

AVMSD TECHNICAL SPECIFICATION SHEET – CURRENT VS. NEW DISPOSITIONS

I. OVERVIEW – TOP LINE POINTS TO KEEP IN MIND

a) Context and Next steps

On 25 May 2016, European Commission (EC) published a new legislative proposal amending the current AVMS Directive. The overall aim was to simplify the legislative framework, establish a level playing field and create a future proof set of rules that would reflect market and technological developments.

On 6 June 2018, negotiations between all three European Institutions ended. Now it is up to both, Council of European Union and the European Parliament to officially adopt the outcome agreement. EU ambassadors on behalf of the Council confirmed the agreement at the Coreper meeting on 13 June, now it is the European Parliament's turn to confirm it in the main lead Committee for this dossier, i.e. Culture Committee on 11 July. Then it will be adopted in one of the Council Ministerial Meetings and finally in European Plenary (all MEPs) on 2 October 2018. The directive will enter into force on the 20th day after its publication on the Official Journal of the EU and Member States will have 21 months to transpose it into national legislation.

b) Highlights

Scope

- Enlarged as video sharing platforms (VSPs) and social media services have been added. The latter should only be covered if the provision of programmes and user generated videos (UGVs) constitute an essential functionality of that service. EC after consulting the Contact Committee will issue guidelines on the practical application of “essential functionality” criterion.

Definitions (Art 1)

- Several new definitions have been added namely a definition on video sharing platform service, video sharing platform provider, user generated video and an editorial decision

Establishment (Art 2)

- Mainly unchanged but with a new slightly stricter definition of an editorial decision
- New obligation for Member States to put together an up to date lists of the audiovisual media service providers under their jurisdiction which the Commission shall ensure to be all saved in a centralised database
- Additional optional consulting role for European Regulators Group for Audiovisual Media Services in cases where Member States concerned do not agree on which Member State has jurisdiction

Derogation (Art 3)

- New ground for the derogation procedure has been added in cases of serious and grave risk of prejudice to public security including the safeguarding of national security and defence of a Member State
- Urgency procedure has also been changed

Circumvention (Art 4)

- Extension of a possibility for the Member State to trigger the circumvention procedure as now they do not need to prove that media service provider in question had an intention to circumvent stricter rules but need to only allow for circumvention to be reasonably established

Commercial communications (Art 9, 10, 11, 19, 20, 22, 23)

- Most rules remain unchanged with some liberalisation on quantitative limits and self and cross promotional announcements. Also a new article on signal integrity has been added

Promotion of European works (Art 13)

- Obligatory quotas for European works for media service providers of on-demand catalogues set at 30%
- Works will have to be promoted and visible
- Member States will have an option to impose a financial obligation on on-demand or/and linear media service provider when these target audiences in a Member State outside their Member State of establishment
- Low turnover/low audience providers will be exempted from quotas, prominence and levies
- Thematic audiovisual media service providers may optionally be exempted as well – Members States to individually decide on this at the national level

Video sharing platforms (Art 28a)

- Some layer of qualitative regulation (linked to Article 9.1. on qualitative commercial communications)
- Member States may also impose measures that are stricter or more detailed on video sharing platforms

Accessibility (Art 7)

- Provisions have been enlarged, however without hard targets or strict deadlines

Prominence (Art 7a)

- New article has been inserted which allows Member States to take measures to ensure the appropriate prominence of audiovisual media service of general interest

Signal integrity (Art 7b)

- New article has been inserted which allow Member States to take appropriate and proportionate measures to ensure that audiovisual media services provided by media service providers are not overlaid for commercial purposes or modified without the explicit consent of those providers

Self and co-regulation (Art 4a)

- New article has been inserted which refers to Member States being encouraged to use co-regulation and foster self-regulation through codes of conduct adopted at national level in the fields coordinated by the Directive
- The new law also introduces a new concept of “union codes” which shall be developed jointly by industry representatives, consumer organisations and facilitated by the EC

Listed events (Art 14)

- No change

c) Implementation time

21 months – Rules will be applicable at national level 2 years after the date when the outcome document is adopted in European Parliament plenary (foreseen for 2 October 2018).

d) References & Links

- European Commission [Proposal](#)
- European Commission [Impact Assessment](#) Outcome consolidated text
- [Consolidated text](#) – outcome of trilogue negotiations

II. DETAILED OUTLINE OF CHANGES

a) Establishment

Jurisdiction (Art 2) (recitals: p.7, article: p.34)

Key takeaways: Mostly provisions have not changed. Slight change when it comes to determining jurisdiction if Head office and editorial decisions are taken in a different Member State. New law is linking the determining factor for jurisdiction, which is still significant part of the workforce, with “*programme related*” audiovisual media service activities. Additionally, a new definition of editorial decision has been added which is still defined as a decision taken on a regular basis but with additional more narrow scope as it should now be also linked to “*day-to-day operations*” of the AV media service.

When Member States do not agree which one has a jurisdiction, they need to bring the matter to the EC's attention without undue delay. The EC can also request the European Regulators Group for AV media services (ERGA) to provide an opinion on the matter within 15 working days from submission of the Commission's request.

Derogation (Art 3) (recitals: p.7, article: p.36-38)

Key takeaways: Additionally to new grounds for the derogation procedure, Member State now has 3 months instead of 2 to send a notification of the measures taken.

EC now also needs to request an opinion from ERGA before taking a final decision whether those measures are compatible with Union law.

Where the EC concludes that measures Member State has taken against the media service provider in question, are incompatible with the Union law, the European Commission has so far been obliged to ask that Member State in question to urgently put an end to those measures. The new law adds a possibility for the European Commission to go back (within 1 month to Member State in question) to ask for more information if necessary to reach that decision.

Circumvention (Art 4) (recitals: p.8, article p.39-41)

Key takeaways: The new law will make it easier for the Member State to trigger the circumvention procedure, as new evidence provided will no longer need to prove the media service provider's intention it was circumventing stricter rules but only allow such circumvention to be reasonably established.

EC will also have to request an opinion by ERGA.

Where the EC concludes that measures Member State has taken against the media service provider in question, are incompatible with the Union law, the European Commission has so far been obliged to ask that Member State in question to urgently put an end to those measures. The new law adds a possibility for the European Commission to go back (within 1 month to Member State in question) to ask for more information if necessary to reach that decision.

b) Commercial communications

Key takeaways: In general, there has been no major change in the law except some liberalisation on a few parts. Several rules will stay the same, some slightly stricter and only a few liberalised.

Qualitative commercial communications (Art 9) (recitals: p.13, 20, article: p.48-50)

Key takeaways: All forms of audiovisual commercial communications now also prohibited for electronic cigarettes and refill containers. Alcohol provisions to be applied for on-demand services as well with the exception of sponsorship and product placement.

Member States also now encouraged to use co-regulation and foster self-regulation through codes of conduct on high fat, salt and sugar (HFSS) products. Those codes shall aim to effectively reduce the exposure of “children” not “minors” which would be broader. Again, fostering self-regulation is encouraged through a new concept of Union codes of conduct referred to in the Art 4a on self-regulation.

Sponsorship (Art 10) (recitals: p.20, article: p.50, 51)

Key takeaways: Sponsorship by electronic cigarettes and refill containers manufacturers is now prohibited. New provisions allow Member States to prohibit sponsorship of children’s programmes altogether where before this only applied to showing a sponsorship logo in these programmes.

Product placement (Art 11) (recitals: p.15, article: 51, 52)

Key takeaways: Product placement de facto permitted in all programmes except for news and current affairs, consumer affairs, religious and children’s programmes. Banned products list unchanged with the addition of electronic cigarettes and refill containers.

Isolated spots (Art 19.1) (article: p.59)

Key takeaways: No change

Interruption rules (Art 20.2) (article: p.59)

Key takeaways: No change. Teleshopping ban in children’s programmes has been added.

Quantitative limits (Art 23.1) (recitals: p. 15, 16, article: p.61)

Key takeaways: Greater flexibility. From existing 20% hourly limit, two windows will now need to be respected where advertising and teleshopping spots do not exceed 20% of that period. First window will start at 6.00 and finish at 18.00 and second at 18.00 until 00.00.

Self and Cross promotion (Art 23.2) (recitals: p.16, article: p.61)

Key takeaways: Slight liberalisation as now broadcasters will be able to promote their own VOD services without these being counted in advertising count. The same will apply to sponsorship announcements and product placements. Additionally, neutral spots (black spots between advertising spots as well as between editorial content and advertising or teleshopping spot) will not count towards limits.

Self and co-regulation (Art 4a) (recitals: 8, 9, article: p.42, 43)

Key takeaways: New article encourages Member States to use co and self-regulation through codes of conduct adopted at national level. These should be broadly accepted by the main stakeholders, have clearly set objectives, provide for transparent and independent monitoring and provide for effective enforcement and proportionate sanctions.

In case of self-regulation, the EC together with Member States will have a possibility to facilitate “*Union codes of conducts*” which shall be without prejudice to the national codes of conduct. These will be drawn up by media service providers, VSP providers in cooperation with others sectors as well as consumer organisations and European Commission will make them publicly available.

c) Promotion/financing of European Works

Quotas (Art 13.1) (recitals: p.17, article: p.52)

Key takeaways: Have been made stricter as by new rules 30% of on-demand services catalogues will need to be dedicated to European works.

Prominence (Art 13.1) (recitals: p.17, article: p.52)

Key takeaways: Have been made stricter as media service providers will now need to ensure prominence of

European works in their on-demand catalogues. Several suggestions on prominence put forward: labelling in metadata of AV content that qualifies as a European work, dedicated section for European works in the catalogue, use of European works in campaigns and/or use of banners and similar tools.

Levies (Art 13.2) (recitals: p.18, 19, article: p.53)

Key takeaways: Have existed as an option for Member States already but new law is making them optional for linear services as well. Member States can decide to impose a levy on on-demand or/and linear media service provider when these target audiences in a country of destination but are established in another Member State. This can only be required where a Member State require the same financial contribution from providers under their jurisdiction.

Media service provider that will be required to contribute to film funding schemes in a targeted country should however be able to benefit in the same way as domestic players from the aid available under film funding schemes. Additionally, if a targeted Member State decides to impose a financial obligation on a broadcaster, it is *obligatory it takes direct contributions to the production and question of rights in European works in particular co-productions made by that broadcaster into account.*

Exemptions are also different in the new law as obligatory ones will only be available for *low turnover/low audience providers* in relation to quotas and levies whereas for thematic and specific nature providers will only be optional and subject to decisions in each Member State individually.

d) Accessibility services (Art 7) (recitals: 11, 12, article: p.46)

Key takeaways: So far accessible services needed to be only “gradually accessible”. Still Member States without hard targets will need to ensure “without undue delay”, that services provided by media service providers under their jurisdiction are made “continuously and progressively” more accessible to people with disabilities through “proportionate measures”.

Member States now also need to ensure that media service providers report on a regular basis to the national regulatory authorities how they are implementing the required measures. Also, encouragement for providers to develop accessibility action plans has been added. Lastly, Member States will need to ensure emergency information, public communications and announcements in natural disaster situations are provided in a manner accessible to persons with disabilities.

e) Signal integrity (Art 7a) (recitals: p.14, article: p.47)

Key takeaways: A new article has been inserted in a Directive on this in order to protect the editorial responsibility of the media service provider. Provision does not allow shortening, altering, interrupting or overlaying programmes for commercial purposes without this being first explicitly allowed by media service provider itself.

Not included in the above provisions: control elements such as volume bars, search functions, navigation menus, lists of channels, warning information, public interest information, subtitles or commercial communications overlays provided by the AV media service provider.

f) Video sharing platforms (Art 28a) (recitals: p.5, 6, 19, 20-22, 25, articles: 29, 30, 64-68)

Key takeaways: Obligation for Member States to ensure VSPs protect minors from programmes, UGC and commercial communications which may impair their physical, mental or moral development.

When commercial communications ARE marketed, sold or arranged by VSP providers, Member States need to ensure that VSP providers under their jurisdiction comply with the requirements set out in Article 9(1). This article refers to several prohibitions such as use of surreptitious commercial communications, use of subliminal techniques, any disrespect of human dignity, discrimination based on sex, race, nationality...etc, encourage behaviour prejudicial to health, safety or protection of the environment. Additionally it bans all forms of commercial communications for cigarettes, other tobacco products, electronic cigarettes and refill containers, medicinal products and medical treatment on prescription. It further prohibits commercial communications using alcoholic beverages not being aimed specifically at minors as well as encouragement of their immoderate consumption. And finally, it also prohibits directly encouragement for minors to buy the advertised product or encourage them to persuade their parents to do so.

When commercial communications are NOT marketed, sold or arranged by VSP providers, Member States need to ensure that VSP providers under their jurisdiction *take appropriate measures to comply* with the requirements set out in Article 9(1) on commercial communications.

On high fat, salt, sugar products commercial communications on VSPs, Member States should encourage the use of co-regulation and self-regulation.

Overall measures to apply on VSPs providers should be practicable and proportionate, they need to take into account the size of a VSP provider and the nature of the service that is provided. These measures should also not lead to *any ex-ante control measures or upload-filtering of content*, which do not comply with Article 15 of the E-Commerce Directive.

When it comes to personal data of minors that VSP provider has collected or generated, it is forbidden to process them for commercial purposes such as direct marketing, profiling and behaviourally targeted advertising.

III. ABOUT ACT AND USEFUL CONTACTS

The ACT represents the interests of leading commercial broadcasters in Europe. 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 Europe's economy, society and cultures.

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- [European Commission](#), Unit I1 Audiovisual & Media Services Policy
- [ERGA](#) - European Regulators Group for Audiovisual Media Services
- [EPRA](#) - European platform of regulatory authorities
- [EAO](#) - European Audiovisual Observatory
- [ERA](#) - Academy Of European Law