

Digital Single Market

European Commission launches
proposals for new regulatory
framework for audiovisual media
services

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European Commission launches proposals for new regulatory framework for audiovisual media services

The EU Commission has today (25 May 2016) published its long-awaited review of the AVMS Directive – the key legislation governing the regulation of media services in the EU. AVMS is built on the concept of "country of origin" (COO) so that any service regulated in its "home" Member State may operate throughout the EU without incremental regulation (at least in the fields covered by the Directive). In return, the Directive sets out minimum regulatory obligations which each Member State must implement.

We look at the proposals, what impact they will have on different parts of the evolving media ecology and what the next steps are towards this proposal becoming law.

Context

The AVMS proposals are part of the announcement of the next major wave of "Digital Single Market" initiatives. Also announced today were legislative proposals on cross-border parcel delivery, consumer protection co-operation among regulators and geo-blocking – the latter does not apply to geo-blocking of audiovisual services or (at least for the time being) of other electronically supplied services "the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter services".

In addition to the legislative proposals, there are two non-legislative papers. The first concerns "online platforms" and discusses issues such as notice-and-action and the need for a level playing field for comparable digital services, but without proposing any immediate actions; the second is revised guidance on unfair commercial practices, seeking to ensure uniform practical application of EU rules in that area.

What services will be covered by the new AVMS Directive?

In addition to broadcasts and certain on-demand video services with an identifiable entity with editorial responsibility, the new Directive applies to "video-sharing" services, the most obvious example of which is YouTube. While the obligations on those services are limited, as we explore below, it is significant that the EU has chosen to bring them within the scope of the AVMS Directive – allowing for further obligations potentially to be imposed in due course.

It is also noteworthy that they have chosen to apply a different jurisdictional test to these video-sharing services. Broadcasters and on-demand services are regulated by reference to the location of their head office and where editorial decisions are made (with special rules for those services based outside of the EU but with a workforce or using facilities in the EU). This will remain broadly unchanged, though there are new rules to make it easier to resolve disputes where more than one country claims jurisdiction. For the new video sharing services, however, where they are not "established" in an EU state, but there is any group company established in the EU, that will be enough to bring them within the jurisdiction of an EU regulator. If there are multiple group companies based in the EU, the service may nominate a representative entity and thereby choose (or forum-shop) where in the EU it will be regulated.

What is changing for linear broadcasters?

Traditional broadcasters will be pleased to see some loosening of the EU-wide rules. While the general principle of separation of advertising and editorial content remains, the proposal deletes the explicit ban on "promotional references" to sponsors and companies providing product placement and the reference to undue prominence of products which are subject to placement deal.

In terms of ad-break patterns, films and news programmes may have an ad break every 20 minutes, rather than every 30 minutes as at present. Also, the cap of 12 minutes per hour of ads (and teleshopping) becomes a cap in average across the entire day (07:00 to 23:00) potentially allowing for longer ad breaks in peak.

There will also be a removal of all restrictions on night-time teleshopping (although in practice this is likely to make little difference). Broadcasters will also welcome the removal of specific rules on protection of minors, which means that linear broadcasters will be placed on the same footing as on-demand services.

On the other hand, this de-regulation falls far short of that demanded by broadcasters who consider the playing field tilted away from them and in favour of on-demand and video sharing services.

Moreover, there is no guarantee that any broadcaster will find themselves in a more liberal regime, as individual countries remain free (as they always have been) to apply stricter rules in all of these areas. The UK caps ad breaks at 9 minutes per hour on average (and 12 minutes in any clock hour) and it is too early to say whether those rules will be relaxed – it is widely thought that an increase in supply of ad minutes simply depresses prices.

What is changing for on-demand services?

The existing AVMS Directive includes a general obligation on Member States to ensure that on-demand services promote EU content, but gives them a broad discretion as to how to deliver that obligation. In reality, while a few countries have introduced quotas, most have not.

The new rules require almost all on-demand services to include at least 20% European works in their catalogues (without explaining whether this is measured by number of titles, duration etc.). In addition to the volume quota, the proposals also demand that Member States **ensure prominence** of European works. In an on-demand environment, the latter is highly controversial and subjective – will a "European works" genre in a list of genres be enough?

More radical still is the loosening of the COO principle to allow for contributions to national content investment funds. Clearly driven by French objections to (in particular) Netflix, it allows organisations such as the CNC to impose levies on services originating (and regulated) outside of France (in this example) based on the size of their French revenues. Given that COO is such a cornerstone of the Directive, there have been widely articulated concerns that once the principle is breached in one area, it might lead to other countries looking for special treatment for their own issues of particular concern.

The services to which the above quotas and other rules will not apply are those with low turnover or low audiences as well as small and micro-enterprises, while Member States are also permitted (but not obliged) to waive the quotas where they would be "impracticable or unjustified by reason of the nature of theme" of the on-demand service. This mirrors the "where practicable" quota for linear TV channels. It is not clear which Member State may exercise this waiver right in the case of the financial contribution obligations.

What obligations are imposed on video sharing services?

Both traditional broadcasters and on-demand services will welcome the inclusion in scope of video sharing services such as YouTube. The rules applying to them are relatively minimal – and only touch on the most basic areas of protection of minors and protection from hate speech. In these areas, appropriate measures have to be taken to protect citizens – with Ofcom and the other national regulators being tasked with ensuring that the video sharing services are taking appropriate measures, from a list set out in the new Directive.

The principle that video sharing services are no longer beyond the reach of EU rules will lead some to conclude that they will be open to more scrutiny next time the Directive is revisited. However, for the time being, Member States are not permitted to impose stricter rules and are required in particular to respect the so-called safe harbour rules set out in the e-commerce Directive.

What happens next?

The draft now falls to be considered by the ultimate legislators: the EU Council Of Ministers (representing the Member States' governments) and the directly-elected European Parliament.

Prior experience of AVMS and its predecessor suggests that this will not be a speedy process. The first Directive took over three years from proposal to the statute book and the last major revision in 2007 took almost two years. Clearly those involved are keen to push this forward faster, but there are a number of complex competing interests.

Following the adoption of the final Directive, each EU Member State has to change its laws to accommodate the changes – they will be given a period (the draft suggests 12 months) to do this – so we are unlikely to see the new rules become law until late 2018/early 2019.



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