



## 5.22. NL – The Netherlands – National legal summary<sup>260</sup>

The provisions of the revised Audiovisual Media Services Directive (AVMSD) related to video-sharing platforms (VSPs) have been transposed into the Media Act 2008.

### 5.22.1. Applicable regulatory framework

Relevant legislation includes the following:

Primary legislation:

- Amendments to the Media Act 2008 (*Mediawet 2008*).<sup>261 262</sup>

### 5.22.2. Definitions and scope

This section aims at identifying the relevant definitions related to VSPs stemming from the transposition of the revised AVMSD as well as elements of interpretation of the main concepts present in those definitions.

**Table 42. Definition of the main concepts related to VSPs**

Concept	Existence of a definition
VSP service	Yes.
VSP provider	Yes.
User-generated video	Yes.
“Principal purpose”	No.
“Dissociable section”	No.
“Essential functionality”	No.

Source: Dutch response to European Audiovisual Observatory standardised survey

<sup>260</sup> The factsheet on the Netherlands incorporates the feedback received from Marcel Betzel, *Commissariaat voor de media*, during the 2021 and 2022 checking rounds with the national media regulatory authorities.

<sup>261</sup> [https://www.eerstekamer.nl/behandeling/20201021/publicatie\\_wet\\_4/document3/f=/vld2h6eh0jxl.pdf](https://www.eerstekamer.nl/behandeling/20201021/publicatie_wet_4/document3/f=/vld2h6eh0jxl.pdf)

<sup>262</sup> A link to the continuing text of the Media Act 2008: <https://wetten.overheid.nl/BWBR0025028/2020-11-01>.



#### 5.22.2.1. VSP service

Article 3a.1 of the Media Act 2008 provides the definition of a VSP service in line with the text of the revised AVMSD:

- a service or a dissociable section thereof,*
- a. where the principal purpose or an essential functionality of the service is devoted to providing programmes or user-generated videos to the general public in order to inform, entertain or educate,*
  - b. for which the video-sharing platform provider does not have editorial responsibility,*
  - c. the organisation of which is determined by the video-sharing platform provider by automatic means or algorithms, and,*
  - d. which is offered by means of a public electronic communications network within the meaning of Article 1.1 of the Telecommunications Act.*

#### 5.22.2.2. VSP provider

Article 3a.1 of the Media Act 2008 provides for the definition of a VSP provider by transposing the text of the revised AVMSD verbatim, as follows: “the natural or legal person who provides a video-sharing platform service.”

#### 5.22.2.3. User-generated video

Article 3a.1 of the Media Act 2008 provides for the definition of user-generated video by transposing the wording of the AVMSD verbatim, as follows:

- a set of moving images, with or without sound, constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user.*

#### 5.22.2.4. “Principal purpose” or “dissociable section” of a VSP service

There are no details in the primary legislation or in other texts (secondary legislation, by-laws, recommendations, caselaw, etc.) on how to interpret these concepts.

#### 5.22.2.5. “Essential functionality” of a VSP service

There are no details in the primary legislation or in other texts (secondary legislation, by-laws, recommendations, caselaw, etc.) on how to interpret these concepts.



### 5.22.3. Obligations and measures imposed on VSP providers

The revised AVMSD provides for the extension of its scope to cover VSPs. It introduces obligations on these players to take appropriate measures to protect minors from harmful content which may impair their physical, mental or moral development; to protect the general public from illegal content and content that incites to violence or hatred; and to respect certain obligations around commercial communications (Article 28b (1) and (2) of the revised AVMSD). To fulfil with these obligations, member states are required to ensure compliance with the measures listed in Article 28b (3) of the revised AVMSD.

This section aims at identifying the obligations and measures imposed on VSP providers under national legislation in order to ensure their compliance with those obligations.

When available, this section also provides for other additional relevant information about the measures and concepts at stake.

#### 5.22.3.1. General provisions

Currently, measures against incitement to violence or hatred, etc. are regulated by criminal law.

Article 4.1 of the Media Act 2008 has been replaced by Article 4.1 and 4.1a, which will apply to “audiovisual media content”, and will not be applicable to VSPs. Article 4.1 of the Media Act 2008 obliges AVMS providers to affiliate with the Netherlands Institute for the Classification of Audiovisual Media (NICAM), the Dutch self-regulatory body, in relation to the classification of content under the *Kijkwijzer* system. In practice, most of the on demand AVMS providers have already done so (in their capacity as commercial broadcasters or, like Netflix, on a voluntary basis). Article 4.1a, paragraph 2 of the Media Act 2008 states that the media service provider is responsible for making the most harmful content inaccessible for people under the age of 16, such as gratuitous violence and pornography, but this is not applicable to VSPs. Article 4.2 of the Media Act 2008 stipulates the criteria for the regulations (of NICAM) with regard to the classification of audiovisual content. A media service provider that uses the services of a VSP needs to meet the requirements of Article 4.1 and 4.1a and, therefore, of NICAM.

For VSPs, Article 3a.3, paragraph 1 of the Media Act 2008 introduces the general obligation to establish a code of conduct in this regard, referring directly to the provisions of the revised AVMSD:

*A video-sharing platform provider adopts a code of conduct which provides the measures laid down in Article 28b, paragraphs 1 and 2, second and fourth subparagraph, of the AVMS Directive and applies this code of conduct and these measures to the video-sharing platform.*

As for commercial communications, the Dutch Advertising Code (hereinafter “the Advertising Code”) – established by the Advertising Authority, a self-regulatory body –



contains the relevant rules. The Advertising Code is divided into a general section and a section on special advertising codes. The general section contains rules with which all advertising should comply, such as the rule that advertisements may not be misleading or untrue. This section also contains a number of other standards, one of which stipulates that advertising must not be gratuitously offensive or at odds with good taste and decency. Apart from the general section, the special codes may apply to advertising for specific products and services. The two relevant special codes are the Advertising Code for Social Media & Influencer Marketing (RSM) and the Code for Advertising Directed at Children and Young People. The key element of the RSM is that if an advertiser offers the distributor (for example a vlogger) any benefit, or chance thereof, for distributing advertising via social media and that benefit affects the credibility of the relevant communication, the relationship between the advertiser and the distributor must be clear. Both the advertiser and the distributor are responsible for compliance with Articles 3, 4 and 5 of the RSM (these Articles regulate disclosure and recognisability of a relevant relationship, a ban on manipulation and on directly encouraging children aged 12 or under to advertise products or services on social media).

The Media Act 2008 in Article 3a.5 introduces the following general obligations for VSPs:

- 1. Audiovisual commercial communications on a video platform service shall be readily recognisable as such.*
- 2. In audiovisual commercial communication no subliminal techniques shall be used.*
- 3. Surreptitious audiovisual commercial communication shall be prohibited.*
- 4. In the case that programmes and user-generated videos contain audiovisual commercial communications and a video-sharing platform provider has knowledge of that fact, the video-sharing platform provider clearly informs users accordingly.*

In addition, the protection of minors in relation to commercial communications on VSPs will be subject to an extensive self-regulatory system. In accordance with Article 3a.4 of the Media Act 2008, a VSP provider will be obliged to be affiliated with the Advertising Code Foundation, an independent body that decides, after a transparent and swift procedure, whether an advertisement conflicts with the Advertising Code, and to prove this by means of a written declaration from the Advertising Code Foundation. Article 3a.4, paragraphs 1 and 2 of the Media Act 2008 stipulates:

- 1. A video-sharing platform provider which markets, sells or arranges audiovisual commercial communications, is affiliated with the Dutch Advertising Code, or a comparable code established by the Advertising Code Foundation, and therefore subject to supervision by the Advertising Code Foundation.*
- 2. Affiliation is to be proved by means of submitting to the Dutch Media Authority a written declaration of the Advertising Code Foundation.*



#### 5.22.3.2. Adapting terms and conditions of the VSP service to include those obligations – Article 28b (3) (a) AVMSD

Regarding the measure consisting in including and applying in the terms and conditions of the VSP services the requirements referred to in section 5.23.3.1, Article 3a.3, paragraphs 1 and 2 of the Media Act 2008 establishes that the code of conduct needs to contain the measures from the revised AVMSD, again referring directly to the text of the revised AVMSD, without further elaboration:

- 1. A video-sharing platform provider adopts a code of conduct which provides the measures laid down in Article 28b, paragraphs 1 and 2, second and fourth subparagraph, of the AVMS Directive and applies this code of conduct and these measures to the video-sharing platform.*
- 2. The code of conduct, provided for in paragraph 1 of this Article, shall consist of, as appropriate, the measures laid down in Article 28b, paragraph 3, of the AVMS Directive.*

#### 5.22.3.3. Adapting terms and conditions to include obligations regarding commercial communications that are not marketed, sold or arranged by the VSP provider – Article 28b (3) (b) AVMSD

Please see under 5.22.3.2.

#### 5.22.3.4. Having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications – Article 28b (3) (c) AVMSD

Please see under 5.22.3.2.

#### 5.22.3.5. Establishing and operating transparent and user-friendly mechanisms for users to report or flag content – Article 28b (3) (d) AVMSD

Please see under 5.22.3.2.

#### 5.22.3.6. Establishing and operating systems through which VSP providers explain to users what effect has been given to reporting and flagging – Article 28 (b) (3) (e) AVMSD

Please see under 5.22.3.2.



5.22.3.7. Establishing and operating age verification systems for users with respect to content which may impair the physical, mental or moral development of minors – Article 28b (3) (f) AVMSD

Please see under 5.22.3.2.

5.22.3.8. Establishing and operating easy-to-use systems allowing users to rate the content – Article 28b (3) (g) AVMSD

Please see under 5.22.3.2.

5.23.3.9. Providing for parental control systems that are under the control of the end-user with respect to content which may impair the physical, mental or moral development of minors – Article 28b (3) (h) AVMSD

Please see under 5.22.3.2.

5.22.3.10. Establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints – Article 28b (3) (i) AVMSD

Please see under 5.22.3.2.

5.22.3.11. Providing for effective media literacy measures and tools and raising users' awareness of those measures and tools – Article 28b (3) (j) AVMSD

Please see under 5.22.3.2.

5.22.3.12. Forbidding the processing of personal data of minors for commercial purposes – Article 28b (3) AVMSD

Please see under 5.22.3.2.

5.22.3.13. Other relevant provisions related to the protection of minors

N/A.



#### 5.22.3.14. Other relevant provisions related to commercial communications which may impair the physical, mental or moral development of minors

In addition to the rules mentioned earlier, relevant regulation is also found in the Code for Advertising Directed at Children and Young People. When making advertising directed at children and minors/youths, the recognisability of the advertising communication is important. In addition to the Advertising Code, in this Special Code the manner in which the recognisability of the advertising communication directed at children and minors is expanded. This Special Code applies to all sorts of media (platforms).

The RSM applies to all social media platforms and is part of the Advertising Code. The complaint procedure of the Advertising Code Committee is applicable.

Finally, it should be mentioned that in 2017 a group of Dutch YouTube vloggers launched a self-regulatory mechanism known as the Social Code, a voluntary code in collaboration with the Dutch Media Authority. The Social Code, which only applies to YouTube, contains four simple guidelines that make it clear when videos will be sponsored, involve product placement or free samples or are of entirely independent content. However, in a recent edition of *Mediaforum*, a scientific review on media law, this code was heavily criticised for being in breach of the AVMS Directive and, moreover, for the fact that none of the vloggers who had initiated the code actually followed it.

#### 5.22.3.15. Other relevant provisions related to minors' exposure to advertising for alcohol products and HFSS foods (high fat, sugar and salt foods) in commercial communications

The obligations with regards to minors' exposure to advertising for alcohol products and HFSS foods (high fat, sugar and salt foods) in commercial communications are governed by the self-regulatory system of the Advertising Code. The standards of the Advertising Code are defined in a platform-neutral way and mainly addressed to the advertisers and not to the VSP provider as such. Therefore, no distinction is currently made between commercial communications that are or are not marketed, sold or arranged by VSP providers. Furthermore, the Advertising Code for alcoholic beverages, in Articles 10 to 13 inclusively and Article 23 specifically, is aimed at commercial communications concerning minors. Also, the Advertising Code for food products, in Articles 8 and 9 specifically, addresses advertising directed at children. Article 8 stipulates that advertising for food products intended for children of 12 years and younger is not permitted (with some exceptions). Article 9 deals with commercial communications aimed at schools and nurseries and refers to sponsorship and schools.

#### 5.22.3.16. Other relevant information

N/A.



## 5.22.4. Practicability of the measures imposed on VSP providers

Article 28b (3) of the revised AVMS Directive does not only provide for the list of measures which are detailed under the previous section. Paying attention to the principle of proportionality, it also states that the measures imposed on VSP providers should be practicable and proportionate and take into account criteria such as the size of the VSP service and the nature of the service, as well as the nature of the content.

This section aims at identifying how this is implemented in the national legislation.

No specific provision of the revised Media Act 2008 deals with this issue.

## 5.22.5. Regulation and enforcement

This section aims at identifying which body is in charge of regulatory and enforcement powers with regard to VSPs, as well as the scope of its activities with regard to such platforms. These relate to registration/notification systems of VSPs with the relevant national regulatory bodies, as well as with the development of self- or co-regulatory codes and schemes (as encouraged by Article 4a of the AVMS Directive), provisions related to out-of-court redress mechanisms for the settlement of disputes between users and VSP providers (as envisaged by Article 28(b)7 of the AVMS Directive) and provisions related to how users can assert their rights before a court in relation to VSP providers (as required by Article 28(b)8 of the AVMS Directive).

### 5.22.5.1. Regulatory body

The competent regulatory body for VSPs is the *Commissariaat voor de Media* (Dutch Media Authority – CvdM).<sup>263</sup>

### 5.22.5.2. Existence of a registration/notification system

Under the revised Media Act 2008, VSP providers will be obliged to adopt a code of conduct that meets the requirements of the AVMS Directive and to apply the code of conduct of the VSP. (Article 3a.3 of the Media Act 2008). The CvdM will monitor the establishment, the content and the application of the code, in accordance with Article 7.11 of the Media Act 2008, which is the legal basis for the Dutch Media Authority to exercise its authority.

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<sup>263</sup> <https://www.cvdM.nl/>





Article 3a.2, paragraph 2 of the Media Act 2008 obliges a VSP provider to publish the requested data directly, permanently and easily, including its name, the place where the company has its registered office, contact information including mail address and internet address, and the name of the CvdM as the regulator that is entrusted with the supervision of compliance with the provisions of the Media Act with regard to VSP providers. It states:

*A video-sharing platform provider shall make easily, directly and permanently accessible to the public the following information:*

- a. name;*
- b. the address at which it is established;*
- c. the details, among which an email address or internet address, and,*
- d. the name of the Dutch Media Authority that is entrusted with the supervision of compliance with the provisions under of pursuant to this chapter.*

Subsequently, Article 7.22, paragraph 2 of the Media Act 2008 obliges the CvdM to establish and maintain a list of VSP providers that fall within the Dutch jurisdiction:

*The Dutch Media Authority shall maintain a list of the video-sharing platform providers which come within the jurisdiction of the Netherlands according to Article 3a.2, paragraph 1, indicating on which of the criteria set out in Article 28a, paragraphs 1 to 4, of the AVMS Directive their jurisdiction is based.*

#### 5.22.5.3. Compliance, enforcement and sanctioning powers

The CvdM will monitor the establishment, the content and the application of the codes of conduct. The criteria for an effective code of conduct as laid down in the revised AVMSD are transposed into Article 3a.3 of the Media Act 2008, and the CvdM will supervise the quality of the codes of conduct adopted by VSPs.

In the explanatory memorandum to the draft law, the government asserts that the current system of self-regulation and enforcement by the Advertising Code Foundation and the CvdM is sufficiently effective and offers effective and proportionate sanctions in accordance with the revised AVMSD. Therefore, the government sees no reason for an extension of the enforcement powers of the CvdM.

To date, it appears that there are not any VSP's that fall directly under the scope of Dutch jurisdiction. However, the CvdM updated its policy rules with regard to commercial on-demand media services, based on which content creators that are active through VSP's are able to establish whether the service they provide will qualify as a commercial on demand media service that falls under the supervision of the CvdM. Under the new policy rules, a service qualifies as a commercial on demand media service when 1) it is distributed through a VSP and in the past 12 months 24 or more videos have been published 2) the company is registered at the Chamber of Commerce and an economic advantage is gained with the publication of the videos and 3) the videos generate more than 500.000 followers.



#### 5.22.5.4. Development of self- or co-regulatory codes or schemes

As stated earlier, under the Media Act 2008, Article 3a.3, VSP providers will be obliged to adopt a code of conduct that meets the requirements of the revised AVMSD. In addition, in accordance with Article 3a.4, paragraphs 1 and 2 of the Media Act 2008, a VSP provider will be obliged to be affiliated with the Advertising Code Foundation and to be able to prove this by means of a written declaration from the Advertising Code Foundation, supervised by the CvdM.

The Dutch media sector has two other systems of co- and self-regulation. These systems include the Advertising Code Committee and NICAM, as mentioned earlier.

#### 5.22.5.5. Out-of-court redress mechanisms for users

No specific provision of the Media Act 2008 deals with this issue. However, the explanatory memorandum to the law refers to the various out-of-court mechanisms that are currently available in the Netherlands. A VSP provider can classify a dispute committee under the Foundation for Consumer Complaints Board. This foundation is regulated by the Implementation Act of the consumer alternative dispute resolution directive.

#### 5.22.5.6. Rights before a court for users

No specific provision of the Media Act 2008 deals with this issue, but nothing prevents users from asserting their rights before a court.

### 5.22.6. Studies, reports and research

- Study by Radboud University and the University of Amsterdam, commissioned by the Dutch Media Authority: “How do minors experience sponsored video on YouTube?”, 2019.<sup>264</sup>

### 5.22.7. Data compilation

This factsheet is based on data compiled by Louise Doorman, independent legal adviser.

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<sup>264</sup> <https://www.cvdM.nl/sites/default/files/files/Rapportage%20Onderzoek%20effecten%20reclame%20in%20YouTube%20video%E2%80%99s.pdf>.