

**EDRI's analysis on the CULT compromise on Article 28a of the draft
 Audiovisual Media Services Directive (AVMSD) proposal**
Version of 27 March 2017

Article 28 a	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers take appropriate measures to:	1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States and the Commission shall ensure that video-sharing platform providers take appropriate, proportionate and efficient measures to:
Comments: We welcome the improvements made to this paragraph, even though they do not resolve the underlying problems with the overall approach.	
<i>(a) protect minors from content which may impair their physical, mental or moral development;</i>	<i>(a) protect all citizens from content containing incitement undermining human dignity, incitement to terrorism or content containing incitement to violence or hatred directed against a person or a group of persons defined by reference to nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health.</i>
Comments: Many of the activities listed, as well as being extremely vague, have no harmonised law, or no law at all underpinning them. Requiring companies to restrict freedom of expression in order to protect society from “incitement to hatred” on the basis of “any other opinion” falls below minimum standards for legal predictability. The standard for complying with “provided for by law” is described in the ECtHR ruling 33014/05 of 5 May 2011 (cf. Para. 51): http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-104685&filename=001-104685.pdf	

<p><i>(b) protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin.</i></p>	<p><i>(b) protect minors from content which may impair their physical , moral or mental development;</i></p>
<p>Comments: This is excessively vague. In paragraph 2 they only refer to physical or mental development of minors, which is more meaningful</p>	
<p>2. Those measures shall consist of, as appropriate:</p> <p>(a) defining and applying in the terms and conditions of the video-sharing platform providers the concepts of incitement to violence or hatred as referred to in point (b) of paragraph 1 and of content which may impair the physical, mental or moral development of minors, in accordance with Articles 6 and 12 respectively;</p> <p>(b) establishing and operating mechanisms for users of video-sharing platforms to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 stored on its platform;</p> <p>(c) establishing and operating age verification systems for users of video-sharing platforms with respect to content</p>	<p>2. Those measures shall consist of, as appropriate:</p> <p>(a) defining and applying in the terms and conditions of the video-sharing platform providers the concepts of incitement to violence or hatred as referred to in point (a) of paragraph 1 and of content which may impair the physical or mental development of minors, in accordance with Articles 6 and 6a respectively; For the purposes of paragraph 1, Member States shall ensure that measures based on terms and conditions are only permitted if national procedural rules provide a possibility for users to assert their rights before a court after learning of such measures;</p> <p>(b) establishing and operating transparent and user-friendly mechanisms for users of video-sharing platforms to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 hosted on its platform;</p> <p>(ba) establishing and operating systems through which providers of video-sharing platforms explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (b);</p> <p>(c) establishing and operating age verification</p>

<p>which may impair the physical, <i>mental or moral</i> development of minors;</p> <p>(d) establishing and operating systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;</p> <p>(e) providing for parental control systems with respect to content which may impair the physical, <i>mental or moral</i> development of minors;</p> <p>(f) establishing and operating systems through which providers of video-sharing platforms explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (b).</p>	<p>systems for users of video-sharing platforms with respect to content which may impair the physical <i>or mental</i> development of minors; <i>such systems shall not lead to any additional processing of personal data and be without prejudice to Article 8 of Regulation (EU)2016/679;</i></p> <p>(d) establishing and operating <i>easy to use</i> systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;</p> <p>(e) providing for parental control systems <i>that are under the control of the end-user and in proportionality</i> of the measures referred to in paragraphs 2 and 3 with respect to content which may impair the physical <i>or mental</i> development of minors.</p> <p><i>The regulatory bodies and / or authorities shall provide the necessary guidelines to ensure that the measures taken, respect freedom of expression, and include a requirement to inform users;</i></p> <p>(f) establishing and operating <i>transparent, easy to use and effective procedures for the handling and resolution of disputes between the</i> video-sharing platform <i>platform provider and its users in relation</i> to the implementation <i>of the measures</i> referred to in <i>points (b) to (f).</i></p>
<p>Comments: In the previous version of the compromises, point (e) had a requirement to ensure that the measures taken “<i>are based on prior judicial authorisation</i>”. This has unfortunately been removed from this new version. It is welcome that the new wording makes it harder for companies to avoid their obligations by claiming that the restriction was on the basis of their terms of service and not the provisions of the national law transposing the Directive.</p>	
<p>What constitutes an appropriate measure for the purposes of paragraph 1 shall be</p>	<p>What constitutes an appropriate measure for the purposes of paragraph 1 shall be</p>

<p>determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having <i>created and/or</i> uploaded the content as well as the public interest.</p>	<p>determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having uploaded the content as well as the public interest. <u>Appropriate measures shall respect freedom of expression and information, and media pluralism. The most harmful content shall be subject to the strictest measures. Such measures shall not lead to any ex-ante control measures or upload-filtering of content.</u></p>
<p>Comments: The current version is much better than the previous versions. We welcome this addition.</p>	
<p>3. For the purposes of the implementation of the measures referred to in paragraphs 1 and 2, Member States shall encourage co-regulation as provided for in Article 4(7).</p>	<p>3. For the purposes of the implementation of the measures referred to in paragraphs 1 and 2, Member States <i>and the Commission</i> shall encourage <i>and facilitate</i> co- <i>and self-</i> regulation as provided for in Article 4(7) <i>and 7(a) (new) ensuring that codes of conduct are compliant with the provisions of this Directive and fully respect the obligations set out in the Charter of Fundamental Rights, in particular Article 52 thereof.</i></p> <p><u>Member States shall ensure that video-sharing platform providers conduct and publish regular audits of their performance in accordance with the measures referred to in paragraph 1.</u></p>
<p>Comments: The word “self-regulation” (regulation of users by platforms) in this paragraph has an entirely different meaning from its meaning in the rest of the Directive (where it means actual self-regulation by media outlets of their own policies). It is not clear from the text who (Member States or video sharing platforms) should be “ensuring” that codes are compliant with the Charter. In any event, the Charter is binding on Member States and the Commission when implementing EU law and not on video-sharing platforms. We welcome the new, last paragraph introduced, as this will permit more meaningful assessment of whether the measures imposed “genuinely meet objectives of general interest”, as required</p>	

by the EU Charter.	
<p>4. Member States shall establish the necessary mechanisms to assess the <i>appropriateness</i> of the measures referred to in paragraphs 2 and 3 taken by video-sharing platform providers. Member States shall entrust this task to the authorities designated in accordance with Article 30.</p>	<p>4. Member States shall establish the necessary mechanisms to assess <u>and report on the delivery and effectiveness</u> of the measures <u>taken</u>, taking into account their <u>legality, transparency, necessity, effectiveness and proportionality</u>.</p> <p>Member States shall entrust this task to the authorities designated in accordance with Article 30. <i>The regulatory bodies and / or authorities shall provide the necessary guidelines to ensure that the measures taken, respect freedom of expression, and include a requirement to inform users.</i></p>
<p>Comments: These safeguards are welcome, it is not at all clear what procedures, if any, a Member State would be expected to create in order to verify fundamental rights compliance of “voluntary” efforts of video-sharing platforms to delete content to avoid liability under this instrument. Again, it is regrettable that a reference to the need to resort to prior judicial authorisation has been removed.</p>	
<p><i>5. Member States shall not impose on video-sharing platform providers measures that are stricter than the measures referred to in paragraph 1 and 2. Member States shall not be precluded from imposing stricter measures with respect to illegal content. When adopting such measures, they shall respect the conditions set by applicable Union law, such as, where appropriate, those set in Articles 14 and 15 of Directive 2000/31/EC or Article 25 of Directive 2011/93/EU.</i></p>	<p><i>5. Article 8 shall apply to video-sharing platform providers.</i></p>
<p><i>5a. Member States shall provide that commercial communications or sponsoring that are marketed, sold, or</i></p>	

	<p><i>arranged by video-sharing platform providers comply with the requirements of Articles 9 and 10.</i></p> <p><i>Without prejudice to Articles 14 and 15 of Directive 200/31/EC, Member States shall provide that video-sharing platforms require users who upload content, to declare whether such content contains advertisements, sponsored content or product placement.</i></p> <p><i>Member States shall require platforms to provide that service recipients be clearly informed of declared of known content including advertisements, sponsored content or product placement.</i></p>
<p>Comments: It is far from clear whether the problem being addressed here (a handful of YouTube or Facebook “stars” allegedly advertising/promoting products in an untransparent way) is of a scale that merits EU legislation, nor that the proposed text is clear enough to be limited to achieving that goal.</p>	
<p>6. Member States shall ensure that complaint and redress mechanisms are available for the settlement of disputes between users and video-sharing platform providers relating to the application of the appropriate measures referred to in paragraphs 1 and 2.</p>	<p><i>deleted</i></p>
<p>Comments: We refer to our comments on paragraph 2, point (f).</p>	
<p>7. The Commission and ERGA shall encourage video-sharing platform providers to exchange best practices on co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct.</p>	<p>7. The Commission and ERGA shall encourage video-sharing platform providers to exchange best practices on <i>self- and</i> co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct.</p>
<p>Comments: If the Commission is “facilitating” and not formally endorsing codes of conduct,</p>	

then there is no legal obligation for these Codes to be compliant with the Charter of Fundamental Rights. The EU should learn from experiences, e.g. the Hate Speech code of conduct: <https://edri.org/faq-code-conduct-illegal-hate-speech>

8. Video-sharing platform providers or, where applicable, the organisations representing those providers in this respect shall submit to the Commission draft Union codes of conduct and amendments to existing Union codes of conduct. The Commission may request ERGA to give an opinion on the drafts, amendments or extensions of those codes of conduct. The Commission *may give appropriate publicity to those codes of conduct.*

8. Video-sharing platform providers or, where applicable, the organisations representing those providers in this respect shall submit to the Commission draft Union codes of conduct and amendments to existing Union codes of conduct. The Commission may request **the** ERGA to give an opinion on the drafts, amendments or extensions of those codes of conduct. The Commission ***shall publish those codes in order to promote the exchange of best practice.***

Comments: Paragraph 8 implies that self-regulatory measures are similar to, but different from, the codes of conduct being referred to here. The responsibility of the Commission with regard to the legality and Charter-compliance of such codes is very unclear.