merlin.obs.coe.int/iris/2013/2/article27.en.html>.

¹⁶⁸ Ofcom (UK media regulator), *Channel Flip*, cit, para 57.



6. State of play

As described in Chapter 1 of this publication, significant changes have taken place in the market since the adoption of the TVWFD in 1989 and the entry into force of the AVMSD in 2007. As the Internet changes the way audiovisual media is consumed, new patterns of distribution of audiovisual content have emerged and viewers can increasingly access a new range of on-demand content from all over the EU on a greater range of mobile devices. The traditional distinctions between linear and non-linear content services are blurring. On the other hand, the structure of the audiovisual market has evolved with an ever greater diversity of players raising new competition issues.

In view of these developments, all relevant stakeholders have questioned whether the regulatory approach taken in the AVMSD is still fit to address the new converged environment, or whether it should be modernised in order to continue fulfilling the audiovisual public policy goals. The Commission has been working intensively on this question in recent years through several evaluation and consultation activities in relation to the AVMSD that started in 2013, and which culminated in the presentation of the proposal of amendments to the AVMSD of 25 May 2016. This chapter will take into account both the preparatory activities and the main changes envisaged by the Commission's proposal.

6.1. Evaluation and consultation activities on the AVMSD

6.1.1. The European Commission

In 2013, the Commission published the Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values"¹⁶⁹ and invited stakeholders to share their views on the changing media landscape and borderless Internet, in particular on market conditions, interoperability and infrastructure, and the implications for EU rules.

Among the questions raised in the Green Paper, the Commission asked stakeholders whether they considered that the regulatory differentiation between linear and non-linear services was still justified in a converged media environment. It also enquired about the need to adapt the definition of AVMS providers and/or the scope of the AVMSD, in order to make those currently falling outside its scope subject to part or all of the obligations of the AVMSD, or if there were other ways to protect values, such as through self/co-regulation. Furthermore, the Commission canvassed the views of the industry on the impact of a change of the audiovisual regulatory approach on the country of origin principle and therefore on the single market. It also questioned the relationship

¹⁶⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:en:PDF>.



between the provisions of the AVMSD and the E-Commerce Directive in an increasingly converging audiovisual landscape.

There were no clear tendencies among respondents as to which policy options to give priority to. Some respondents advocated that the AVMSD should be broadened to encompass services that are either outside of the definition given by the Directive and/or those that fall outside its geographical scope. Other cautioned against broadening and argued that this approach was not justified and would prejudice innovation. Many respondents raised the question of self- and co-regulation as a possible way forward.

Concerns were raised, in particular, in relation to the two-tier approach of the protection of minors, with many respondents questioning the status quo, although no clear consensus emerged from the responses.¹⁷⁰

More recently, the revision of the AVMSD was included as a key priority of the digital Single Market strategy, as is reflected in the Commission's Communication "A Digital Single Market Strategy for Europe" adopted in May 2015.¹⁷¹ The Commission announced as part of its strategy that it will examine the functioning of the rules currently in force and "*...(it) will review the Audiovisual Media Services Directive with a focus on its scope and on the nature of the rules applicable to all market players, in particular measures for the promotion of European works, and the rules on protection of minors and advertising rules.*"

6.1.2. The Council of the EU

The Council has also actively participated in the discussions on the revision of the AVMSD. Thus, the Council conclusions of the Italian Presidency of the EU invited the Commission in 2014 to "*urgently complete the exercise of the review of the AVMSD in the light of the rapid technological and market changes resulting from the digital shift, and on the basis of the outcome of this review submit an appropriate proposal for the revision of this Directive as soon as possible, in respect of the principle of subsidiarity.*"¹⁷²

6.1.3. The European Parliament

On the European Parliament's side, two own-initiative reports were adopted in relation to the review of the AVMSD. The first of these reports, "Connected TV"¹⁷³ published in July 2013, stresses that technical media convergence has now become a reality, particularly for broadcasting and the Internet, and European media, culture and network policy must adapt the regulatory framework to the new conditions and ensure that a uniform level of regulation can be established and enforced.

¹⁷⁰ For more details about the outcomes of the Green Paper, see the feedback document and executive summary of the replies published by the Commission in September 2014, <https://ec.europa.eu/digital-agenda/en/news/publication-summaries-green-paper-replies>.

¹⁷¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM/2015/0192 final, 6.5.2015, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192>.

¹⁷² www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/145950.pdf.

¹⁷³ European Parliament resolution of 4 July 2013 on connected TV, Rapporteur MEP Petra Kammerevert (S&D, DE), www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0329&language=EN&ring=A7-2013-0212.



According to the European Parliament, the advancement of technological developments leads inevitably to what is to some extent only an apparent increase in user autonomy, and there is therefore a growing need to ensure protection of exclusive rights and integrity of content. The report stresses that the AVMSD provisions do not yet reflect ongoing technological convergence and that the graduated regulation, which differentiates between television programmes (including webcasting and live streaming), and on-demand AVMS will become less important in its existing form. This is because differently regulated information and communications services are available on one and the same device, including services which do not fall within the scope of the AVMSD but of the E-Commerce Directive. This situation may result, according to the European Parliament, in unequal competitive conditions and unacceptable discrepancies in the protection of users.

The second report, "Preparing for a Fully Converged Audiovisual World"¹⁷⁴ published in March 2014, also calls for a review of the AVMSD. The European Parliament considers that "...similar content on the same device requires a uniform, flexible, user-friendly and accessible legal framework which is technology-neutral, transparent and enforceable". It calls on the Commission to ensure "that platforms are operated in a way which accords with market conditions, entailing fair competition". In particular, the European Parliament recommends that the Commission examine the extent to which the linearity criterion is preventing the regulatory objectives of the Directive from being attained in many areas of the converged world.

6.1.4. The European Economic and Social Committee

It is also worth mentioning the Opinion adopted by the European Economic and Social Committee (EESC) in September 2013 on the Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values".¹⁷⁵ The EESC also calls on the Commission to conduct an impact assessment to consider whether, in the light of the developments in all AVMS accessible to European citizens, the scope of the AVMSD is still relevant.

6.1.5. Parallel initiatives

A number of parallel initiatives announced in the framework of the Digital Single Market Strategy for Europe are also potentially relevant to the revision of the AVMSD, some of which were already carried out in 2015:

- a reform of the EU regulatory framework for electronic communications via Commission proposals to be presented in 2016, and aiming to ensure, amongst other things, consumer protection and a level playing field for market operators;

¹⁷⁴ European Parliament resolution of 12 March 2014 on Preparing for a Fully Converged Audiovisual World, Rapporteur MEP Sabine Verheyen (EPP, DE),

www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0232&language=EN&ring=A7-2014-0057.

¹⁷⁵ European Economic and Social Committee, Preparing a fully converged Audio-visual World: Growth, creation and values (Green Paper) www.eesc.europa.eu/?i=portal.en.ten-opinions.28469.



- a copyright reform to ensure better access to digital content via Commission legislative proposals to be tabled by spring 2016;¹⁷⁶
- a comprehensive assessment of the role of platforms and online intermediaries, through a Public consultation¹⁷⁷ which was carried out between September 2015 and January 2016. The aim of the consultation was to better understand the social and economic role of platforms, market trends, the dynamics of platform-development and the various business models underpinning platforms. According to the preliminary trends observed,¹⁷⁸ collaborative economy service providers, platforms and public authorities favour more guidance and better information on the application of existing rules as a policy response. “Traditional” service providers that still mainly operate without extensive involvement of online platforms favour new rules for the collaborative economy. The Commission announced that by spring 2016 it will publish a full report with a comprehensive assessment of the role of online platforms and online intermediaries;
- a Public consultation¹⁷⁹ on the Satellite and Cable Directive¹⁸⁰ was carried out by the Commission during autumn 2015, to assess the need to tackle further measures to ensure enhanced cross-border access to broadcasters' services in Europe.

6.2. A media framework for the 21st century

6.2.1. The REFIT exercise

As announced in the EU Digital Single Market Strategy and in the Work Programme 2015 of the Commission,¹⁸¹ a proposal will be tabled in 2016 that will scrutinise the scope of the Directive and the nature of the rules applicable to all market players. Accordingly, in 2015 the Commission started a broad assessment of the AVMSD via the new Regulatory Fitness and Performance Programme (REFIT).¹⁸² The REFIT evaluation process aims to identify burdens, gaps and inefficient or ineffective measures, including possibilities for the simplification or repeal of existing regulation.

As part of this exercise, during summer 2015 the Commission carried out a public consultation on "Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework

¹⁷⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a modern, more European copyright framework, 9 December 2015, COM(2015) 626 final, http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=12526.

¹⁷⁷ Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, from 24/09/2015 to 06/01/2016, <http://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>.

¹⁷⁸ <https://ec.europa.eu/digital-agenda/en/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

¹⁷⁹ Consultation on the review of the EU Satellite and Cable Directive, from 24/08/2015 to 16/11/2015, <https://ec.europa.eu/digital-agenda/en/news/consultation-review-eu-satellite-and-cable-directive>.

¹⁸⁰ Council Directive 93/83/EEC of 27 September 1993.

¹⁸¹ Annex 3 to COM (2014)910 final of 16 December 2014, http://ec.europa.eu/atwork/pdf/cwp_2015_refit_actions_en.pdf.

¹⁸² For more details on the REFIT process, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “EU Regulatory Fitness”, COM(2012) 746 final of 12 December 2012, http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2013_en.pdf. and Commission Staff Working Document, “Regulatory Fitness and Performance Programme (REFIT): Initial Results of the Mapping of the Acquis”, SWD(2013) 401 final of 1 August 2013, http://ec.europa.eu/smart-regulation/docs/reg_fitn_perf_prog_en.pdf.



for the 21st century".¹⁸³ Through this new consultation, the Commission sought input from stakeholders on the functioning and impact of the AVMSD and on policy options for the future of the Directive. As far as the scope of application of the Directive is concerned, the overall preliminary trends¹⁸⁴ show a convergence of views regarding the need for certain changes to the rules.

6.2.2. The European Regulators Group for AVMS (ERGA)

The Commission also relies for the REFIT exercise on the input from the national regulatory authorities, through the European Regulators Group for Audiovisual Media Services (ERGA).¹⁸⁵ According to a report published by a sub-group of ERGA chaired by Ofcom (UK) on the material jurisdiction of the AVMSD, several recommendations were presented to the Commission in January 2016 on the way the AVMSD should evolve.¹⁸⁶ The ERGA report identifies two main questions that should be addressed in the policy discussions in relation to the material scope of the Directive, namely: the types of services to be covered by the AVMSD and the criteria that are used to define “editorial responsibility”; and the rules that should apply to these services.

Concerning the services to which the Directive applies, ERGA recommends a review of the cumulative criteria that are currently provided in the AVMSD¹⁸⁷ for determining whether a service constitutes a regulated on-demand AVMS. According to EU media regulators, the growth of new and innovative services containing audiovisual content, as well as new intermediaries in the on-demand chain of distribution¹⁸⁸ make it more challenging to determine which services fall within the scope of the Directive and to apply the “TV-like” criteria.

Furthermore, ERGA recommends that the Commission review and clarify the criteria of the “principal purpose of a service” in the AVMSD, and identify those that may become problematic in a context where new types of hybrid online services are offered.

It also considers that the notion of “editorial responsibility” and “effective control” (Recital 25 AVMSD) would require further clarification through guidelines, especially in cases where more than one person has some editorial control in the offering of an audiovisual on-demand media service.

¹⁸³ European Commission, Consultation on Directive 2010/13/EU on audiovisual media services (AVMSD) - A media framework for the 21st century, <https://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st>.

¹⁸⁴ The public consultation gathered a total of 434 replies.

¹⁸⁵ ERGA was established by the European Commission on 3 February 2014. The Group advises the Commission in implementing the EU's Audiovisual Media Services Directive (AVMSD) in a converged media age. It is composed of 28 heads or high level representatives of the independent national regulatory authorities for AVMS nominated by each Member State. Iceland, Lichtenstein, Norway, EPRA and the European Audiovisual Observatory were also invited in their capacity as observers. ERGA coexists with other cooperation networks whose objectives and mode of functioning are complementary, the largest of them being the EPRA, <http://ec.europa.eu/digital-agenda/en/news/commission-decision-establishing-european-regulators-group-audiovisual-media-services>.

¹⁸⁶ http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=13287.

¹⁸⁷ The provision of “TV-like programme”, the “principal purpose” of the service, and the definition of a media service provider and their editorial responsibility.

¹⁸⁸ According to ERGA report, new services include: “mixed media” services which combine elements of live streaming and/or on-demand material with other content like archive of photographs or text offerings; “hybrid” services which blend elements of linear and non-linear content distribution; open online sharing platforms combining short form and user-generated content and/or traditional broadcast services; or delivery of content “over the top” (OTT).



Finally, the role of audiovisual platforms is also raised by EU regulators which recommend that the Commission conduct a comprehensive assessment on the role of these platforms and on whether a new set of specific rules would be needed to supplement them.

In general, ERGA recommends that any new criteria and/or guidance from the Commission that would extend the scope of the AVMSD and impose specific rules on media service providers should only be permitted for those audiovisual services that are important for society and democracy, and if a more level playing field is achieved. In addition, any extension of the scope of the AVMSD should take into account whether any “new” services to be covered are already subject to other regulatory frameworks, e.g. the E-Commerce Directive and the interactions between these frameworks.

Concerning the level of regulation required, the converged environment raises the question of the need for the graduated regulatory approach enshrined in the AVMSD and based on the mode of delivery of the service. First, the criterion of control of the user over the content is debatable as the same content may now be accessed from different platforms, and different types of media services are accessible via the same interface. Secondly, the criterion evaluating the impact of VoD services on society (Recital 58 AVMSD) seems no more applicable in a context of increased consumption of VoD services. Finally, on a competitive level, the growing importance of audiovisual on-demand media services exacerbates the need to provide a level playing field between all actors.

6.3. The Commission’s amendment proposal of 25 May 2016

On 25 May 2016 the European Commission made public a proposal to amend the AVMSD.¹⁸⁹ As the Commission noted in its press release, the aim of the proposal is:

*“to achieve a better balance of the rules which today apply to traditional broadcasters, video-on-demand providers and video-sharing platforms, especially when it comes to protecting children. The revised AVMSD also strengthens the promotion of European cultural diversity, ensures the independence of audiovisual regulators and gives more flexibility to broadcasters over advertising”.*¹⁹⁰

The main changes pertain to the following aspects:

- Scope: apart from the removal of the principle of the “TV-likeness”, video-sharing platforms are to a certain extent subject to the Directive;
- Country of origin: this principle is maintained, transparency obligations are reinforced, and the procedures for assessing jurisdiction are simplified;
- Protection of minors: the two-tier approach is replaced by common rules concerning content that “may impair”, and a provision that special measures must be put in place for the most harmful content;
- Incitement to hatred: there is a reinforcement of the grounds for prohibiting hate speech;

¹⁸⁹ European Commission, 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 concerning the provision of audiovisual media services in view of changing market realities, 25 May 2016, COM (2016) 287, <https://ec.europa.eu/digital-single-market/en/news/proposal-updated-audiovisual-media-services-directive>.

¹⁹⁰ European Commission, Press release, “Commission updates EU audiovisual rules and presents targeted approach to online platforms”, 25 May 2016, http://europa.eu/rapid/press-release_IP-16-1873_en.htm.



- European works: the obligations on broadcasters are maintained, while those on non-linear services are reinforced, also with regard to targeting countries;
- Commercial communications: there is a relaxation of the rules, but also a reinforcement of self- and co-regulatory codes;
- Audiovisual regulators: the principle of independence is recognised and ERGA will play a bigger role, including in assessing jurisdiction and adopting Union codes.

The following sections provide a short overview of the most relevant changes concerning the scope of the AVMSD.

6.3.1. What is going to change in the material scope of the amended AVMSD

As mentioned above, under the amendment proposal to the AVMSD, the criteria traditionally used to define audiovisual media services, such as the “principal purpose” of providing programmes or the criterion of “TV-like”, will evolve to adapt to the new context. Other concepts, such as the “editorial responsibility” used to limit the scope of the AVMSD, are being revisited in order to include new types of services.

More specifically, according to the proposal, *“a service [...] where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, in order to inform, entertain or educate, to the general public by electronic communications networks”* will qualify as audiovisual media service (new Article 1.1 (a) (i)). This definition applies to both linear and non-linear services.

The definition of a “programme” is also modified and there is no longer reference to the “TV-like” criterion. Instead, the Commission provides concrete examples and adds “videos of short duration” to the existing list which comprises feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama (new Article 1.1.(b)).

In Recital 3, the proposal details that the “principal purpose” requirement should also be considered to be met *“if the service has audiovisual content and form which is dissociable from the main activity of the service provider, such as stand-alone parts of online newspapers featuring audiovisual programmes or user-generated videos where those parts can be considered dissociable from their main activity”*, in application of the *New Media Online* judgment.¹⁹¹ The Commission expressly excludes social media services, except if they provide a service that falls under the definition of a video-sharing platform.

On the other hand, new services which according to the Commission are not editorially responsible will enter into the scope of the AVMSD. This is the case for video-sharing platform (VSP) services, which are defined as (new Article 1.1 (aa):

“A service [...] which meets all of the following requirements:

(i) the service consists of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility;

¹⁹¹ See paragraph 5.1.12. of this publication.



(ii) the organisation of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing;

(iii) the principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate;

(iv) the service is made available by electronic communication networks (...)."

According to the proposal, "user-generated video" means "a set of moving images with or without sound constituting an individual item that is created and/or uploaded to a video-sharing platform by one or more users" (new Article 1.1. (ba)). "Video-sharing platform provider" is defined as "the natural or legal person who provides a video-sharing platform service" (new Article 1.1 (da)).

In practice, the concept of "editorial responsibility" seems to be decreasingly relevant in relation to the material scope of the AVMSD, as illustrated in Recital 3 of the amended AVMSD:

(...) "A service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity. As such, channels or any other audiovisual services under the editorial responsibility of a provider may constitute audiovisual media services in themselves, even if they are offered in the framework of a video-sharing platform which is characterised by the absence of editorial responsibility. In such cases, it will be up to the providers with editorial responsibility to abide by the provisions of this Directive".

The Commission considers that an important share of the content stored on VSPs is not under the editorial responsibility of the VSP provider. However, it acknowledges that these providers intervene in some way in the organisation of the content, programmes or user-generated video, and that this intervention is not merely the result of automatic means or algorithms.

There is also an extension of the geographical scope, since the proposal allows the imposition of financial contributions on on-demand services established in other member states, if they are targeting another country. In this case, the targeted member state can extend its jurisdiction and include in its scope of intervention the concerned service, but the definition of the service as such has to be assessed according to the same criteria applied to AVMS in general.¹⁹²

6.3.2. Towards a different two-tier regulatory approach

Under the Commission's amendment proposal, the two-tier regime will be maintained with regard to the protection of minors, but the line will be drawn between audiovisual media services as a whole (comprising both linear and non-linear services) and VSP services.

The distinction between content that "might *seriously* impair" and that is "*likely* to impair" the development of minors, as well as the different regimes associated with the content depending on whether it is linear or non-linear in nature, gives way to new unified and simplified standards. These standards are applicable to all audiovisual media services, and are based on programmes that "*may impair the physical, mental or moral development of minors*". Member states shall take

¹⁹² See Cabrera Blázquez F.J., Cappello M., Grece C., Valais S., *Territoriality and its impact on the financing of audiovisual works*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015.



appropriate measures to ensure that minors will not normally hear or see these programmes (new Article 12), regardless of whether such programmes are shown by TV broadcasters or provided by on-demand media service providers. Self- and co-regulation are highly encouraged in this field, although the minimum harmonisation approach allows member states to take stricter measures if they so wish.

As far as VSP services are concerned, the Commission requires member states to ensure that the VSP providers take appropriate measures against harmful content (in order to protect minors) and content inciting violence or hatred (in order to protect all citizens). However, under the new proposal those measures would relate to the organisation of the content and not to the content as such, due to the providers' involvement with the content stored on video-sharing platforms. It is therefore an obligation of means and not of result. Furthermore, the Commission makes it clear that VSP providers will in practice continue to benefit from the exemption from liability regime provided under the E-Commerce Directive as information society services, and that no new monitoring obligations shall be imposed on them. The Commission thus encourages member states to involve these platforms through co-regulation, and proposes a set of new measures to that end (new Article 28a).

In contrast to the general regime applied to AVMS, the Commission provides for a maximum harmonisation approach in this field (Article 28a (5)). Nonetheless there is a possibility of the introduction of stricter rules (Recital 30) in the case of illegal content, and on a voluntary basis:

“With a view to ensuring a clear and consistent approach in this regard across the Union, Member States should not be entitled to require video-sharing platform providers to take stricter measures to protect minors from harmful content and all citizens from content containing incitement to violence or hatred than the ones provided for in this Directive. However, it should remain possible for Member States to take such stricter measures where that content is illegal, provided that they comply with Articles 14 and 15 of Directive 2000/31/EC, and to take measures with respect to content on websites containing or disseminating child pornography, as required by and allowed under Article 25 of Directive 2011/93/EU of the European Parliament and the Council. It should also remain possible for video-sharing platform providers to take stricter measures on a voluntary basis.”¹⁹³

In addition, as far as the promotion of European works is concerned, a two-tier regulatory approach is maintained between traditional linear services and on-demand audiovisual media services. However, more stringent requirements can be seen for non-linear providers, who will have to comply with new obligations in terms of the share of European works and prominence in catalogues (new Article 13.1). Member states may also set out financial contribution obligations on European production, and these can also concern providers established outside the jurisdiction of the state in question in the case of targeting services (new Article 13.2). In this case the contributions must be limited to the revenues earned in the targeted member state, to be identified on the basis of a set of *“indicators such as 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”* (Recital 23).

With respect to audiovisual commercial communications, the introduction of an increased flexibility of the rules for TV broadcasting indicates the same trend towards an alignment of the rules for all audiovisual media services.

¹⁹³ Recital 30 of the amendment proposal, COM (2016) 287.



6.4. Concluding remarks

The upcoming reform of the AVMSD is seeing many institutions at work, both at the national and European level. The issues at stake are numerous, ranging from the country of origin principle to the independence of national regulators, from the protection of minors to measures against hate speech. However, above all of these remains the material scope of the Directive itself. This is crucial in order to establish which service providers will be subject to the special rules laid down therein, the main question being how to deal with the distribution of audiovisual content on Internet platforms. The choices that will be made will have a direct impact on the question of responsibility of the providers for the content they distribute, both own and third-party.

Policy makers can certainly get some indication about what is keeping national authorities busy from the guidance notes and the case-law that have been developed so far. Some trends are already easily identifiable, but many questions have not yet been settled. Should online platforms, which are incidentally still to be defined, be included in the AVMSD, this is likely to have an impact on the actual audiovisual market. Some economic activities, currently subject to the less intrusive system of the E-Commerce Directive, might become less attractive, but the advantages in terms of legal certainty as to who is responsible for the content distributed online may be a significant counterweight.

The proposal of amendments to the AVMSD presented by the Commission on 25 May 2016 will now undergo the scrutiny of the European Parliament and the Council. From an initial reading there seem to be some aspects concerning the scope that would still warrant some further reflection, especially concerning responsibility issues. As briefly outlined above, the main changes concern:

- the new definition of “audiovisual media services”, with the inclusion of “dissociable sections thereof”, which remain “under the editorial responsibility” of an AVMS;
- the new definition of “programmes”, with the inclusion of “videos of short duration”;
- the inclusion in the scope of video-sharing platform services that store both programmes and user-generated videos, for which the VSP provider “does not have editorial responsibility”;
- the definition of “user-generated video”, which are created and/or uploaded to a VSP by the users.

Without prejudice to the obligations deriving from the E-Commerce Directive, which remain unchanged, the set of changes introduced by the Commission’s proposal would result in the following matrix:

Table 3: The AVMSD Matrix

WHICH SERVICES	WHAT IS DISTRIBUTED	WHO IS RESPONSIBLE
Audiovisual media services	Programmes (also dissociable services and short videos)	AVMS provider (editorial responsibility)
Video-sharing platforms	Large amount of programmes and user-generated videos (principal purpose)	VSP provider (obligations of means) and users
Other info-soc services	Small amount of audiovisual content (not principal purpose)	E-commerce providers (liability exemption) and users

Source: European Audiovisual Observatory



How this matrix will work in practice will depend on how far the concept of editorial responsibility will be stretched, considering that this concept remains the cornerstone for media regulation:

- all audiovisual content that is subject to the ex ante objective responsibility, enshrined by editorial responsibility, would fall under the scope of the provisions applicable to AVMS (Chapters II and III),
 - on-demand services would additionally be subject to Chapter IV, and
 - television broadcasting would additionally be subject to Chapters V-IX;
- video-sharing platforms would be exempted from editorial responsibility and subject only to the obligations of means laid down by the maximum harmonisation provisions in Chapter IX.

As not all services are easy to define, and some will have to be re-assessed over time as their natures potentially change, this construction might result in some uncertainty as to the applicable rules. This is not ideal in the case of restrictions to freedom of expression.

A different issue concerns how the obligations on VSPs are to be defined in practice. The proposal sets out an obligation on the VSP to “take appropriate measures” in the fields of protection of minors and of incitement to violence or hatred. It further identifies the criteria for the evaluation of the appropriateness of the measures, of which it also provides an example list. The measures should be implemented through co-regulatory systems, which are not mandatory but are left as a recommended option. It is then for the national regulators within ERGA to assess if the measures that have been implemented by the VSP are appropriate, and to ensure their enforcement.

How this assessment will concretely develop is likely to depend on a strong cooperation between all involved stakeholders, who will now have to discuss the issues in a completely new light.

