

## Audiovisual Media Services Directive and Article 52 of Charter of Fundamental Rights

With regard to the video-sharing platforms, the relevant provisions of the Audiovisual Media Services Directive proposal (AVMSD) aim to impose legitimate restrictions on freedom of expression.

In order to be compliant with Article 52 of the Charter (in particular, the requirement that restrictions must be “provided for by law”), these restrictions must be foreseeable for individuals.

The standard for complying with “provided for by law” is described in the ECtHR ruling 33014/05 Judgment of 5 May 2011: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-104685&filename=001-104685.pdf>

*51. The Court notes that...[i]n order to comply with this requirement, interference does not merely have to have a basis in domestic law. The law itself must correspond to certain requirements of quality. In particular, a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct : he must be able if need be with appropriate advice to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*

The concern that the proposed Directive fails to respect this standard arises from:

- A Commission funded research report that shows that the underlying legislation (the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law) has been implemented in very diverse ways (“huge disparity”) across the Member States. Given the fact that Member States have different approaches to fight against illegal hate speech, incitement to hatred or violence, the various video-sharing sites will, in practice, have little or no option other than to over-comply, to varying extents, with their obligations, as over-compliance will carry no legal risk.

See: [http://mandola-project.eu/m/filer\\_public/7b/8f/7b8f3f88-2270-47ed-8791-8fbfb320b755/mandola-d21.pdf](http://mandola-project.eu/m/filer_public/7b/8f/7b8f3f88-2270-47ed-8791-8fbfb320b755/mandola-d21.pdf)

- Recital 8 underlines the previous point, because it makes the overlap between the laws implementing the Framework Decision and the AVMSD even more unclear for citizens and for social media companies, that are meant to enforce the law through “self-regulation”:

*Recital 8. ‘the notion of “incitement to hatred” should, to the appropriate extent, be aligned to the definition in the Council Framework Decision 2008/913/JHA’;*

- The above problems are exacerbated by lack of clarity in the references to “self-regulation.” The proposal fails to take account of the fact that this term has fundamentally different meanings in the traditional media context (regulation by those services of their own communications) and video-sharing sites (regulation of the users of those services by the provider outside a predictable framework). The same problem also exists, albeit to a lesser extent, for the term “co-regulation”. As a result, the same words have different meanings in different parts of the text.

- Recital 30 and Article 28a.5 strongly suggest that the intention is for legal speech that is perceived to be “incitement to violence and hatred” could or should be deleted, going beyond the provisions that are actually provided for by law. This impression is reinforced, in particular, by the final sentence of recital 30.

- Insofar as the recently adopted Directive on combating terrorism has an opt-out for Denmark, Ireland and the UK, the proposed addition of terrorism to the provisions being enforced by social media companies as a result of this measure may not be backed up by a specific law. Under the current proposal, the safeguards in the Terrorism Directive, such as they are, will not be obligatory in the transposition of the AVMSD. This will create legal confusion and legal uncertainty.

- Restrictions by video-sharing platforms will (as evidenced by the Commission's "code of conduct" on "illegal" hate speech) be [based on terms of service](#) and not the law. The redress mechanism proposed in the Directive (Article 28a.6) only cover disputes "relating to the application of the appropriate measures referred to in paragraphs 1 and 2" of that Article. It seems logical to assume that the Commission saw the inclusion of this provision as a necessary safeguard for the freedom of expression of individuals, to counteract the restrictive measures in the proposed Directive. The fact that it appears that the provision would be unavailable (or, at least, contingent on the good will of the platforms), means that Directive does not offer minimum protections for the fundamental rights of European citizens.