

AVMS IMPLEMENTATION – ACT SUGGESTED APPROACH ESSENTIAL FUNCTIONALITY | AUDIENCE/TURNOVER SHARE

INTRODUCTION

On 28 November 2018 the revised AVMS Directive was published in the Official Journal of the European Union. Member States have until 19 September 2020 to transpose. The European Commission is expected to issue guidelines in consultation with the Contact Committee. To this effect ACT would like to offer its views on the following:

1. **Essential functionality:** ways in which the provision of programmes (professionally produced videos) and user-generated content constitutes essential functionality (Recital 5 AVMS Directive)
2. **Low audience/low turnover:** threshold(s) below which providers are exempted from the obligation of making financial contributions (Article 13 (7) AVMS Directive) and promoting European works (Recital 40)

The objective is to assist the Contact Committee in its work and ensure the audiovisual ecosystem can continue to deliver against the objectives set out in the AVMSD.

ESSENTIAL FUNCTIONALITY

Reference in AVMS Directive

Article 1, paragraph 1, letter (aa) of the revised AVMS Directive states:

'video-sharing platform service' means 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 of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.' [bold / underline added]

Recital 5 elaborates on this aspect by making clear, that *while the aim of [the] Directive [...] is not to regulate social media services as such, a **social media service should be covered if the provision of programmes and user-generated videos constitutes an essential functionality of that service.***

*The provision of programmes and user-generated videos could be considered to constitute an essential functionality of the social media service if the audiovisual content is **not merely ancillary to, or does not constitute a minor part of, the activities of that social media service.** In order to ensure clarity, effectiveness and consistency of implementation, the **Commission should, where necessary, issue guidelines, after consulting the Contact Committee, on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service'.** Those guidelines should be drafted with due regard for the general public interest objectives to be achieved by the measures to be taken by video-sharing platform providers and the right to freedom of expression. [bold / underline added]*

Suggested Approach to defining guideline(s)

To the best of our knowledge, there is no existing definition of essential functionality provided within the EU legislative framework. We therefore look to the existing legal corpus for elements that would provide a sound basis for deciding whether essential functionality is established. Our understanding is that where social media services are of an active nature, this is a deliberate commercial choice they make in order to promote programmes and/or user-generated videos, and therefore by definition constitutes a core (rather than ancillary) part of their service. Platforms would not promote videos if this were not directly relevant to their business model as a means of retaining and/or boosting user engagement.

Recital 42 of the e-Commerce Directive sheds some light on what constitutes a passive (vs active) platform stating:

*The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this **activity is of a mere technical, automatic and passive nature**, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.*

[bold/underline added for emphasis]

Further, the Court of Justice of the European Union (CJEU) clarified ([Case C-324/09 L'Oréal and others](#)) that when a platform optimises the presentation and/or promotes the content on their platform it is deemed as active and therefore cannot benefit from liability exemption (Article 14 e-Commerce Directive). The same rationale therefore flows for significant criteria.

Suggested Guideline

Where social media services are considered to be actively promoting video content as set out in the eCommerce Directive and existing case law then this is sufficient for this content to be considered an essential functionality. For example where services index, promote and/or organise programmes and user-generated videos this should constitute an essential functionality of these services.

LOW AUDIENCE/LOW TURNOVER THRESHOLD FOR QUOTAS & LEVIES

Reference in AVMS Directive

Article 13

1. Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure **at least a 30 % share of European works** in their catalogues and ensure prominence of those works.

2. Where Member States require media service providers under their jurisdiction to contribute financially to the production of European works, including via **direct investment in content and contribution to national funds**, they may also require media service providers targeting audiences in their territories, but established in other Member States to make such financial contributions, which shall be proportionate and non-discriminatory.

[...]

6. The obligation imposed pursuant to paragraph 1 and the requirement on media service providers targeting audiences in other Member States set out in paragraph 2 **shall not apply to media service providers with a low turnover or a low audience**. Member States may also waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services.

7. *The **Commission shall issue guidelines** regarding the calculation of the share of European works referred to in paragraph 1 and **regarding the definition of low audience and low turnover referred to in paragraph 6**, after consulting the Contact Committee.*

[bold/underline added for emphasis]

Recital 40 (Quotas):

*In order to ensure that obligations relating to the promotion of European works do not undermine market development and in order to allow for the entry of new players in the market, **providers with no significant presence on the market should not be subject to such requirements. This is particularly the case for providers with a low turnover or low audience.** A low audience can be determined, for example, on the basis of a viewing time or sales, depending on the nature of the service, while the determination of low turnover **should take into account the different sizes of audiovisual markets in Member States.** It might also be inappropriate to impose such requirements in cases where, **given the nature or theme of the audiovisual media services**, they would be impracticable or unjustified.* [bold/underline added for emphasis]

Suggested Approach to defining guideline(s)

Low audience. How to define low and at what level to place the threshold for “significant presence”?

Data source. To define *low audience* ACT relies upon public data provided by the European Audiovisual Observatory (EAO) for the last year of reference, 2017. The EAO database gives an indication of the audience share of 1,287 channels (and apparented media groups) in 2017 in 26 different European Countries (excludes Malta & Luxembourg). We assume that based on the 4,208 channels identified by the EAO in its annual 2017 report, the sample is statistically significant¹. That is to say that the sample reflects characteristics of the whole population. This dataset is freely available upon request to the EAO. Excluding paid professional audience measurement providers, we have not been able to obtain revenue figures.

Level of analysis. ACT believes the best level of analysis is at channel level as this allows for a more granular approach to viewership at Member State level. A contrario, taking a group level analysis would lead to a similar regime being applied to channels with very different audience ratings and foci (eg generalist vs thematic); and in so doing hinder the development of smaller/specialist channels and with it cultural diversity and choice.

Data analysis results. Based on the EAO data provided we are able to infer the following factual assertions on the channels in the overall dataset:

- **The market represents a classical representation of the Pareto Principle (also known as the 80/20 rule); whereby we observe in the dataset that 20% of the largest channels take 80% of all audience share**
- The overall EU market is very fragmented: 71% of channels have less than 1% audience share
- The top 20% of channels have audience share of 1.7% and over, but this threshold varies widely between small, medium and large sized countries

Implications for guidelines

- Given this classical 80/20 distribution we can infer that a low audience would apply to the 80% of small or micro channels that make up the “long tail” distribution of existing channels
- We use the channel as the level of analysis and use this term interchangeably with media service provider as set out in the text; this level of analysis/implementation is rational given the channel (rather than the group) is the provider of programmes and meets the principle purpose test

¹ To the extent that many of the channels not included in the database are micro channels (falling under 0.1% audience share) we would even summarise that country averages for audience share may be overestimated

- Audience share data is freely available, guidelines should therefore strive to use this data point to ensure regulators can reliably establish a threshold that can be easily assessed by others and based on a neutral source.
- As noted in Recital 40 and as seen in the data analysis, allowance should be made for the “different sizes of audiovisual markets”. As fragmentation levels differ according to country size, we would therefore propose that three country groups be established – countries with population below 10M; countries with population between 10-20M and countries with population above 20M. Again this information is freely available and regularly updated by Eurostat.
- Data suggests that the vast majority of Europe’s channels are micro or small channels. We would therefore expect that they are excluded from obligations, and that only the top 20% of channels in the respective country grouping are covered.
- Turnover data is not easily accessible and would change according to the professional providers’ assessment. Lest the Commission (or independent body) is able to make available an annually updated central database on turnover we would recommend that a proxy for low turnover should be whether a channel can be designated a micro, small and medium-sized enterprise (SMEs). Where channels directly employ fewer than 250 persons and have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million euro then they should be excluded from the scope of application. As expressed this should be used as a proxy measure for deciding whether a channel is in or out of scope regarding obligations.
- The channel should remain the level of analysis to ensure a coherent approach/same level of analysis if/when looking at audience or turnover. For this reason group level or legal entity analysis is not a suitable level of analysis and would likely undermine the development of small channels in the EU.

A unified approach to thematic channels

- A unified definition would ensure thematic channels are provided equivalent treatment across the EU; thereby putting an end to fragmented approaches taken by NRAs on what constitutes a thematic channel.
- As set out in Article 13.6, thematic channels whose theme or nature makes it unpracticable or unjustifiable should see their obligations waived. UNESCO defines a thematic channel as “Channel dedicated to a specific genre or topic and intended for a specific target audience, which offer viewers/listeners a content corresponding to their individual taste.”² We would therefore suggest that where practicable a channel should be deemed thematic where more than 50% of average daily air time (excluding advertising and static/test card) is devoted to non-European cinematographic works, series or documentaries.

Suggested Guideline

Shall be deemed excluded from requirements:

- Channels that have average audience share below the top 20 percentile in the respective country grouping set out in the table below/overleaf

Or

- Media service providers that are considered as SMEs in line with the Commission recommendation 2003/361/EC, which employ fewer than 250 persons and have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million

Or

- Thematic Channels defined as channels where more than 50% of average daily air time (excluding advertising and static/test card) is devoted to non-EU cinematographic works, series or documentaries

² This definition is also reflected by Nielsen (audience measurement market leader) as “TV channel specialising in a particular kind of programming (e.g. showing children's programming, films, sports, weather, news, different kinds of documentary, etc.)”.

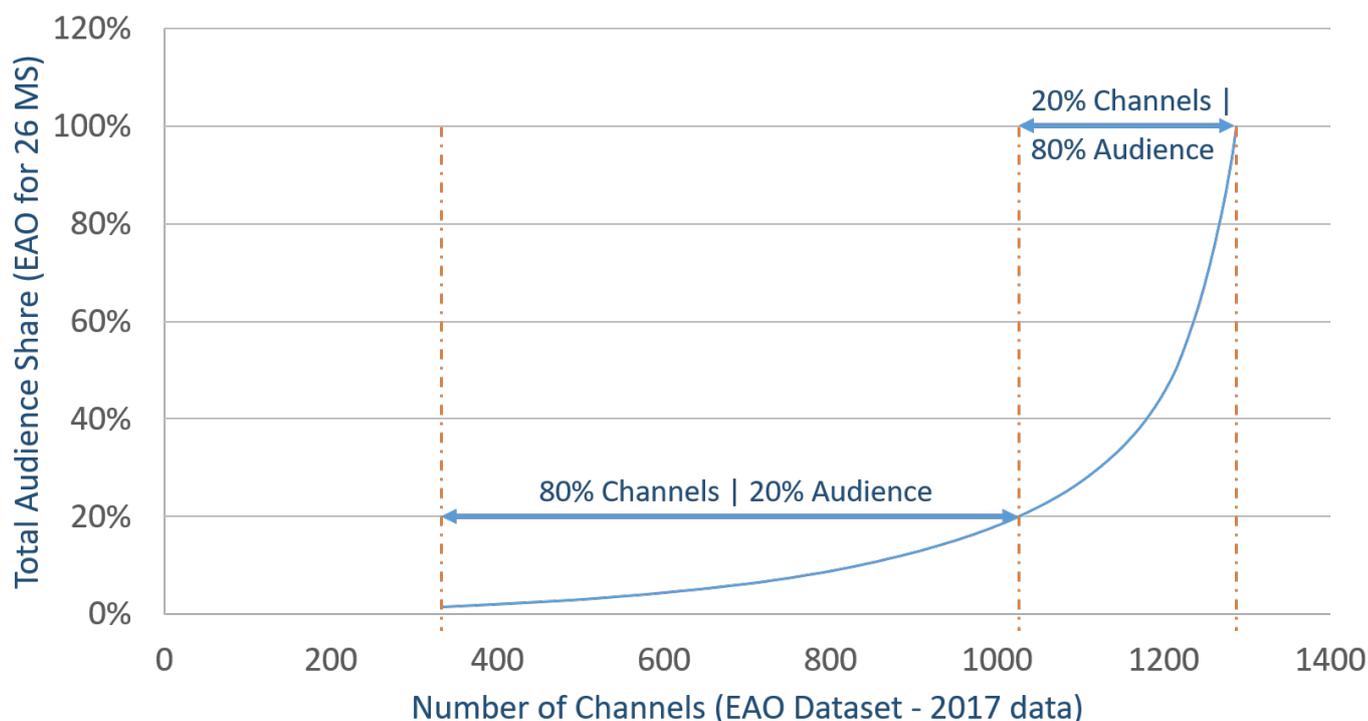
AUDIENCE SHARE THRESHOLD TABLE

Population bracket*	MS in scope**	Average audience share across all channels in grouping	Total # Channels in grouping (from EAO database)	Average minimum audience share for channels in top 20% audience share bracket
<1-10M	MT**, LU**, CY, EE, LV, SI, LT, HR, IE, SK, FI, DK, BG, AT, HU	2.3	388	2.8
10-20M	SE, PT, CZ, EL, BE, NL, RO	2.1	338	2.0
+20M	DE, FR, GB, IT, ES, PL	1.0	561.0	1.0***
513M	28	1.7	1287	1.7

*Based on Eurostat official publication ** European Audiovisual Observatory database (covering 26 Member States; LU & MT not in dataset) *** Rounded to nearest share

NB: Due to largescale of database file, analysis is available on demand, please see contacts below

Number of Channels & Audience Share Demonstration of the Pareto Principle



ABOUT ACT



The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters across the EU and beyond. The ACT member companies finance, produce, promote and distribute content and services benefiting millions of Europeans across all platforms. At ACT we believe that the healthy and sustainable commercial broadcasting sector has an important role to play in the European economy, society and culture. Our role is to protect and to promote the interests of the European private broadcasters. We engage with the EU institutions to achieve a balanced and appropriate regulatory framework which will encourage further investment and growth in our sector. This will allow the commercial audiovisual industry to continue to do what we do best – getting great content to viewers. See our most recent communications [here](#)

Further enquiries to be directed to Algara Castle, ACT Communications & EU Affairs Manager
T: +32 2 738 76 12 | E-mail: ac@acte.be