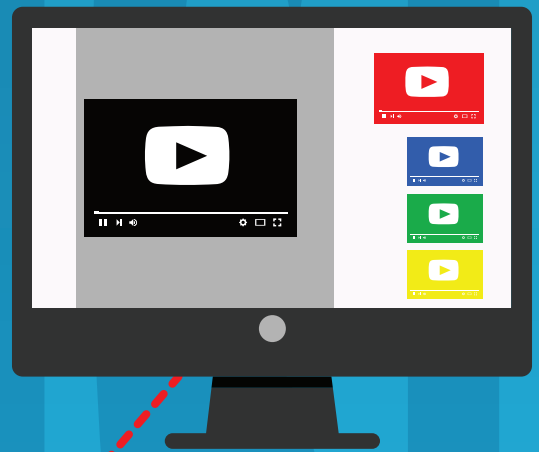




EUROPEAN DIGITAL RIGHTS



# EDRi position on AVMSD trilogue negotiations



## Recommendations for the trilogue negotiations on the Audiovisual Media Services Directive (AVMSD) revision

European Digital Rights (EDRi) is an association of 35 [civil and human rights organisations](#) from 19 countries, active both in Europe and across the globe. We defend rights and freedoms in the digital environment.

In the view of the upcoming trilogue negotiations on the [Directive on Audiovisual Media Services \(2016/0151\(COD\)\) \(AVMSD\)](#), EDRi would like to make a set of recommendations. **This position paper focuses on the new elements proposed regarding video-sharing platforms, their liability and content covered by the AVMSD.**

The absence of comments on certain provisions should not be interpreted as an endorsement. For the remaining articles and recitals, we broadly support the position taken by the European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) in its [Opinion on the Directive](#). EDRi's wording proposals are based on the Commission's proposal unless expressly specified (in the latter case, to explain the changes needed to the [European Parliament's Culture and Education Committee \(CULT\) Report](#)) or to the [Council's General Approach](#).

EDRi would like to expressly caution against extending the scope of the Directive to include weakly defined video-sharing platforms, including social media companies. This is because video-sharing platforms should not be subject to vertical legislation for both legal and possibly illegal content, that cuts across existing horizontal legislation on possibly illegal content. In addition, EDRi is concerned that **the proposed revision of the AVMSD fails to clearly draw the line between different concepts and different services.** Video-sharing platforms (and social media generally) are not traditional media, as their activities are not the production or publication of content, but the hosting and online distribution of content. The importance of online distribution for contemporary democracies is both high (as these actors can reasonably be considered as influencing the public sphere) and new (therefore it is a learning process, where caution is needed when it comes to legislation and regulation). **The consequences of getting it wrong can have a damaging effect on freedom of expression, competition, the fight against illegal material online and the protection of children online.** For these reasons, deletion of the relevant parts of the proposal would be the best option.

Failing deletion, EDRi proposes some constructive suggestions to mitigate the negative consequences of the proposal:

- **Article 1(1)(aa)** should be deleted, failing which the definition of video-sharing platforms would need more clarity. EDRi proposes some suggestions.
- **Article 1(1)(ba)**: legal certainty for the “user-generated video” definition is needed.

- **Article 28a and related recitals (8, 26, 30, 31 and 39)**
  - Article 28a should be deleted, failing which EDRi proposes some amendments to mitigate the risks identified, in line with the Charter of Fundamental Rights, CJEU case law, the E-Commerce Directive and the Framework Decision on racism and xenophobia.
  - Recital 8: legal certainty for the notion of incitement to hatred is needed.  
=>AM 2 of LIBE's Opinion would be a good compromise.
  - Recital 26 should comply with the principle of legality and predictability.  
=>AM 28 of CULT's Report or AM 10 of LIBE's Opinion would be a good compromise.
  - Recital 30: co-regulation should include all relevant stakeholders, including civil society organisations like EDRi, not undermine the E-Commerce Directive and should not restrict legal content.
  - Recitals 31 and 39 need to comply with the Charter of Fundamental Rights in practice.
- **Recitals 28, 29 and 32:** the liability of video-sharing platforms should be drafted in line with the E-Commerce Directive to ensure a proper "balance of incentives".

### I. Recommendations on Article 1-paragraph 1-point aa

*This provision should be deleted, failing which the definition of video-sharing platforms would need more clarity.*

**If deletion is not possible**, we propose the following amendment to minimise the negative effects of this provision.

#### **EDRi's compromise proposal:**

Article 1 – paragraph 1- point aa:\*

(aa) 'video-sharing platform service' means a service, as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, which meets ***all of*** the following requirements:

(i) the service consists of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform does not have editorial responsibility and ***whose market power on a national market is such that specific regulatory intervention is proportionate;***

(ii) the ***assistance provided to the end user is such that the provider has an active role in the presentation or promotion of the stored content that is of a kind that allows it to have knowledge or control of the data stored;***

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

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

**\*Comments:**

- “all of” is proposed in CULT’s report. It is important the criteria is cumulative. Otherwise, it would be very difficult to estimate which platforms will be within the scope of the reviewed AVMSD, leading to legal uncertainty.

- (i): the “large amount” criterion is subjective and risks being unpredictable.

- (ii): our suggestion brings the text into line with the knowledge requirement of the CJEU case L’Oreal/eBay, C-324/09. We took the language directly from the court ruling (see paras 116 and 123).

- (iii): our suggestion brings the text into line with the CJEU case NewsMedia Online GmbH v. Bundeskommunikationssenat, C-347/14. “and” was provided for in both the Council and the CULT’s positions.

## **II. Recommendations on Article 1-paragraph 1-point ba**

*Legal certainty for the “user-generated video” definition*

### **EDRI’s compromise proposal:**

Article 1-paragraph 1-point ba\*:

(ba) ‘user-generated video’ means a set of moving images with or without sound constituting an individual item that is created and/or uploaded to a video-sharing platform by one or more users **independent of and separate from the video-sharing platform;**

**\*Comments:** These changes reflect LIBE’s AM 34. The CULT report’s proposal introduced further uncertainty to the Commission’s text as it removed the notion that a user-generated video had to be user-generated, which means that the material in question would not need to be user-generated nor, indeed, would it need to be a video.

## **III. Recommendations on Article 28a and the correspondent recitals**

*We propose a deletion of the entire article 28a, failing which we make proposals that mitigate some of its flaws.*

14 September 2017

According to the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and relevant case law, legislation restricting fundamental rights, such as freedom of expression must be subject to a strict assessment.

In particular, restrictions on freedom of expression must be: “provided for by law”, and “necessary and genuinely meet objectives of general interest”. The requirement for a restriction to be “provided by law” means that the law must be accessible, clear and sufficiently precise to enable individuals to regulate their behaviour. This has been established by the case law of the European Court of Human Rights.<sup>1</sup> In addition, the principles of necessity and proportionality mean that the least restrictive option should always be preferred.

Therefore, Article 28a is not compatible with the European Convention of Human Rights and the EU Charter because, firstly, the description of the targeted content lacks clarity and secondly, incitement to broad removals (including removals of lawful material) is disproportionate.

In addition, the lack of an impact assessment of the expansion of scope by the CULT Committee and the Council means that respect for the necessity and proportionality obligations in the Convention and the Charter is highly doubtful.

Questions about the legality of the proposal are reinforced by the CJEU Opinion on the EU/Canada PNR Agreement (Opinion 1/15). It seems unquestionable that the Directive will lead to restrictions on the freedom of expression of individuals, when content is deleted. It also seems reasonable to argue that, as these restrictions will be implemented in a variety of different ways, based partly on law and partly on terms of service, the Directive is not specific with regard to how the restriction is imposed. This approach seems to be in stark contrast with the abovementioned CJEU Opinion:

Paragraph 139: It should be added that the requirement that **any** limitation on the exercise of fundamental rights must be provided for by law implies that the legal basis which permits the interference with those rights **must itself define the scope of the limitation on the exercise of the right concerned** (see, to that effect, judgment of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 81).  
(emphasis added)

The aim of the provisions set up in the article is to restrict the transmission of content alleged to be harmful to minors, described as “content which may impair the physical, mental or moral development of minors,” which is not necessarily illegal content. Moreover, the article also provides for a restriction or even a prohibition on content that is alleged to “incite to violence or hatred” or “to publicly provoke the commitment of terrorist offences”.<sup>2</sup>

---

1 See also “Freedom of expression and information: Explanatory Memorandum” <https://www.coe.int/en/web/internet-users-rights/freedom-of-expression-and-information-explanatory-memo>

2 Stalla-Bourdillon, S., “Key priorities for the trilogue negotiations on the Audiovisual Media Services Directive”, University of Southampton, UK, [2017], available at: <https://peepbeep.wordpress.com/2017/06/05/on-article-28a-and-the-proposal-to-extend-the-avmsd-is-it-time-to-be-pessimistic/>.

It is clear that the broad restrictions of legal and illegal content that video-sharing platforms are meant to impose will logically lead to significant levels of removal of legal content and therefore will not comply with the above mentioned requirements.

- Article 28 a – paragraph 1 (introductory part):

EDRI's compromise proposal:

Article 28 a – paragraph 1 (introductory part)\*:

1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, *the Commission and the Member States shall encourage* that video-sharing platform providers take appropriate, *proportionate and efficient* measures to:

\*Comments: These changes reflect the CULT amendment, adding “encourage” for the sake of clarity and proportionality. However, we still believe that they do not resolve the underlying problems with the overall approach. For example, if the measures that are referred to are “self-regulatory” and not laid down by law, there are few, if any, mechanisms for the Commission or Member States to ensure that the measures used by private companies, regulating the content uploaded by their customers on the basis of contractual arrangements are, in fact, proportionate. Some reflection is needed on whether an accountable, predictable structure could be built around the successful independent press council models that exist in some countries where this has been tried.

- Article 28a-paragraph 1-point a

EDRI's compromise proposal:

Article 28a-paragraph 1 point a\*:

(a) protect minors from *programmes, user-generated videos and audiovisual commercial communications* content which may impair their physical *or mental* ~~or moral~~ development;

\*Comments: On the one hand, these changes reflect the Council's position, which specifies which content video-sharing platforms deal with. On the other hand, it reflects LIBE's amendment 45. Do we want a society in which “video-sharing platform providers” have a strong influence on what should be or not morally good for our children?

- **Article 28a-paragraph 1-point b**

**EDRi's compromise proposal:**

Article 28a-paragraph 1-point b\*:

~~(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~~ ***act expeditiously to remove or disable access to illegal content, once it receives actual knowledge of the illegality of the content.***

\*Comments: A Framework Decision (albeit imperfect) already exists on racism and xenophobia. However, action is urgently needed to bring this instrument into line with international human rights law.<sup>3</sup>

It is inconsistent, both here and in Recital 8, to seek to move away from the law – in obvious contradiction to Article 52 of the Charter – with regard to regulation of content in this context. Our suggestion is based on the wording of the E-Commerce Directive. Both the Council and the CULT report fail to acknowledge this. In particular, EDRi would like to express strong concern about the CULT proposal for this paragraph. CULT includes grounds for action that are too vague, thus failing to comply with minimum standards for legal certainty and can lead to arbitrary restrictions of legal content, e.g. “content containing incitement to undermine human dignity” or content inciting to violence or hatred defined by a “political or any other opinion”.

- **Article 28a-paragraph 1-point ba and related recital 8a** introduced by the Council.

**EDRi's compromise proposal: deletion.**

\* Comments: The fight against terrorism is clearly important but the new text either duplicates (unnecessary) or contradicts (unclearly) existing legal provisions, such as the Directive on combating terrorism.<sup>4</sup> We urge you to take into consideration Sweden's and Commission's reservations on the Council's addition of a new point (ba) and of a new recital 8a, adding “terrorism” as another reason to limit the freedom of expression.

3 EDRi-member Article 19 has developed this point. See <https://www.article19.org/resources.php/resource/38231/en/%E2%80%98hate-speech%E2%80%99-explained:-a-toolkit> and <https://www.article19.org/resources.php/resource/38430/en/eu:-european-commission%E2%80%99s-code-of-conduct-for-countering-illegal-hate-speech-online-and-the-framework-decision>

4 <https://edri.org/terrorism-directive-document-pool/>

- Recital 8

EDRI's compromise proposal:

Recital 8\*:

~~(8) In order to ensure coherence and give legal certainty to businesses and Member States' authorities, the notion of "incitement to hatred" should, to the appropriate extent, be aligned with international law the definition in 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 which defines hate speech as "publicly inciting to violence or hatred". This should include aligning the grounds on which incitement to violence or hatred is based.~~

\*Comments: There is no logical reason to redefine an offence that is already regulated. Legal certainty is needed not only for businesses and Member States, but also for civil society organisations and citizens. Therefore, we urge to use common legal terms like "legal certainty" and we support LIBE's AM 2 on this matter. The standard for complying with "provided for by law" is described in the ECtHR ruling 33014/05 of 5 May 2011 (cf. Para. 51). The type of content to be regulated by these companies, including content which is not illegal - e.g. incitement to hatred based on "political opinions or any other opinions" (emphasis added, CULT report) falls far below minimum standards established in case law. This can only lead to arbitrary decisions by companies, without accountability.

- Recital 26

EDRI's compromise proposal:

Recital 26:

~~There are new challenges, in particular in connection with video-sharing platforms, on which users - particularly minors - increasingly consume audiovisual content. In this context, harmful content and hate speech stored on video-sharing platforms have increasingly given rise to concern. It is necessary, in order to protect minors from harmful content and all citizens from content containing incitement to violence or hatred, to set out proportionate rules on those matters. Self-regulatory and co-regulatory measures implemented or approved by Member States or by the Commission should fully respect the rights, freedoms and principles set out in the Charter, in particular Article 52 thereof.~~

\*Comments: The deletions are needed because all providers already have obligations regarding transmission (linear) or hosting (non-linear) of illegal content. No evidence has been provided to indicate that an horizontal approach is inadequate. The language added comes from CULT's report proposal on Recital 26 that we support except for the last sentence ("Regulatory authorities and/or bodies should retain effective enforcement powers in this regard"). Regulatory authorities should NOT have enforcement powers over self-regulatory mechanisms as it would defeat the purposes of self- and co-regulation.



- **Article 28a-paragraph 2 (introductory part)**

**EDRI's compromise proposal:**

Article 28a-paragraph 2 (introductory part):

2. 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. ***Appropriate measures shall respect freedom of expression and information. Such measures shall not lead to any ex-ante control measures or upload filtering of content. Member States shall ensure that such measures based on terms and conditions are only permitted if national procedural rules provide the possibility for users to assert their rights before a court after learning of such measures.***

Those measures ~~shall~~, **may** consist of, as appropriate:

\*Comments: Our modifications follow CULT's report for this provision that we support. We deleted "media pluralism" because it is part of freedom of expression and information (see article 11 of the EU Charter).

The last part of the first paragraph brings the proposal of CULT into this paragraph (instead in point a), which brings these measures into line with CJEU case law, specifically with the Telekabel case, c-314/12 (paragraph 57).

Finally, changing "shall" for "may" is important in view of the principle of proportionality. It mirrors (and at the same time improves) the proposal from the Council.

- **Article 28a-paragraph 2-point a:**

The proposal from the Council is particularly disturbing in the context of other instruments – such as the Europol regulation – which tasks that body with the job of reporting content to internet service providers, without any reference to the law, but for "their voluntary consideration of the compatibility of the referred internet content with their own terms and conditions" (cf. Article 4,1 (m) of the Europol Regulation).

**EDRI's compromise proposal:**

Article 28a-paragraph 2-point a\*:

(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, ~~moral~~ **or mental** development of minors, in accordance with Articles 6 and 12 respectively;

\*Comments: Video sharing-platforms should not decide on moral grounds via their terms and conditions. We support the safeguard introduced by the CULT report here. Since the addition refers to paragraph 1, we have proposed it in that paragraph.

- **Article 28a-paragraph 2-point b:**

EDRI's compromise proposal:

Article 28a-paragraph 2-point b\*:

(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 ~~stored~~ **hosted** on its platform;

***(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);***

\*Comments: We fully support the CULT report on these points.

- **Article 28a-paragraph 2-point c:**

EDRI's compromise proposal:

Article 28a-paragraph 2-point c\*:

(c) establishing and operating **efficient** age verification systems for users of video-sharing platforms with respect to content which may impair the physical, **or mental** ~~or moral~~ development of minors. ***Such systems shall not lead to any additional processing of personal data and shall be without prejudice to Article 8 of Regulation (EU) 2016/679;***

\*Comments: If Member States identify a problem that is of a scale that specific legislation is needed on age verification, this will raise significant privacy concerns. It is therefore important to ensure that any such measure fully respects the legal obligation to be the least restrictive option available. We support CULT's proposal in this sense, as the least problematic option apart from deletion. However, it is important to reiterate that video-sharing platforms should not decide what constitutes a moral impairment for the development of children. Which moral should they take into account, the one of the company, the parents, the governing party?

- **Article 28a-paragraph 2-point d:**

**EDRI's compromise proposal:**

Article 28a-paragraph 2-point d:

(d) establishing and operating ***easy-to-use*** systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;

\*Comments: This proposal reflects the changes in CULT's report.

- **Article 28a-paragraph 2-point e:**

**EDRI's compromise proposal:**

Article 28a-paragraph 2-point e:

(e) providing for parental control systems ***that are under the control of the end-user***, with respect to content which may impair the physical ***or*** mental ~~or moral~~ development of minors;

\*Comments: Parental controls should allow maximum autonomy for end-users. The changes mirror parts of CULT's report. We do not consider that guidelines will solve the issues that we currently experience unless they are duly drafted, monitored and enforced consistently.

- **Article 28a-paragraph 2-point f:**

**EDRI's compromise proposal:**

Article 28a-paragraph 2-point f:

(f) establishing and operating ***transparent, easy-to-use and effective procedures for the handling and resolution of disputes between*** systems ~~through which~~ providers of video-sharing platforms ***and explain to*** users of video-sharing platforms, ***including the validity of and***, what effect has been given to the reporting and flagging referred to in point ~~s(b)~~ ***to (f)***.

\*Comments: This proposal reflects the changes in CULT's report that we support.

- **Article 28a-paragraph 3**

As regards the promotion of self- and co-regulation, there is not a clear delineation in the proposal. User rights are sidelined and made more difficult to assert in non-legislative options. The overall lack of provisions on counter-notices from uploaders of reported content in all versions of the Directive is deeply regrettable.

In paragraph 3, the Commission's proposal required "co-regulation". In our opinion, that provision could be accepted with the small number of changes that we propose.

**EDRI's compromise proposal:**

Article 28a-paragraph 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).

***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.***

\*Comments: We welcome the last paragraph introduced by CULT, but we do not agree with its amendments to the first paragraph, for the reasons detailed above.

- **Article 28a-paragraph 4**

**EDRI's compromise proposal:**

Article 28a-paragraph 4

4. Member States shall establish the necessary mechanisms to assess ***and report on the transparency, necessity, effectiveness legality and proportionality*** appropriateness of the measures referred to in paragraphs 2 and 3 taken by video-sharing platform providers. Member States shall encourage ***video sharing platforms to ensure that*** the measures taken respect freedom of expression are based on prior judicial authorisation, and include the necessity to inform users.

\*Comments: It is not clear what could be understood by "appropriateness" by the Member States or on what grounds the Commission believes or believed that this would be understood in a harmonised way. We have improved CULT report's suggestions with wording adopted by the [LIBE Committee](#).

- Article 28a-paragraph 5 and corresponding recital 30

*The proposal should not undermine the E-Commerce Directive and should not restrict legal content.*

**EDRI's compromise proposal:**

Article 28a-paragraph 5\*:

***When adopting measures in relation to content that has been ruled to be illegal, Member States shall respect the conditions set by applicable Union law, such as***~~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, Article 25 of Directive 2011/93/EU~~  ***and the EU Charter of Fundamental Rights.***

\*Comments: As regards illegal content, the proposed paragraph 5 establishes that Member States shall (or “may”, in the Council’s version) take “stricter” measures than those provided for by the E-Commerce Directive. The Commission’s proposal permits these “stricter” measures but does not mention what they are or what they might be. Ultimately, video-sharing websites are already regulated by the E-Commerce Directive. Therefore, any additional requirement will, almost by definition, lead to the deletion of legal content, due to fears of liability in this new, confused environment.

Recital 30\*:

It is appropriate to involve the video-sharing platform providers, ***civil society organisations and other stakeholders*** as much as possible when implementing the appropriate measures to be taken pursuant to this Directive. Co-regulation ***within a transparent and accountable multistakeholder process*** should therefore be encouraged.

With a view to ensuring a clear and consistent approach in this regard across the Union, Member States should not be entitled to require video-sharing platform providers to take stricter measures ~~to protect minors from harmful content and all citizens from content containing incitement to violence or hatred than the ones provided for in this Directive. However, it should remain possible for Member States to take such stricter measures where provided that they comply with Articles 14 and 15 of Directive 2000/31/EC, and to take measures with respect to content on websites containing or disseminating child pornography, as required by and allowed under Article 25 of Directive 2011/93/EU of the European Parliament and the Council 35~~. It should also remain possible for video sharing platform providers to take stricter measures on a voluntary basis.

\* Comments: Recital 30 proposes that video-sharing websites should be able to take stricter measures than deletion on a voluntary basis. The last part of this recital places video-sharing platforms on a higher level than legislators, in apparent gross violation of Article 52 of the Charter. The law and the safeguards therein must be respected by all parties.

- Recitals 31 and 39

*The proposal should be compliant with the EU Charter of Fundamental Rights*

The key element of the EU Charter in this context is Article 52, which requires that restrictions on fundamental freedoms be “provided for by law”. The Commission’s proposal fails to respect this requirement, with CULT and Council going even further beyond the bounds of legality.

Recitals 31 and 39 make reference to the Charter but, when describing restrictions on fundamental rights, fail to mention Member States’ obligations with regard to such restrictions under the Charter.

- Recital 31

EDRI’s compromise proposal:

Recital 31:

When taking the ~~appropriate~~**necessary** measures to protect minors from, harmful, or illegal **racist and xenophobic** content and to protect all citizens from content containing incitement to violence or hatred in accordance with this Directive, the applicable fundamental rights, as laid down in the Charter on Fundamental Rights of the European Union, should be carefully balanced. That concerns in particular, as the case may be, the right to respect for private and family life and the protection of personal data, the freedom of expression and information, the freedom to conduct a business, the prohibition of discrimination and the rights of the child. **Member States have a positive obligation to ensure that the balance of incentives for media service providers and video-sharing platform providers covered by this Directive is such that legal content, including content that can offend, shock or disturb, can be communicated. Similarly, age verification should only be required by law if necessary and proportionate and should be implemented in a way which offers the maximum protection of privacy.**

\*Comments: The changes reflect AM 17 of the LIBE’s opinion, which provide a reasonable compromise to solve the issues addressed above.

- Recital 39:

EDRI's compromise proposal:

Recital 39:

***Member States, when implementing this Directive, are under the obligation to*** respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, ***Member States should ensure that no measure adopted for the transposition of*** this Directive ~~seeks to ensure full respect for~~ ***directly or indirectly undermines*** the right to freedom of expression, the freedom to conduct a business, the right to judicial review and to promote the application of the rights of the child enshrined in the Charter of Fundamental Rights of the European Union.

\*Comments: Recital 39 includes a welcome reference to the Charter. However, the issue at stake is not the Directive itself, but rather the restrictions that video-sharing platforms will choose to implement, as a result of the very unclear framework that would result from transposition of the Directive. These changes partially reflect the changes proposed by the CULT report. Our compromise proposal is inspired by AM 28 of LIBE's opinion and AM 28 of IMCO opinion.

- Article 28a-paragraph 6

Under the European Commission's "code of conduct" agreed with four American online companies, providers will review reports of hate speech on the basis of "their rules and community guidelines" first and only "where necessary" on the basis of the law. If the companies choose to rely exclusively on their terms of service on the basis of their internal rules when deleting content, they have no obligation to implement a redress mechanism, as Article 28a.6 only applies to application of the legal measures transposing Paragraph 1 of Article 28a. This is a major and fundamental flaw in the proposal.

EDRI's compromise proposal:

Article 28a-paragraph 6\*:

6. Member States shall ensure that complaint and ***effective*** redress mechanisms are available for the settlement of disputes, ***including, when practicable, counter-notice procedures*** between users and video-sharing platform providers relating to the application of the appropriate measures referred to in paragraphs 1 and 2.

\*Comments: We support the deletion of this text as suggested by CULT's report, but in case the removal would not be accepted, we aligned our text with AM 56 of LIBE's opinion. These changes are proposing notice procedures as they are weighed heavily towards deletion of legal content and would bring practices more into line with the EU Charter and European Convention on Human Rights.

- **Article 28a-paragraph 7**

The proposal that the Commission should be required to develop co-regulatory codes “if appropriate” is very unclear.

**EDRI’s compromise proposal:**

Article 28a-paragraph 7\*:

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.~~

\*Comments: As appropriateness is highly subjective, this suggestion is too unclear to be included in legislation. In addition, experience shows (e.g. Hate of Speech Code of Conduct) that these processes are not representative, inclusive or open to the relevant stakeholders, which lead to unsatisfactory results, not least due to the Commission’s avoidance of accountability for the outcomes of such processes.

- **Article 28a-paragraph 8**

**EDRI’s compromise proposal: deletion**

Paragraph 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.~~

\*Comments: The Commission has not presented any evidence to suggest that this particular regulation of “self-regulation” in the subset of social media represented by video sharing platforms is necessary or appropriate.

#### **IV. Recommendations on liability of video sharing platforms set in Recitals 28, 29, 32**

The liability of intermediaries is an issue of great importance to citizens’ rights. Under existing rules, such as the E-Commerce Directive, there is a delicate balance between liability for illegal content on the one hand, and responsibility to leave legal content online, on the other – the “balance of incentives” referred to in LIBE’s opinion, amendment 17.



- Recital 28

Recital 28 argues that a video hosting platform, simply by “organising” files on their system have enough knowledge of their content to incur responsibilities for the policing of both potentially harmful or illegal content.

**EDRI’s compromise proposal:**

Recital 28\*:

[28] An important share of the content ~~stored~~ **hosted by** video-sharing platforms is not under the editorial responsibility of the video-sharing platform provider. ~~However, t~~ **Those providers** typically determine the organisation of the content, namely programmes or user generated videos, including by automatic means or algorithms. Therefore, those providers should be required, **if the size or nature of their audience merits this**, to take appropriate measures to protect minors from content that may impair their physical **or mental** ~~or moral~~ development and protect all citizens from 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.

\* Comments: It makes little sense to regulate video-based social media in one way – based on the “automatic” or “other” organisation of hosted content and other video-based social media in a different way. Services should be regulated if their on their size and audience merits this, while criteria for constructive knowledge must be in line with CJEU case law. Furthermore, it is not proportionate to regulate providers that are either too small or whose services are irrelevant for minors.

The final text section of the text is deleted as illegal content is already regulated under EU law and the value added of the unclear new level of regulation in this proposal is not explained and is not clear.

- Recital 29

**EDRI’s compromise proposal:**

Recital 29\*:

[29] In light of the nature of the providers’ involvement with the content stored on video-sharing platforms, those appropriate measures should relate to the organisation of the content and not to the content as such. The requirements in this regard asset out in this Directive should therefore apply without prejudice to Articles 14 **and 15** of Directive 2000/31/EC of the European Parliament and of the Council 34, which provides for an exemption from liability for illegal information stored **hosted** by certain providers of information society services. ~~When providing services covered by Article 14 of Directive 2000/31/EC, those requirements should also apply without~~

~~prejudice to Article 15 of that Directive, which precludes general obligations to monitor such information and to actively seek facts or circumstances indicating illegal activity from being imposed on those providers, without however concerning monitoring obligations in specific cases and, in particular, without affecting orders by national authorities in accordance with national legislation.~~

\*Comments: Recital 29 appears to narrowly redefine concepts provided for in the E-Commerce Directive, while saying that this is without prejudice to that instrument. Our suggestions try to eliminate legal uncertainty from the text.

- Recital 32

**EDRI's compromise proposal:**

Recital 32\*:

Video-sharing platform providers covered by this Directive provide information society services within the meaning of point (a) of Article 2 of Directive 2000/31/EC ***and generally provide hosting services in line with Article 14 of that instrument.*** Those providers are consequently subject to the rules on the internal market set out in Article 3 of that Directive, if they are established in a Member State. It is appropriate to ensure that the same rules apply to video-sharing platform providers which are not established in a Member State with a view to safeguarding the effectiveness of the measures to protect citizens set out in this Directive and ensuring a level playing field in as much as possible, in as far as those providers have either a parent company or a subsidiary which is established in a Member State or where those providers are part of a group and another entity of that group is established in a Member State. To that effect, arrangements should be made to determine in which Member State those providers should be deemed to have been established. The Commission should be informed of the providers under each Member State's jurisdiction in application of the rules on establishment set out in this Directive and in Directive 2000/31/EC.

\* Comments: The E-Commerce Directive's liability exceptions have been key to ensuring the growth of information society services. Any failure to maintain this protection will have a damaging effect on the online environment in the European Union, particularly for smaller companies.