

AVMSD GUIDELINES: BROADCASTERS WELCOME VSP APPROACH, LAMENT THRESHOLDS ERODING MEDIA PLURALISM

BRUSSELS, 2 JULY 2020. In June 2018, the Association of Commercial Television in Europe (ACT) issued a press release following the conclusion of the AVMSD review. In this statement, commercial broadcasters recalled their leading role in the financing, dissemination and development of European original content, including news and current affairs¹. These investments in high-quality content and editorial independence should not be taken for granted. They are essential, and more than ever required, in times where trust and accuracy are in short supply online and Europeans turn to trusted television news for independent and fact checked information.

In order to ensure the equal protection of European viewers and their ability to enjoy sustained levels of choice and media pluralism, the ACT has systematically called for greater accountability for online platforms whilst securing the core principle of the AVMSD, namely the Country of Origin principle. The ACT has actively contributed throughout the legislative process which led to the adoption of Directive 2018/1808/EU, and the publication of the European Commission’s guidelines².

On essential functionality, the Guidelines are a small but essential step towards establishing essential protections and redressing the regulatory imbalance. Namely by extending a small set of AVMS rules to services which have as an essential functionality the provision of programmes and/or user-generated videos to the general public, in order to inform, entertain or educate. We welcome the draft indicators proposed by the European Commission on the essential functionality criterion as they reflect many of the issues raised by the industry during the drafting process³. ACT trusts that Member States will follow an approach that considers essential functionality as distinct from principal purpose; as best understood, and assessed, at user level; and, as determined by one or a combination of regularly reviewed indicators.

On thresholds, ACT has consistently argued, backed by strong analytical⁴ and economic arguments, that any turnover or audience thresholds for imposing levies and European works obligations on broadcasters should support the requirements set out in the Directive. Namely, by respecting the Country of Origin principle (a cornerstone of the AVMSD), proportionality and the overall goal of sustaining media pluralism and cultural diversity. While ACT welcomes an audience share level set at 2% for the application of obligations, the other criteria set out undermine the potential benefits achieved by this higher audience threshold. The resulting Guidelines are therefore not fully consistent with the objectives of the AVMSD and the European Union’s stated political objective of rebuilding a media landscape that is, and will continue, to suffer from the economic fallout of the pandemic.

The thresholds and “methodology” encourage legal fragmentation, deter Broadcasters from investing in cross-border content and services, and continue to widen the regulatory asymmetries between Broadcasters and

¹ “Respondents perceive traditional media as the most trusted source of news: radio (70%), television (66%) and printed newspapers and news magazines (63%).” They also concluded that the least trusted sources of news are video hosting websites (27%) and online social networks (26%). (Eurobarometer on fake news and online disinformation, March 2018)

² See ACT contribution to the EC’s Consultation on AVMS Guidelines and related statements

³ Joint industry position (ACT, EBU, egta): *AVMSD, Essential Functionality, Broadcasting industry suggested rationale & approach, a public private broadcaster initiative* (April 9, 2019)

⁴ “Guiding Principles in establishing the Guidelines for Implementation of Article 13 (6) AVMSD – Criteria for exempting certain providers from obligations concerning European Works” (Institute for European Media Law). “the model suggested by ACT and described in the previous section achieves the correct balance between not overburdening providers while allowing the cultural policy goals to be reached. It is also precise in terms of the threshold which makes the applicability of the provision, at least for this element, clear and more easily to handle, which is important considering that the administrative procedures to use the possibilities of Article 13 (2) will be very complex” (p.51).

unregulated players. The micro enterprises threshold used to evaluate low turnover is too low to achieve the balance required and account for the wider scale needed for one service to develop and be sustainable, particularly as the size of the players grows. Any entity able to promote and offer services across one or more Member States, process payments from different payment platforms, negotiate licensing/distribution agreements with a multitude of rightsholders in order to have an attractive repertoire, etc. is unlikely to fit the definition of micro enterprise. This approach will mean that practically any new market entrant will be subject to the obligations. This discriminates against the emergence of new services, particularly in larger geographies and contributes to consolidate the current monopoly of certain big platforms⁵. Broadcasters rightly question how this approach is coherent with the provisions of the Directive seeking to avoid measures “undermining market development and the entry (and growth) of new players in the market” (Recital 40, AVMSD).

Further, the approach assumes that the “reach” and “market share” for VoD can be calculated and used as a practical unit of measure across Member States. While audience data is readily available for linear services, this is far less prevalent in the VoD space, where data is opaque to say the least. The Guidelines do not clarify how such access to data would be obtained, under what conditions and how often it can/will be updated. This will lead regulators to apply very different approaches, based on different methodologies and partial data. More specifically, the methodology and potential impact on providers established outside the so-called targeted Member State are concerning insofar as the measurement of audience may be inconsistent across Member States. Resulting in a fragmented environment and no legal certainty as to exactly how and on what basis the thresholds are made or reviewed. The result will lead to arbitrary thresholds, and will incentivise players to forum shop or limit/delay the opening of new services.

We recall that it is fundamental to maintain the analysis at the channel/service level in order to ensure (a) the right level of comparison and (b) protect the exception made for thematic channel. As regards a multi-channel approach, the channel/service level of analysis is even more important given that these may comprise thematic channels. As set out in Article 13.6, thematic channels whose theme or nature makes it unpracticable or unjustifiable should see their obligations waived. While this is not expressly part of the guidelines, we take this opportunity to recall that a unified approach to thematic channels would be welcome to ensure they are subject to equivalent treatment across the EU; thereby putting an end to fragmented approaches taken by NRAs on what constitutes a thematic channel.

In conclusion, the Guidelines apply, limited yet welcome, new responsibilities to online platforms, while applying new administrative burdens, more quotas and a levy system to broadcasters and VoD services that leaves less financial room for investment and the emergence of new services. The ACT looks to the upcoming Digital Services ACT, Media and AV Action Plan and Democracy Action Plan to deliver a level regulatory playing field and greater protection for Europeans.

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ABOUT THE ASSOCIATION OF COMMERCIAL TELEVISION IN EUROPE (ACT)

The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters across 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 the European economy, society and culture.



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⁵ ACT and EUROVOD had already pointed this out in a joint statement (5/11/19)