

Key digital priorities for the Audiovisual Media Services Directive

Introduction

European Digital Rights welcomes the intensive work undertaken by the joint rapporteurs on the Audiovisual Media Services Directive. We support their efforts to reach a balanced outcome, despite some fundamental structural problems with the Commission's text.

Restrictions must be “provided for by law”

A key element of the EU Charter is Article 52, which requires that restrictions on fundamental freedoms be “provided for by law”. The Commission's proposal fails in this respect quite gravely.

Illegal content:

Not alone has the EU's Framework Decision on Racism and Xenophobia been heavily criticised,¹ independent research funded by the European Commission shows that it is transposed in very divergent ways and poorly implemented.² In this context, therefore, a very precise approach to this issue is needed in the AVMSD in order have any chance of withstanding a challenge under Article 52 of the Charter. Instead:

- Recital 8 says that the definition of “hate speech” should be aligned “where appropriate” to the definition in the Framework Decision. Amendment 127 and LIBE's amendment 2 would improve this recital.

- Recital 30 refers to obligations with regard to “incitement to violence” (which is normally illegal), before saying that Member States may not go further than the requirements of the Directive, except when such content is illegal. By implication, this means that the Directive envisages restrictions on “incitement to violence” which is not illegal. Amendments 292 and 300 and LIBE's amendment 16 would improve the text significantly.

- Recitals 31 and 39 make reference to the Charter but, when describing restrictions on fundamental rights, fails to mention Member States' obligations on such restrictions under the Charter. Amendments 300 and 301 to recital 31 and LIBE's amendment 17 are very helpful. 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. Amendments 339 and 340 and LIBE's amendment 28 add a great deal of clarity to recital 39.

This repeated confusion makes it impossible to understand the legality or not of the content referred to by the Commission in Article 28a.1.

Red line: References to restrictions of illegal content must be clear enough to comply with the EU Charter

1 ARTICLE 19's submission to the Consultations on the European Union's justice policy. See <https://www.article19.org/resources.php/resource/37412/en/article-19%E2%80%99s-submission-to-the-consultations-on-the-european-union's-justice-policy>

2 Mandola Project: intermediate report Definition of illegal hatred and implications. See http://mandola-project.eu/m/filer_public/7b/8f/7b8f3f88-2270-47ed-8791-8fbfb320b755/mandola-d21.pdf

Video-sharing platforms - liability

The liability of intermediaries is an issue of great importance to citizens' rights. Under existing rules, such as the E-Commerce Directive, a delicate balance between liability for illegal content on the one hand, and responsibility to leave legal content online, on the other.

The AVMS Directive puts this delicate balance under threat in several ways:

- 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. This situation would be improved by amendments 266 and 277.
- This is reinforced by Recital 29 which appears to narrowly redefine concepts provided for in the E-Commerce Directive, while saying that this is without prejudice to that instrument. Amendment 282 would help address this
- Recital 32 further mixes legal (but potentially “harmful”) content. This problem would be solved by amendments 308 and 309.
- The definition of the companies covered by the Directive is extremely unclear. There is no concept of “large amount”, a confusion between “organisation” of content and the likelihood of a diligent operator having an insight into the nature of the content.
- In particular, article 28a.1 makes no reference to the illegality of the content. It is remarkable that recital 8 urges Member States to align definitions to the Framework Decision, while this paragraph does not align its definitions to existing legislation. We welcome the amendments proposing the deletion of this article, such as 880. Amendments 882 and 883 are an alternative approach, which is also acceptable. Amendment 255 to recital 26 provides helpful guidance as does LIBE's amendment 13.

Red line: The definition of the services covered and their obligations should be clear and not based on unclear terms such as “large amount” or “protect all citizens”

Redress measures

Under the European Commission's “code of conduct” agreed with a group of 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.

While it is welcome that the Commission's proposal recognises that the Directive creates a problem that needs to be solved, sadly the proposed redress mechanism seems unlikely to achieve its intended aims.

Red line: The redress mechanism should cover all “self-”regulatory codes that are approved by Member State regulatory authorities.