



Position Paper

Proposed revision of the Audio-Visual Media Services Directive

Introduction

European Digital Rights (EDRi) is concerned that the [proposed revision](#) of the Audio-Visual Media Services Directive (AVMSD) fails to clearly draw the line between different concepts and different services. The consequence of this lack of clarity will be a damaging effect on competition, freedom of expression, the fight against illegal material online and the protection of children online. This position paper only covers issues which fall within our scope of work.

Much of the lack of clarity can be traced back to the fact that traditional regulation of the relatively straightforward, two-sided *Service-->Viewer* TV and TV-like relationship is being extended to the more complex three-sided (if not circular) *Service-->Viewer, Service-->Uploader, Viewer-->Uploader* environment of video-sharing website.

This position paper is divided into two parts:

General issues

- The review does not effectively distinguish between illegal and harmful content
- Self-regulation is dealt with in a confusing and contradictory way
- Freedom of expression safeguards in the proposal are welcome but need to be extensively strengthened in order for them to have practical meaning

Specific issues

- The definition of video-sharing platforms is not clear
- The AVMSD should not interfere in the scope of E-Commerce Directive
- Platforms should be regulated where they do influence the content – advertising, for example
- A coherent approach of the AVMSD should include channel owners, in line with the intention of the Commission

General issues

The review does not distinguish between illegal and harmful content

From a [horizontal perspective](#) (recital 30 and Article 28a.5), the proposal establishes that Member States may take “stricter” measures than those provided for by the Directive, while respecting Directive 2000/31/EC. In addition, Recital 30 proposes that video-sharing websites should be able to take stricter measures than deletion on a voluntary basis. The proposal permits these “stricter” measures but does not mention what they are or what they might be.

From a [vertical perspective](#), the proposal establishes that hate speech, whose illegality is weakly defined under Framework Decision 2008/913/JHA, should be subject to specific regulation (recitals

8, 26 and 37), carrying this approach over from the existing Directive. However, recital 8 clarifies that, even though there is a legal framework, the law (which, itself, suffers from a weak definition) should only be the baseline “to the appropriate extent”. Insofar as the definition is not actually based on national law, measures to regulate it (in particular regarding video-sharing platforms) are legally questionable as the restriction is neither accessible nor predictable.

The proposal repeatedly treats potentially (but not necessarily) illegal and/or possibly harmful content in the same or similar ways (cf. Recitals 26, 28, 30, 31 and 32, for example)

In the context of the more complicated set of relationships being regulated in video-sharing platforms, this mixture of horizontal and vertical approaches and mixture of legal, possibly illegal content, actually illegal content and possibly harmful content is not conducive to legal certainty and falls below the minimum standards of foreseeability that is required by human rights law.

Self-regulation is dealt with in a confusing and contradictory way

The proposal uses the term “self-regulation” in ways which mean very different things:

- On the one hand, the term is used in its traditional sense. For example, regulation by industries of their own advertising, such as recital 11, where they agree to adopt particular measures to minimise possible risks to minors
- On the other hand, the voluntary approaches are also proposed for measures undertaken by industry players to regulate the activities of their customers (deletion, blocking, surveillance) ostensibly in the name of child protection or protection against (possibly illegal) hate speech. (such as in Recital 30)

Added to this is a tangential suggestion that the contracts between providers and their customers could or should be regulated by Member States. The notion of 'self-regulation' is further confused by, for example, Recital 37, which proposes that the European Commission should have a role in the regulation of (self-regulatory) codes of conduct. It will be (article 3d.7) informed of codes of conduct (without a clarification of whether this covers self- or co-regulation (or both)) *and* that the European Commission, where “appropriate’ (without explaining on what basis would be or might be appropriate), will actively launch initiatives to develop codes of conduct itself (article 6a.3). Why the Commission, rather than the European Regulators Group for Audiovisual Media Services ([ERGA](#)) or another organisation, is the most appropriate body to undertake such a function is never explained. Due to the risk of the Commission using its political power to coerce industry into taking restrictive measures, as we have seen happening already, we strongly believe that, insofar as the task should be undertaken by any public body at European level, this should be the ERGA.

Particular attention needs to be given to restrictions imposed by intermediaries that are in position of dominance or significant power in this context. Such companies, intentionally or not, through automated and human decision processes, make decisions that impact on the visibility, accessibility or findability of media content. These decisions have a clear impact upon public debates on issues of general interest. As a result, careful analysis is needed regarding the risks to media pluralism and diversity of content that result from their activities in the distribution of media content, as well as appropriate remedies.

Freedom of expression safeguards should be strengthened throughout the proposal

Recital 31 of the Directive seeks to defend freedom of expression. This clarification is very welcome. However, all of the content regulation that is mentioned apart from the single operational reference (recital 8)¹ to illegal content covers content that is not necessarily illegal, with no specific proposal on how to defend legal content from deletion by social media companies. As content would be (supported by 28a.2.a) removed on the basis of terms of service and not law, the redress mechanism foreseen in 28a.6) will, unquestionably, be inaccessible in practice. This is a major and fundamental flaw in the proposal.

A further problem is posed by Article 1.1.ii. This provision establishes the notion that, in principle, any kind of “organisation” of files on a social media platform could constitute grounds for regulation, possibly on the basis that this implies a degree of knowledge of the content. This makes little sense in the context of a subset of social media (video-sharing). In addition, it would set a very unhelpful precedent for social media regulation in general, in contradiction with the E-Commerce Directive.

Specific issues

1. The definition of video-sharing platforms is not clear

There is not a proven need to include video sharing platforms in the AVMSD reform

One of the biggest novelties of the proposal for an updated AVMSD is the inclusion of video-sharing platforms within the scope of new Directive. At first sight, the aim seems legitimate - combating hate speech and dissemination of potentially harmful content to minors. However, the wording of the proposed potentially raises more new issues than it resolves existing problems.

The European Commission [Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe](#) established that the challenges of digital age should be resolved in a careful and straightforward manner, since the various legal rules in this field have to provide a predictable legal environment for all stakeholders. This being the case, it is not clear why video-sharing platforms (rather than, for example, other social media sites which have – even indissociable – video sharing) should be independently regulated through the AVMSD, separately from other content-sharing platforms, which carry the same risk of providing access to illegal hate speech and other illegal forms of content. In particular, it is not obvious why a (poorly defined) degree of organisation of files in a video-sharing website should generate a new level of responsibility when there is no suggestion that the same would, should or could apply for non-video content (Article 26a). What is the specific research that suggests that regulating DailyMotion differently from Periscope is likely to achieve the intended public policy objectives?

Article 1(b) proposes a definition of video-sharing platforms. The definition includes four elements. Three of them provide for a far too broad margin of interpretation, and therefore create ambiguity. The fourth element is clear. These elements of video-sharing platform services are:

- (i) *“the service consists of the **storage of a large amount of programmes or user generated***

¹ Except for references to liability exceptions and undefined « stricter » measures)

*videos, for which the video-sharing platform provider does **not** have editorial responsibility".*

There are several issues here:

(a) What is the threshold for the "large amount" criterion? How technology-independent will should such a threshold be?;

(b) If the service does have some aspects of editorial responsibility, what happens then? Does it immediately fall within definition of "on-demand audiovisual media service"? Would standards of actual knowledge and awareness from the [E-Commerce Directive](#) be used for purposes of this distinction as well? Or would it be enough that at least one of current elements of editorial responsibility from AVMSD definition are not present? Instead of creating an unpredictable new criterion, would it not make more sense to ensure that the procedural safeguards foreseen by the European Court of Justice case law (see the [Kino.to case](#), c-314/12) are actually available in all EU Member States?

- (ii) *"the organisation of the stored content is determined by the provider of the service **including** by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing"*

What are those other means that are not automatic? Are they manual? How does such (automatic) "organisation" of the stored content affect the content itself? Is there a service that falls outside this definition – is it possible to put files in a computer system without them being organised "including [but not limited to] by automatic means"? Ironically, while being excessively broad, the definition still does not cover services such as Periscope.

- (iii) *"the principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate"*.

What is the "principal purpose"? Was the CJEU really clear enough in case C-347/14)) that "dissociable" will be clear to Member States? In any even, surely it is the dissociable service and not the service from which it is dissociable that should fall under the definition?

- (iv) *"the service is made available by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC."*

There is no guidance in the recitals of the AVMSD Proposal on these questions. Consequently, it is very difficult to estimate which platforms will be within the scope of the AVMSD nor, indeed, why and this will inevitably create additional legal uncertainty.

2. AVMSD should not interfere in the scope of E-Commerce Directive

The E-Commerce Directive's scope is horizontal. It has rules on the liability regime for intermediary service providers in its Articles 14 and 15 that is largely supported by the stakeholders² and the European Commission has also not seen fit to table an updated legislative proposal.

2 Online Platforms Communication, page 8.

Although the AVMSD proposal assumes that new obligations imposed to video sharing platforms will be without prejudice to the liability regime set out in the E-Commerce Directive, it is difficult to imagine how could be this be true in practice. It is impossible to leave it completely unaffected with current wording of **the proposed Article 28a**, because the latter concerns directly "notice and take down" obligations covered by Article 14 of the E-Commerce Directive, and, crucially, **diminishes the threshold for standards of "knowledge" and "awareness" laid out in that Article.**

In the explanatory memorandum of the review, the Commission states that "*[t]he system would be compatible with the liability exemption for hosting service providers set out in Article 14 ECD, in as far as that provision applies in a particular case, because these obligations relate to the responsibilities of the provider in the organizational sphere and do not entail liability for any illegal information stored on the platforms as such.*"

- '[T]he responsibilities of the provider in the organisational sphere' means that if a provider organises the content by automatic means or otherwise, it will be covered within the scope of the AVMSD.
- **It appears that the intention of the Commission proposal was to legislate for cases where the organisation of content is done to a degree of specificity that an appropriate level of knowledge is acquired, but it does not actually say this.**

While in some cases the logic follows, (in the case of media service providers with editorial responsibility, for example) this logic is hard to understand for video-sharing websites. In the case of media service providers the logic for being covered by the legislation is clear: editorial responsibility is derived from the fact that the provider has awareness of what the content actually is. If this unclear yardstick applies to online video, it is unclear how (or, indeed, why) it would not apply equally to organisation of other content in social media platforms. Platforms, to which *Article 14 of the E-Commerce Directive "applies in a particular case"* do not have that awareness. The simple declaration that there is certain responsibility for platforms that derives from their organisational behaviour that justifies their inclusion in the AVMSD is not enough. **The legal text should provide a more in depth explanation as to why does organisation of content performed by platforms have substantive importance for the content itself, such that specific legislation is needed.**

On the other hand, the proposed Article 28a(2) states the following:

*"What constitutes an appropriate measure for the purposes of paragraph 1 shall be 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 created and/or uploaded the content as well as the public interest."*

How are any of these bolded elements are related to "organisation" of content performed by platforms? How will Member States (or, under so-called "self-regulation", the platforms themselves) determine which measures are appropriate, without involving responsibility of the platforms for content, except through the notice and take down system that is the cornerstone of the Article 14 of the E-Commerce Directive. Where is the balance of interests of the intermediary that will lead to

the various concerns and stakeholders being given adequate consideration by the intermediary? How will the appropriate balance and redress, as envisaged by CJEU case law (see the *Kino.to* case, c-314/12, for example), be achieved by the intermediary? If this is not clearly defined, how can the laudable aims of Recital 31 be achieved in practice?

The main interest of the platforms and their content "organisation" is to reach the highest views possible, because they generate profit through advertising. They are neutral as to what the viewed content actually is, if they want to be covered by E-Commerce Directive's exceptions. The balance of interests currently relies on the unsubstantiated hope that the provider's objective to have the large number of video views will lead to an efficient balance in the notice and take down regime regulated by Article 14 of E-Commerce Directive. In addition to this hope, a fair balance in practice is conditioned on liability being imposed in a proportionate, Charter of Fundamental Rights-compliant way. In short, the current liability regime is already deeply questionable from the perspective of protection of the rights enshrined in the Charter of Fundamental Rights.

Therefore, insofar as the Commission wishes to argue that the measures proposed in Article 28a of AVMSD are necessary, they should, if anywhere, be contained in E-Commerce Directive. This would mean that the liability regime for platforms would potentially be changed, but that would also *de facto* be the case if Article 28a becomes part of the AVMSD in its current wording. The only difference being that, that in the latter case, interpretation of two sets of rules would be unclear and would lead to legal uncertainty. **We need legal certainty.**

3. Platforms should be regulated where they do influence the content - advertising

The AVMSD has so far regulated media service providers. A core element of the current definition of "media service" is their editorial responsibility for content.³ Thus, platforms should be regulated in AVMSD only in part where their editorial responsibility for content comes into play, and that is in their advertising role. In this respect, their obligations should be compliant with those of other media service providers.

In sum, regulating (social media) platforms specifically because of their organisational responsibility is simply not coherent with the current logic of the AVMSD. The proposed changes add a completely new category of service providers i.e. video-sharing platforms, based on their organisation of the content they host. However, these do not have any quality of media service providers except in relation to advertising. That aspect is not covered by the AVMSD proposal at all.

4. A coherent approach of the AVMSD should include channel owners, in line with the intention of the Commission

An additional inconsistency of the AVMSD proposal is that it does not clearly cover channel owners

³ Recital 25 of the current version of the AVMSD states that "[t]he concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Further on, Recital 26 states that: *For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.*"

that generate content on platforms and are therefore holders of editorial responsibility for content stored on platforms like media service providers.

Regulators should focus on channels carried on those platform services that **actively** compete in the audiovisual market(s) commercially **and** have editorial responsibility. These could be identified on the basis of their commercial arrangements with the platforms and their engagement in the market. The AVMSD should set out additional, clear criteria for identifying these channels, such as:

- (1) commercial revenue through sponsorship, advertising and product placement, affiliate programs etc.,
- (2) market relevance when comparing viewership numbers and community.

The current AVMSD proposal tackles channel owners in a rather confusing manner. Recital 3 says: *"As such, channels or any other audiovisual services under the editorial responsibility of a provider may constitute audiovisual media services in themselves, even if they are offered in the framework of a video-sharing platform which is characterised by the absence of editorial responsibility. In such cases, it will be up to the providers with editorial responsibility to abide by the provisions of this Directive."*

Could a literal reading of these two sentences be that, in this case, a platform would have no obligations, since liability would pass onto a channel provider, who would have the exact same obligations as any other media service provider, with no exceptions resulting from its specific nature? This was probably not the intention of AVMSD drafters. Thus, we once more point out that **a clear framework for actors in the digital sphere is imperative for the efficient application and implementation of the EU rules.**