

***Key issues in the AVMSD revision debates:
Video-sharing platforms and regulator
independence***

Issue Paper

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1. Introduction

Since the European Commission published its proposal for revisions to the Audiovisual Media Services Directive (AVMSD) in May 2016, there have been countless stakeholder meetings and discussions and well-over a thousand amendments proposed by MEPs. Two issues seem to have generated controversy: the inclusion of "video-sharing platforms" (VSPs) and the coordination and independence of national regulatory authorities (NRAs), including a stronger role for the European Regulators Group (ERGA).

2. Video-sharing platforms

2.1. Recommendations

- Article 28a in the draft legislation should contain language referring to Freedom of Expression (FoE), communications rights and the rights of the child in paragraph 2 point (a).
- Article 28a paragraphs 7 and 8 in the draft legislation should be altered to ensure that the Commission or ERGA coordinate among VSPs and various stakeholders to establish both guidance as to what constitutes incitement to hatred and violence, and what kind of content might be harmful to minors, as well as to create codes of conduct for identification mechanisms and enforcement.
- An additional paragraph should be added to Article 28a in the draft legislation setting out transparency and reporting requirements for VSPs on the functioning of their mechanisms.
- Provisions in Articles 9 and 11 in the draft legislation should apply to VSPs as well, at least those related to protecting minors such as participation in codes of conduct to limit minor's exposure to certain kinds of advertising and restrictions on product placement in content aimed at children

2.2. Explanation

This part of the proposal has generated a number of proposed amendments in the Parliament and discussion in the Contact Committee³ that broadly address the following concerns:

1. The degree of balance achieved with freedom of expression (FoE) and other fundamental rights and protections;
2. The process of implementation through co-regulation and codes of conduct;
3. The levelness of the playing field between VSPs and other audiovisual media services.

³ <https://ec.europa.eu/digital-single-market/en/news/45th-meeting-avmsd-contact-committee>



YouTube's policies in relation to the protection of minors give specific guidance on nudity and sexual content and on violence that are even more detailed and arguably restrictive than those set out in the UK Broadcasting Code, to take an example. In their conditions for age-restriction, the company seems to put emphasis on the potential for influence and imitation, the extent of the potentially harmful content, and the purpose of the video. Both Facebook and Snapchat, on which video sharing has grown substantially in the last few years⁴, could be defined as a VSP if the "dissociable part" requirement in the definition is removed⁵. Facebook's community standards do not specifically deal with the protection of minors, except in the banning of child pornography.⁶ Their nuanced rules on nudity and sexual content are stricter than most broadcasting rules. The company limits the type and context in which violence can be depicted, and has specific rules related to self-harm or suicide. Snapchat's guidelines only give details on nudity and sexual content, which are largely banned, and do not allow intimidation or bullying.

There are not commonly held definitions of what content might "seriously impair" or be "likely to impair" minors across Europe, but it is common for these to be more clearly defined and age ratings set by a regulator or co-regulatory system for the entire sector at the national level.⁷ Regarding nudity and sexual content, these VSPs are much more restrictive than most national rules for broadcasting in Europe. There are also serious gaps in their policies to protect minors in comparison to those typical for other audiovisual media, and there is not the kind of industry-wide standard that one would find for broadcasters in any national jurisdiction. There is no mention of freedom of expression or the rights of the child in their policies, which often are considerations in national rules or codes.

What constitutes hate speech, particularly illegal hate speech, and incitement is often defined more specifically in national level codes that apply to all audiovisual media services, as well in the editorial or press codes that form the basis of the self or co-regulatory mechanisms of the print industry. The delicate balance between incitement to hatred or violence and freedom of expression is usually further defined by case law and decisions of NRAs or collective self-regulatory bodies.

Neither YouTube nor Facebook allow hate speech, and YouTube explicitly bans incitement to violence or terrorism while Facebook claims to remove content that celebrates or glorifies it.⁸ Neither has defined hate speech or incitement nor mentioned freedom of expression or anything akin to the "audiences' right to receive information and ideas" referred to in the Ofcom Code, for example.⁹ Without definitions and a clear obligation to consider also freedom

⁴ <http://www.theverge.com/2016/4/28/11526294/snapchat-10-billion-daily-video-views-users-stories>

⁵ This has been proposed by MEPs as amendments.

⁶ Facebook does ostensibly restrict the use of this platform to users over the age of 13, but it is widely acknowledged that this is not adhered to or enforced effectively.

⁷ <http://www.obs.coe.int/documents/205595/3179930/gqqThe+protection+of+minors+in+a+converged+media+environment.pdf/7b590454-a03f-40e8-b460-e2b5e6b0bc28>

⁸ Snapchat's guidelines do not mention hate speech or violence.

⁹ Ofcom Broadcasting Code page 20 https://www.ofcom.org.uk/data/assets/pdf_file/0024/49308/Ofcom-broadcast-code-May-2016.pdf



of expression, the concern that decisions by VSPs as to what constitutes hate speech could be overly restrictive and threaten expression voiced by many advocacy groups and several MEPs would seem justified. This makes the obligation in the Commission's proposal on Member States to ensure adequate redress mechanisms for users are in place very important, and it would be strengthened by the inclusion of a mention of the need for VSPs to also consider freedom of expression.

The crucial element will be the extent to which VSP are left to make these decisions on their own. The Commission's proposal encourages co-regulation and states that where appropriate the Commission shall work with VSPs to draft Union level codes of conduct. Most other AVMS providers are regulated by NRAs, so a more appropriate comparison is with co- and self-regulatory systems for publishers and print press. In a majority of European countries the press is under a co- (or self-) regulatory system that includes some involvement of the state, and most notably significant involvement of the public or "lay people" and journalists.¹⁰ The development of codes, and even the enforcement of them, is not simply left to the publishers. Having users or other stakeholders involved in the enforcement of codes of conduct on the protection of minors or incitement to hatred and violence beyond flagging and reporting, might be unworkable given the transnational nature of VSPs. Nevertheless, there is precedent for having a multi-stakeholder process that includes users for the development of codes of conduct and any Union-wide guidance as to what constitutes unacceptable content.

The first review of the Code of Conduct on Countering Illegal Hate Speech¹¹ showed that YouTube removed content in 48.5% and Facebook 28.3% of the cases in which content was flagged by the users testing the system. Both reviewed the vast majority of the flagged content within 48 hours, and over half in the first 24 hours.¹² What is not known is on what grounds the decisions were made. The decisions of both national regulators responsible for audiovisual media and the co-regulatory bodies covering print media or advertising standards are usually published with explanation. Due to the volume of cases being handled by VSPs, individual justifications for every removal of content or blockage of a user would not be reasonable to expect. However, some transparency requirement that envision reporting on the types of content flagged and trends in decisions would bring any co-regulatory system for VSPs more in line with the systems governing other content providers as well as with EU principles for better self- and co-regulation.

The proposed provisions on VSPs do not currently mention commercial communications or product placement. Other audiovisual media services face limitations on the type of commercial communication that can be aired and on product placement in content with a significant

¹⁰ <http://www.lse.ac.uk/media@lse/documents/MPP/Policy-Brief-6-Replacing-the-PCC.pdf>

¹¹ The Code of Conduct on Countering Illegal Hate Speech Online was signed by 4 companies. Microsoft, Facebook, Twitter and YouTube committed to having internal review systems that would review notifications from users or others within 24 hours, to better inform and give tools to their users to encourage flagging and notices, and to establishing partnerships with civil society group who would act as "trusted reporters" of notifications.

¹² http://ec.europa.eu/newsroom/document.cfm?doc_id=40573

children's audience. Given that young audiences are increasingly consuming content online, particularly through VSPs, this discrepancy in the measures to protect them seems inappropriate. Many of the top earning "YouTubers" produce content directly aimed at children and teenagers. Earning figures from advertising around their content run into the double digits in millions per year and YouTube takes 45%, supporting the platform's increasing contribution to Google's overall revenues.¹³ This results in both a significant gap in the protection of minors and contributed to a distinctly un-level playing field in the market for advertising and sponsorship that threatens investment in production in Europe.

3. Coordination and Independence of Regulatory Authorities

3.1. Recommendations

- Article 3 in the draft legislation should not be amended to include further conditions in which deviations from freedom of reception can be allowed and the condition related to public health in the proposal should be deleted.
- Article 3(4) in the draft legislation should set a clear time limit within which a Member State must end a measure against an audiovisual media service if it is found to be against Union law, and clear time limits should replace "in the shortest time possible" in Article 3(6) and (7).
- The criteria for NRAs and appeal mechanisms set out in Article 30 in the draft legislation should not be watered down.
- The institutional design and responsibilities set out for ERGA in the draft legislation should be largely maintained. An additional paragraph should, however, be added to Article 30a in the draft legislation requiring ERGA to report annually on its work to ensure transparency. Moreover, Article 30a(4) should be amended to allow ERGA to adopt its own rules of procedures to ensure independence.

3.2. Explanation

The Commission's proposal attempts to simplify both the jurisdiction rules and the procedures to be taken by national regulatory authorities (NRAs) if they deviate from the country of origin principle. It foresees an increased and more institutionalised role for the European Regulators Group (ERGA) in coordinating among NRAs, including in advising the Commission on jurisdiction disputes and deviation from the country of origin principle (CoO), and sets out criteria for the independence of NRAs. The amendments in the Parliament and debates in the Contact Committee broadly raise the following concerns:

¹³ <http://uk.businessinsider.com/stats-on-googles-revenues-from-youtube-and-google-play-2015-7>

1. The potential undermining of CoO through the mechanism for resolving deviation between Member States' NRAs
2. The extent of criteria for independence of NRAs
3. The relationship between ERGA and the Contact Committee

Since the passage of the AVMSD in 2007 several incidents have tested CoO, particularly in recent years, and the Commission has had to resolve situations in which the NRA in one Member State has taken action against an audiovisual media service under the jurisdiction of the NRA in another. Recent cases based on the interpretation of incitement to hatred by the NRA in the receiving state have highlighted the need for better coordination and faster mechanisms to deal with such incidents.¹⁴ There is potential for serious threats to FoE and other communication rights, such as those of minority language groups, if the CoO is undermined.

The AVMSD only allows for deviation from freedom of reception of linear audiovisual media services in serious or grave violations of the provision on the protection of minors or on hate speech, but allows many other conditions to be the basis of deviation for on-demand services. The Commission's proposal would unify these conditions allowing for serious and grave risks to public security, national security and public health to be included for all audiovisual media services. There have been several proposals from MEPs to even further expand the list to include public morality and public policy, or the provisions related to commercial communications and product placement. More efficient coordination mechanisms for resolving such cases, including clear time lines and efforts to create common codes of conduct and understandings of what constitutes incitement, could be important improvements to the Directive. However, significantly expanding the list of reasons one NRA can deviate from freedom of reception risks undermining the CoO too much and threatening communication freedoms.

In the last decade, extensive cross-national research¹⁵ and case studies on developments in individual Member State, such as Hungary¹⁶ and Romania,¹⁷ have provided extensive evidence of serious threats to the independence of NRAs for audiovisual media services. The proposed changes to Article 30 that essentially set out criteria for NRAs in order to ensure their independence and that adequate appeals mechanisms are in place. These not only reflect the same principles that are in the electronic communications framework,¹⁸ but also stem from a proposal from the NRAs themselves developed through ERGA with contributions from academics and civil society.

¹⁴ See for example Lithuanian and Latvian cases https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/40_discussion_paper_4_rev_en.pdf

¹⁵ See the INDIREG study :

http://ec.europa.eu/archives/information_society/avpolicy/docs/library/studies/regulators/final_report.pdf or the results from the 2014 Media Plurality Monitor <http://monitor.cmpf.eu.eu/>

¹⁶ <http://www.lse.ac.uk/media@lse/documents/MPP/Policy-Paper---G%C3%A1bor%20Poly%C3%A1k-and-Krisztina-Rozgonyi.pdf>

¹⁷ <http://www.lse.ac.uk/media@lse/documents/MPP/Policy-Paper---Adina-Baya.pdf>

¹⁸ These are independence, impartiality and transparency, and a right of appeal.

Similar efforts to include stronger language around independence or the functioning of NRAs ahead of the adoption of the current AVMSD were rejected, largely on the grounds that the culturally significant domain of audiovisual media policy must remain mainly matter for the Member States subject only to minimal harmonization. However, it is important to note that policy making and regulatory implementation are distinctly different functions and efforts to ensure the independence of the later should not be perceived as a threat to the former. The inclusion of criteria for NRAs should not be rejected or watered down in this revision. Although without the necessary political will in some Member States it is unlikely that the provisions will go far to encourage those national governments to ensure NRA independence, the references to these criteria in the Directive will give national level civil society groups and media companies tools to call upon in their efforts to hold governments and NRAs to account.

Audiovisual media services are increasingly transnational and integrated, especially on-demand services.¹⁹ This makes coordination and cooperation on issues of jurisdiction, interpretation of rules, and codes of conduct of vital importance. Given the current political climate across the Union, intensifying Commission intervention in to achieve could be an unpopular approach, and given the sensitivity of issues related to media may be perceived as undesirable government intervention in the sector. However, ERGA is both well placed to lead on coordination and has already proven itself effective in monitoring the implementation of the Directive. Establishing ERGA through the Directive is a positive step, but its continued independence must be ensured. Proposals that would give the Contact Committee oversight over ERGA or the power to revise its advice should not be accepted.²⁰ It is important to maintain the distinction between the function of ERGA as a coordinative and advisory body on issues of regulatory enforcement and implementation and that of the Contact Committee, which has a clear mandate on matters of policy.²¹

¹⁹ The European Audiovisual Observatory found that 67% of VOD services are non-national services, with more than 70%, 80% and even more than 90% being non-national in some Member States.

²⁰ Such proposals were in the CULT Committee draft report and appear in a number of amendments from MEPs.

²¹ This idea is elaborated more fully in the CERRE policy paper by Bruno Liebhaberger and Jean-François Furnémont (2016) *Audiovisual Regulators: Why are their independence and cooperation crucial* http://www.cerre.eu/sites/cerre/files/160923_CERRE_AVMS_IndepCoopReg_BLJFF_FIN.pdf