

THE NEW AUDIOVISUAL MEDIA SERVICES DIRECTIVE: TURNING VIDEO HOSTING PLATFORMS INTO PRIVATE MEDIA REGULATORY BODIES

The new AVMSD introduces **a dramatic change in the way audiovisual content is regulated and monitored**. Private online intermediaries will develop, interpret and enforce (in a word, regulate) content rules affecting the core elements of the right to freedom of expression within the society of each EU Member State. **Video sharing providers will play a fundamental role in determining the boundaries of legitimate political speech** or the right to adopt and express unconventional social and cultural points of view. This role will be played under the threat of sanctions if platforms under-regulate or fail to take action against dubiously legal content.

The AVMSD is the first legally binding instrument to impose new, and extensive, responsibilities for content regulation on privately owned Internet platforms. They are required to establish and apply detailed rules in areas such as hate speech, child pornography, protection of children's development and preventing terrorism. While platforms must define and enforce these rules through nominally private Terms of Service agreements with users, the AVMSD makes platforms function as de facto arms-length State law enforcement systems. The performance of online platforms in these areas will be supervised by public media regulatory bodies, who can penalize platforms if their performance is considered to be inadequate.

A base principle of AVMSD rules (both old and new ones) is the idea of editorial responsibility as one of the main criteria for classifying a service as a regulated media activity. The notion of editorial responsibility already triggered some degree of legal uncertainty when the AVMSD was incorporated into the Member States' media legal systems. While in the field of traditional television such notion has always been clear, in the case of on demand audiovisual service providers it would encompass the assumption of direct, ex ante, responsibility for choosing the videos offered in their respective catalogue. The Recitals of the AVMSD also clarify that editorial responsibility does not exist (and therefore the AVMSD does not apply) in cases of on-demand services that are not "television-like"(sic), the "electronic version of newspapers" and those modalities of communication that are "primarily non-economic, and which are not in competition with television broadcasting, such as private websites and services consisting of the provision of audiovisual content generated by private users for the purposes of sharing and exchange between communities of interest". For online intermediary platforms exempted under these terms, the AVMSD still in place would not apply.

Nowadays video sharing platforms host profitable and managed channels, and offer more and more influential (in terms of formation of the public opinion) and profitable content similar to traditional television programs. This shift is reflected in Recitals 46 and 47 of the new AVMSD, which explain that "(s)ince users increasingly rely on video-sharing platform services to access audiovisual content, it is necessary to ensure a sufficient level of consumer protection by aligning the rules on audiovisual commercial communications, to the appropriate extent, amongst all providers." The Recitals also, importantly, assert that despite

the fact that a "significant share of the content provided on video-sharing platform services is not under the editorial responsibility of the video-sharing platform provider, (...) those providers typically determine the organisation of the content, namely programmes, user-generated videos and audiovisual commercial communications, including by automatic means or algorithms". According to the text, this justifies bringing video hosts within the AVMSD's regulatory framework, and obliging them to take measures to tackle certain forms of illegal content.

The newly introduced **article 28(b) requires video sharing platform providers to "take appropriate measures to protect" minors from harmful content** – meaning content that may "impair their physical, mental or moral development". **Platforms must also take measures to protect the general public from content that incites to hatred or violence, or the dissemination of which is criminalized under EU law** (this basically covers terrorist content, child pornography and racism and xenophobia). National authorities (mainly independent media regulatory bodies) will verify that platforms have adopted appropriate measures, which could include revising and enforcing terms and conditions; having appropriate flagging, reporting, and declaring functionalities; implementing age verification or rating and control systems; establishing and operating transparent, easy-to-use and effective procedures to resolve users' complaints; and providing media literacy tools.

Some of these measures may indeed improve the transparency, accountability and fairness of online platforms when dealing with online content. Nonetheless, **the overall shift mandated by the AVMSD is disturbing. It assigns to private actors a new de facto role as interpreters and enforcers of the most sensitive and impactful rules affecting freedom of expression.**

Provisions of the AVMSD will create all the incentives for a solidly State supported, **privately executed, overregulation of speech**. This leads to **unacceptable consequences for the exercise of the right to freedom of expression**. Incorporating the AVMSD's general rules into national legal systems in a rights-respecting and proportionate manner will be a difficult, almost impossible task – a task that now lies in the hands of national parliaments and regulatory bodies.



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