

EUROPEAN REGULATION OF VIDEO-SHARING PLATFORMS: WHAT’S NEW, AND WILL IT WORK?

The European Parliament adopted the revised text of the *Audiovisual Media Services Directive (AVMSD)* late 2018. The revised AVMSD governs the EU-wide coordination of the national legislation on legacy audiovisual media and – from now on – key aspects of online audiovisual media.

The New Regulatory Framework

The revision of EU’s AVMSD introduces (among other issues) a completely new element to media regulation: the regulatory framework for *video-sharing platforms (VSPs)*. Although built on many concepts from older regulation of TV or, later, *video-on-demand services (VoD)*, this set of rules creates a novel regulatory model.

This should be seen as a welcome development in regulation. Video-sharing platforms such as YouTube and Facebook, where users are spending much of their time, don’t share the

same strong editorial element as the media previously covered by the directive, i.e. TV and VoD. The regulatory provisions that tackle the traditional types of audiovisual media are relatively direct when imposing obligations on audiovisual media providers. But the sheer scale of operations of VSPs, in combination with an active user who is the primary source behind creating, uploading, mixing and commenting on the content has called for a different approach.

The main difference is not only in the more precise framing of the provisions for VSPs, but there is also a more clear division of regulatory competences between regulators on one hand, and providers on the other.

Now, it is the VSP provider who is responsible for creating the terms and conditions of their platforms. The VSP provider is also responsible for establishing the legal-technical mechanisms through which the user can file a complaint, as well as introducing the system that flags/rates the contents.

Table: The changes in AVMSD related to VSPs

Regulatory Area	Regulated Services	EU Rules Valid Until 2018	EU Rules Valid since 2019
Country of origin principle	TV, VOD, VSPs	Fundamental Rule for TV, and VOD	It remains a fundamental rule for TV/VOD (exception is for transborder financial contributions) and for VSPs
Self- and co-regulation	TV, VOD, VSPs	General compulsory support by the governments	Strengthened: - a duty of governments for higher support for self- and co-regulation - introduction of basic criteria for this regulatory mechanism, - an option of EU-wide regulatory codes of conduct in these areas of regulation
Jurisdiction Definition	TV, VOD, VSPs	Rules on jurisdiction and for very complicated transborder legal procedures in case of abuse	New rules of jurisdiction for VSPs - more efficient approach to transborder legal conflicts - new, publicly accessible database on jurisdiction
VSP Regulation	VSPs	Only basic rules outside the AVMS	Co-regulation for - advertisement, - hate speech encouraging content, - content threatening the development of minors - and another illegal content (e.g. terrorism).
„Hate speech“	TV, VOD, VSPs	The basic rule in cases of hate speech	Stronger Protection in-: - the additional groups of citizens, - the ban on public encouragement to terrorist acts, - the introduction of VSPs regulation

The regulator has a more indirect role when compared to traditional types of audiovisual media regulation. The regulator mainly checks whether the mechanisms established by the provider comply with the law.

This approach gives rise to concerns that regulators are just outsourcing regulations to private companies. Such a delegation of legal rights could certainly run into trouble with the fundamental rights of users of platforms, and therefore with basic principles of constitutional democracies.

A thoughtful recent contribution to the debate in this line of thought was posted by Joan Barata from Stanford University (see paper No. 3.4). Although I agree with many points in his text, I also think that Joan's worries may not be entirely warranted. This post is in part an answer to Joan Barata's arguments.

Regulation vs freedom of speech

Indeed, the delegation of the exercise of regulatory powers to a private entity could be very damaging to freedom of speech and media. However, we also need to admit that the most used platforms are providers of digital public spaces where a big portion of society's conversation is taking place, and in this space, the platforms already are regulators in their own right, but there is almost no transparency, and no accountability. The result of this self-arrangement quasi- or internally set - regulation are far from satisfactory,

Clearly, delegating regulatory powers in media matters to a private entity without any public oversight is not the right solution. But this is also not what, in my opinion, the new AVMSD does. Indeed, it obliges the VSP providers to put protective measures in place. AVMSD requires them to put certain provisions into specific terms and conditions; to create a content rating system and also to establish complaint procedures mechanism. Many of these tasks have already been part of the remit of media regulators. However, in the context of online platforms, this approach is not feasible any longer.

There is clearly no other way to moderate the content of online activities in the audiovisual sector, considering the sheer scale of the operations in question. Moreover, there are other considerations present as well: technological infrastructure and the active role and a high number of users.

The risks that Joan Barata and others highlight are that the regulatory oversight will be there only to make the rules and their application more severe and that more takedowns of content would be interpreted as more effective regulation.

This worry is not completely misplaced of course. Last time, the European Commission nudged the providers to approach more pro-actively hate speech; it indeed seemed at the end as more

takedowns equal more successful regulations. Yet without transparency and information about individual cases, one can not be sure whether the takedowns are really improving the discourse within the media environment, or whether the providers are just trying to get rid of any controversial content – or indeed, getting rid of the content somebody just happens to be complaining about.

Nonetheless, the oversight doesn't need to look like this. For example, regulatory oversight may not singularly push the platforms to clear-up the content of their services, but will also protect the rights of its uploading users. If the overseeing regulator (and of course users) know what the rights of users are and can see what procedures providers put in place for dealing with users' content, then the evaluation of the effectiveness of regulation may have completely different meaning and impact. It may not only push the provider to get rid of the illegal content, but it can also protect the users from overly strict or arbitrary application of the rules. It may, in other words, create an environment where users are not only protected from the harmful content of other users, but also from overbearing or arbitrary intrusions by the platform itself.

This is the solution legally provided for AVMSD. AVMSD establishes transparency of the procedures among users and platforms. AVMSD sets basic standards for the complaints by users and establishes their right to be informed on how their complaint is being handled. AVMSD permits an independent regulator to evaluate whether these mechanisms established by the provider are appropriate. AVMSD sets the option for the user to seek and out-of-court redress if they feel they have been mistreated by the platform. Finally, every EU MS has to ensure that users can defend their rights before a court.

I think the legal groundwork for protection and the fair treatment of users are correctly established in the directive. Now it depends on the MSs to implement the regulation in such a way that this potential will be fulfilled. The European Commission has a big role to play in this process too.



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