

## Research for CULT Committee - The Implementation and Future of the revised Audiovisual Media Services Directive: Policy Recommendations Concomitant expertise for Implementation report

### KEY FINDINGS

The AVMSD should be reinforced as centrepiece of audiovisual content regulation on EU level. Deficiencies within the AVMSD and overlapping with other legal acts need to be addressed such as balancing the country-of-origin principle with necessary exceptions.

The current state of implementation with late transpositions hinders final conclusions regarding the innovative new rules. Nevertheless, focus of the monitoring of the new AVMSD application should be on the assessment of measures taken by video-sharing platform providers.

European works promotion obligations need careful analysis before being able to discuss possible future adjustments, based on the actual impact the provisions have on the audiovisual market.

Institutional structures with national authorities operating independently of market and political powers and cooperating efficiently on European level in an equally independent manner need to be safeguarded for an effective, fundamental rights observant oversight.

Reactions to providers under control of third countries, as with the measures under AVMSD and the economic sanctions package against Russian operators, show the importance of being able to rely on media law based and robust response schemes in the future.

In order to improve coherence and consistency of the regulatory framework, discussion on proposed legal acts, namely the European Media Freedom Act should be seen in the context of implementation analysis of the current AVMSD to be done by the European Parliament.



The following policy recommendations supplement the Background Analysis that was prepared for the European Parliament's Committee on Culture and Education (CULT committee) on the "Implementation of the revised Audiovisual Media Services Directive – Background Analysis of the main aspects of the 2018 AVMSD revision"<sup>1</sup>. In view of the integration of the revised Audiovisual Media Services Directive (Directive 2010/13/EU; AVMSD)<sup>2</sup> by Directive (EU) 2018/1808<sup>3</sup> in the national legislative frameworks by transposition as well as the actual implementation in the work of the competent national regulatory authorities dealing with the application of the relevant rules, a stocktaking two years after the end of the transposition period is necessary. The CULT Committee has therefore decided to present an initiative report on the implementation. However, as has been highlighted – and rightly criticised – on numerous occasions, the transposition of the innovative and new solutions as laid down in Directive (EU) 2018/1808 is suffering from the delay in aligning the national laws in most Member States and specifically the still outstanding transposition in Ireland.

The early discussion that the CULT Committee initiated is to be welcomed and timely as it coincides with significant adaptations to the regulatory framework concerning online content dissemination, creating an increasingly complex regulatory environment. The AVMSD was, is and should remain the core of "European Media Law" as is evident when considering the following focal points in the implementation and outlook. These points are presented as a basis for the CULT Committee's work on contributing not only to the monitoring of the current transposition and application efforts in the Member States, but also to the discussion on future legal acts and the next revision of the AVMSD itself. These steps should be undertaken in a way that identifies the necessary amendments in the medium and long term while initiating discussions on a future balanced approach to regulating media-related elements between Member States and EU level by intensively involving both levels and the stakeholders concerned. The European Parliament can play a critical role in the constant monitoring of developments in the audiovisual sector and the application of the AVMSD even outside of regular reporting periods and the scope of those reports that are for example produced in relation to European works.

## 1. Retaining and future-proofing of the country of origin principle

The Background Analysis shows the continued relevance of the country-of-origin principle to clearly distribute establishment-based responsibility of the Member States for audiovisual media services providers and video-sharing platform providers. The principle as such and the criteria to determine which Member State has jurisdiction have proven to function in most cases in practice. However, developments in recent years have shown that there needs to be a better balancing between a strict application of the principle and a limited amount of exceptions by making providers subject to jurisdiction or measures of Member States that are (mainly) targeted by their services. Such exceptions were foreseen from the very beginning of the AVMSD and its predecessor to ensure that Member States could protect fundamental values and rights of others in their territory. Irrespective of the reasons for a lack of enforcement on the side of the Member States normally having

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<sup>1</sup> Cole, M. D., Etteldorf, C., 2022, Research for CULT Committee – Implementation of the revised Audiovisual Media Services Directive, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2022\)733100](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2022)733100)

<sup>2</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version), OJ L 95, 15.4.2010, p. 1–24. Corrigendum to Directive 2010/13/EU, OJ L 263, 6.10.2010, p. 15–15.

<sup>3</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92.

jurisdiction, to allow for a clearer and more efficient response to exceptional circumstances in future, the framework of the AVMSD should be amended by accelerating and further streamlining the procedures that the Member States can invoke, detailing the derogation reasons and connecting the application of these procedures with clear and binding legal consequences in all Member States concerned.

Meanwhile, solutions should be explored which allow for a more cooperative approach to matters of high urgency and relevance for one or several specific Member States by further supporting and expanding the joint work of the competent national regulatory authorities in the European Regulators Group for Audiovisual Media Services (ERGA). A path that should be further explored has been opened in the form of the ERGA's internal agreement on a "Memorandum of Understanding" which has the aim to involve all regulatory authorities and allow them to take responsibility in the framework of a system in which the other ERGA members can request mutual assistance and cooperation.

## 2. Responding to third-country providers

Such a better coordination is especially relevant when it comes to dealing with potentially dangerous or illegal content originating from outside of the European Union Member States. The case of Russian-language channels targeting parts of the population in the Baltic States and the reaction of the national regulatory authorities in responding to the incitement to hatred contained in some programmes have shown deficiencies in the enforcement system that need to be addressed in a future revision of the AVMSD. With the changed realities, upholding the idea of giving third country providers the full benefit of the EU Single Market by simply using a "technical criterion" such as a satellite uplink to demonstrate attachment to a Member State of the EU is no longer appropriate without at least changing the requirements for applying this criterion. The latter can already be achieved by encouraging the European Commission to explore all possibilities to encourage Member States to apply the AVMSD in a way that allows decisions by one regulatory authority taken in accordance with EU law (including the AVMSD conditions) to have full effect by avoiding any form of further dissemination of the disputed content in the Member State that took action. This is important because those States – due to the current wording of the AVMSD and technical reasons – can only influence certain types of distribution within their territory. The proposed new rules in EMFA and the accompanying Recitals can be seen as first steps in rectifying this situation.

Even though the General Court has upheld the economic sanctions taken by the Council of the EU against certain providers under Russian state influence, such as RT, it should be considered to include a new form of robust joint reaction under media law provisions for cases in which activities by media or audiovisual content providers stemming from non-EU Member States pose a risk for the democratic societies of the EU. Such a newly conceived reaction could range from combatting disinformation issues to responding to threats by state-sponsored propaganda and should be included in the framework of content oversight procedures by independent and neutral regulatory authorities for the audiovisual sector.

## 3. Effectively addressing video-sharing platforms and the responsibility of VSP providers

Without the full picture of transposition and actual application of the rules concerning video-sharing platforms due to the late transposition and the lack of implementation in Ireland, interim conclusions only can be drawn. Firstly, it needs to be underlined how relevant and important the

move forward was to include VSPs in the scope of the revised AVMSD. Their relevance has since then grown further – and significantly so – and their comparability when it comes to competing for the same audience confirms the need to extend certain rules to these platforms even if the majority of the content on the platforms is not created under the editorial responsibility of the actual platform providers. Secondly, due to the increased relevance of these platforms, including social media networks that provide video-sharing as an essential functionality of their service, it has become evident that in the future discussions will have to be continued on whether further elements of the regulatory approach to audiovisual content needs to be aligned between more traditional audiovisual media services and VSPs. This could consequently lead to an increase of obligations also on the side of providers of the latter.

Thirdly and most importantly, the actual application of the new rules which is still outstanding will be an illustrative test case for the possibility of relying on provider-based regulatory approaches. As Member States have passed on the responsibility of choosing adequate measures of reacting to potential harms by the content available on the platforms to the providers thereof, it is important that these self-regulatory approaches are under an assessment procedure which explicitly has been allocated by the AVMSD to the competent national regulatory authorities. Consequently, it should be a high priority of these authorities or bodies to conduct this assessment procedure to evaluate whether measures are sufficient. It is suggested that accompanying studies provide evidence as the basis for future legislative choices. This can help in deciding whether there is a need to extend further provisions of the AVMSD to VSP providers. The focus in research and monitoring should not only be on the major VSP providers but also, to the extent they fall under the scope of the AVMSD, “niche” content providers especially if they provide mainly problematic content, e.g. violence, incitement to racial hatred, openly accessible pornography or similar. In addition, the protection of minors should be the focus of the assessment because the exposure of minors to potentially harmful content is especially problematic on these platforms due to the lack of common editorial responsibilities for the content provided, the international reach and the similar usage patterns by young people using these platforms.

Reflecting the role of VSP providers for the future applicability of rules e.g. on findability and visibility of news or current affairs content – also in light of the significance given to this type of content in the EMFA which generally requires very large online platforms to foresee specific procedures when dealing with content emanating from media service providers that have signalled this to the platforms – as well as cultural support elements such as the European works system of the AVMSD or the indirect effect that restrictions on audiovisual commercial communications have on the (re)financing of audiovisual media content, also need to be discussed.

## 4. European works promotion now and in future

In the context of the newly formulated rules concerning the promotion of European works, especially extending the “quota” obligation to on-demand service providers that need to reserve a share of their catalogues for these works and give them prominence, focus should now be on understanding whether and how Member States have used the possibilities given by the new AVMSD. This is currently happening for the period 2020/21 in the monitoring report under preparation. In an evaluation of these transposition measures, it should be checked whether the Guidelines issued by the European Commission to assist in the calculation of shares of works in the catalogues of on-demand service providers but also as regards low turnover and low audience providers are sufficiently clear and allowed the application to be harmonised to a sufficient extent. In addition, the outcome of the reporting could be used to discuss whether the right choices were made when it comes to the calculation method, although the analysis of the Guidelines already confirms that flexibility is built in to allow a balanced application.

Further, it should be analysed whether the possibilities of exceptions or non-application of the obligations should be further expanded – or reduced – to find the right balance between providers contributing to the promotion of European works and not being limited too much in their investment or programming decisions. This also concerns the introduction or extension of financial obligations, namely via direct investment or levies to national (film) funds, and whether Member States have used the possibilities to impose promotion obligations also to “non-domestic” providers. As this option was chosen by a number of Member States and additionally financial contribution systems exist in national laws based outside of the transposition of the AVMSD, an overall evaluation of the extent, differentiation between type of providers, comparability and impact of such financial obligations across the EU Member States has to be conducted based on the monitoring report due soon. In that context attention should be paid to the question, whether generally obligations are reflected in possible benefits that are given to providers fulfilling these obligations, for example, by guaranteeing higher visibility of content in general interest/public value-promotion systems that correspond to previous investments to European works. It is premature to draw conclusions already, but the CULT Committee should take note of practices in Member States combining obligations and “rewards” and thereby identify possible best approaches for the future.

In conclusion, before a potential rising of the catalogue shares for on-demand service providers is discussed, the effect of the newly introduced obligations should be checked in the forthcoming and next monitoring reports. This is necessary to see the actual effect of the quota/shares and decide on whether it is necessary to further align these between different types of content providers or distributors.

## 5. The relevance of effective institutional structures and cooperation mechanisms

Possibly the most important innovation in the last revision of the AVMSD and at the same time the foundation for future development is the institutionalisation of the structures for oversight of audiovisual media content both on Member State level and the cooperation at EU level, with an enhanced role given to ERGA. Now it needs to be further discussed, what independence of national regulatory authorities exactly means and which factors are used to determine independence not only from economic power of individuals or groups but also in the sense of an absence of state influence. In this regard the rights of media service providers as they are proposed in EMFA as well as the guarantee of independence of the newly proposed European Board for Media Services in EMFA should be considered. Part of this discussion will have to be to what extent a “state neutrality principle” can be defined as a common European standard and integrated into the legislative framework applicable to all bodies involved in the oversight. The approach of editorial independence from Member States and non-EU countries as laid down in EMFA goes in that direction.

The strengthening of ERGA was a very important step to find a more effective way of cooperation in cross-border cases on a European level without transferring the day-to-day work to a centralised body. The latter would already contradict the division of competences between the EU and its Member States as well as constitutional requirements in a number of States. ERGA being the forum for cooperation, has allowed the Group to create the above-mentioned Memorandum as a streamlining of the cooperation. It should be explored to what extent such a Memorandum can be made more binding or have the effect that the outcome of mutual assistance requests or jointly based decisions by the Group have some form of binding legal force in all Member States and especially the one having jurisdiction over the provider concerned in a specific case. The role of

ERGA members in assessing the suitability of measures taken by VSP providers to comply with their obligations will not only allow for conclusions to be drawn about the providers but also about the effectiveness of this regulatory oversight which could provide a blueprint for a co-regulatory system also in other content-related areas by giving the regulatory authorities either the power to lay down more concrete application rules of the legislative framework or to approve self-regulatory standards formally.

Enhancing ERGA's role in future cooperation structures – a possible inspiration for this could be the approach to a European Data Protection Board as created under the GDPR – can improve possible joint responses to issues that have a cross-border dimension or are of such high relevance for some Member States that a joint approach should be found. The European Parliament should check whether legislative proposals of the European Commission, namely in light of the recently enforced DSA (and to some extent DMA) and the monitoring structures created therein, allow for a coherent approach concerning institutions and procedures in this EU level cooperation dimension.

## 6. Looking forward

When looking beyond the implementation period of the recently revised Directive, it should be considered that one revision of the AVMSD per decade will no longer suffice to reflect technological evolution and changes in user and consumption habits. When amending the Directive in the future and putting it into the context of related legal acts, a higher degree of coherence and consistency in the framework applied to the audiovisual sector should be achieved. This does not only concern the question of applicability of the framework to what type of audiovisual content and what type of providers/distributors (scope) but also the clarification of the interconnection between the different elements of the framework. As the Background Analysis has shown, there are numerous questions regarding the meaning of the frequently used clause “without prejudice”. The AVMSD being the core of “European Media Law” should have a clear priority and be regarded as *lex specialis*, which takes precedence over the other legal acts as far as the content regulated by AVMSD is concerned. One way of doing this is the example of the recently proposed provision on devices and user interfaces in EMFA according to which the (potential) new rule would not affect solutions applied by the Member States under the AVMSD. Even though the binding legal force of such priority or precedence rules can only happen in the law itself or would otherwise be subject to interpretation by the CJEU, one possibility for creating more legal certainty and a clearer approach already now would be to encourage a kind of guidance paper by the European Commission for certain constellations in which it points out how in its own view the different elements of the regulatory framework are applicable to those constellations; alternatively further research could be commissioned in this regard.

Further consideration of possible medium and long term adaptations of the EU legal framework should refer to the approach suggested in the Council of Europe's [Recommendation CM/Rec\(2022\)11](#) of the Committee of Ministers to Member States on principles for media and communication governance. The principles therein concern procedural aspects for the creation of the regulatory framework for media and communication governance – including the role of platforms – as well as basic substantive principles which should be taken into consideration concerning production, dissemination and use of (also audiovisual) content for free communication in the public sphere. It was drafted with a view of certain policy developments within the EU and, therefore, can be used as a source for the future discussion on EU level.

The idea of technology neutrality of the regulatory framework cannot be fully achieved in the audiovisual sector as has already become evident in the past, but nonetheless, the main guiding principle should be that the technical possibilities might necessitate a further expansion of the

scope of rules which so far have only been applied to more traditional media service providers also to other forms of distribution. In short, the AVMS-framework needs to be made more “online-proof”. Thereby, even though all recent major steps in creating a digital “constitutional order” of the EU were proposed as Regulations, the AVMS should remain a Directive as well as any other mainly content-related provisions should in doubt be set up in Directives and only exceptionally as Regulations. The AVMSD, which by nature of its provisions has an impact on the cultural diversity of the media markets within the Member States, clearly does not fulfil the conditions to change it into a Regulation.

Finally, the implementation of the revised AVMSD of 2018 should continue to be very carefully followed by the European Commission, and the European Parliament should continue its work on proactively identifying possible future improvement areas without waiting for the first full implementation report and revision proposals of the European Commission. Even though this goes beyond the implementation assessment of the current AVMSD, this will entail an open discussion on whether the recently proposed European Media Freedom Act Regulation which would partly amend the AVMSD, should not be expanded into a revision of substantive rules of the AVMSD – and keeping them in the Directive – instead of creating a separate ruleset which will partly overlap. “Fortifying” the well-functioning AVMSD in the complex regulatory environment promises a successful continuation of this ruleset – reflecting not only the economic aspect of the services provided but also the cultural relevance – in the coming years.

## Further information

This briefing is available in summary, with option to download the full text, at: <https://bit.ly/3DP3ONG>

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