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Digital Single Market Update: The European Commission's Proposal to Revise the Audiovisual Media Services Directive

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The European Commission has proposed legislation in the EU to provide a uniform legal and competition framework for video-streaming services provided via the Internet. The regime includes changes to advertising, the introduction of a quota on the provision of European content, and other provisions to deal with the protection of minors and with hate speech.

Since the current version of the EU's Audiovisual Media Services Directive (AVMSD) was adopted in 2010, media consumption has changed dramatically, largely as a result of developments in the Internet and mobile devices combined with an increase in the available bandwidth. Fewer people, in particular the younger generation, are watching traditional television; instead they are watching films, video and other audiovisual content via the Internet, or on their mobile devices.

As part of its [Digital Single Market initiative](#), the European Commission has come to the conclusion that the current iteration of the AVMSD requires adjustment. In introducing its proposed [revision](#) to the AVMSD, published on 25 May 2016, the Commission aims to provide a uniform legal and competition framework for video-streaming services provided via the Internet. The revisions contained in the revised AVMSD include changes concerning linear TV services and some alignments of rules for linear and non-linear services, as well as changes to advertising, the introduction of a quota on the provision of European content, and other provisions to deal with the protection of minors and with hate speech.

KEY CHANGES

1. *Scope of AVMSD*

The revised version of the AVMSD divides audiovisual content services into three categories:

- Audiovisual media services consisting of linear (*i.e.*, traditional) broadcast services; and
- Audiovisual media services such as on-demand video services that are under the editorial control of the provider, to the extent that such videos are not: (i) "TV-like" (new), or (ii) only provided as (stand-alone) ancillary services to different main online activities of the service provider, where such videos are dissociable from such main activities (confirming prior case law of the European Court of Justice on such services); and
- Video-sharing platform services (new).

Client Alert

TV-Like. The AVMSD currently only applies to on-demand audiovisual media services that provide audiovisual content where the form and content are comparable to the form and content of linear television broadcasting. In the proposed revised AVMSD, this requirement to be TV-like has been removed. Accordingly, all on-demand offerings of moving images that a provider makes available to users via the Internet within a schedule or a certain catalogue of content under its editorial control would be included, no matter how short and whether or not intended for consumption on mobile devices only.

Dissociable Subsections. In addition, the Commission's view is that a subsection of a service provider's offering dedicated to video content will also be considered to be an audiovisual media service if such subsection is dissociable from the other, main activity of the service provider (e.g., stand-alone parts of online newspapers featuring editorial or user-generated videos contained in a sub-domain).

Video-Sharing Platform Service. The Commission proposes introducing certain obligations for hosting providers in respect of third-party video content hosted on their platforms. "Video-sharing platform service" under the proposed revised AVMSD means a service which:

- consists of the storage of a large amount of programmes (*i.e.*, moving images, no matter whether TV-like or not) or user-generated videos for which the video-sharing platform provider does not have editorial responsibility;
- involves the platform provider determining the organisation of the stored content on the platform (*i.e.*, by automatic means of algorithms or by hosting, displaying, checking and sequencing);
- has, as the principal purpose of the service or the relevant dissociable section, to provide programmes and user-generated videos for the general public in order to inform, entertain or educate; and
- is made available by electronic communications networks within the meaning of the Framework Directive for Electronic Communications (2002/21/EC).

2. *Hosting Provider Liability*

The revised AVMSD includes proposed obligations for video-sharing platform providers to take appropriate measures to protect minors from harmful content and all users from hate speech. These measures are not intended to affect the "safe harbor" defences for illegal third-party content available to hosting providers under Articles 14 and 15 of the EU e-Commerce Directive 2000/31/EC.

3. *Non-EU Video-Sharing Platform Service Providers.*

The revised AVMSD also considers non-EU video-sharing platform service providers. If a non-EU provider has a parent or subsidiary or other affiliate that is established in a Member State, such non-EU video-sharing platform service must comply with the national laws of the Member State falling within the scope of the e-Commerce Directive.

Client Alert

4. Social Media Services

The Commission points out that the AVMSD will not apply to social media services (such as Facebook, Twitter and Snapchat, all of which display significant third-party video content on their platforms), unless they qualify as a video-sharing platform. This would require that the principal purpose of the social media service, or at least a dissociable part of the service, be devoted to video content.

Thus, as long as the social media platforms avoid establishing stand-alone subsections for the display of videos, but have the videos included in the general social media content mix, the social media platforms should not be subject to the obligations regarding: (i) the protection of minors and (ii) hate speech that the AVMSD imposes on video-sharing platform services. The social media platforms would only be subject to the provisions of the e-Commerce Directive. The latter does not provide harmonising rules for such topics.

This differentiation, of course, also applies to all other non-audiovisual online content services, such as photos, text and audio only services. Therefore, instead of providing a more harmonised regulatory framework for online content, arguably the proposed revisions could result in an increased fragmentation of the regulatory framework applying to digital content services, depending on the type of content.

5. How Is Product Placement and Advertising Affected?

Product Placement. Product placement will, generally speaking, be permitted for all linear and non-linear services, excluding sensitive programmes such as children's programmes, news and consumer affairs programmes, and certain product classes such as tobacco and medical products, provided that:

- the viewers are clearly informed about the product placement (although Member States have a discretion to permit an exception if the provider was not involved in, and did not commission, the production of the promoted content); and
- the programme does not directly encourage the purchase of products; and
- the editorial independence and responsibility of the service provider is not affected.

Television Advertising and Teleshopping. The revised AVMSD upholds the differentiation between linear and non-linear services as set out in the current AVMSD. While there is no change in the rules for teleshopping channels and windows, traditional TV broadcasters will gain a little more flexibility. Under the proposed revisions, movies and news programmes could now be interrupted by advertising or teleshopping every 20 minutes, instead of every 30 minutes (the 30-minute rule for children's programmes would remain unchanged). In addition, there will be a daily limit of advertising and teleshopping (replacing the existing hourly limit) to 20% of the programme time between 7 a.m. and 11 p.m. Advertisements for programmes and ancillary products of affiliated companies are not included in this limit.

Note that the rules on advertising for alcoholic drinks remain unchanged in the revised AVMSD, *i.e.*, advertising for alcoholic drinks remains permissible subject to the rules set out in Art. 22 of the current version of the AVMSD, if the Member States do not implement stricter rules. However, the proposal does require the Commission and the Member States to encourage the development of self- and co-regulatory codes and the exchange of best

Client Alert

practices across the EU to address inappropriate advertisements for alcoholic drinks, as well as advertisements for unhealthy food and drinks in children's programmes (modified Art. 9).

6. *European Content Quota and Film Production Contributions.*

While traditional television broadcasters are already obliged to reserve the majority of their broadcasting time for European works under the current AVMSD, the proposed revision requires video on demand (VOD) service providers to devote 20% of their catalogues to European works and to ensure *prominence* of this content in their services. This requirement may not be an issue for the majority of leading VOD service providers such as Netflix and Amazon, as they may already have at least 20% European content offered to European users. In addition, it is not clear what "prominence" means. For example, could this be interpreted by national authorities as an obligation to discriminate positively in favour of European content, e.g., give European content preferred positions in the service providers' searches, promotions and recommendations?

In addition, the proposed revision grants Member States the right to impose "film promotion levies" on VOD service providers that are not established in a Member State's territory (but in the territory of another Member State) if and to the extent their VOD services target the audience in the Member State's territory. Member States like Germany, for example, could extend the application of their existing film promotion levy regime to apply for example to Amazon, established in Luxembourg, and Netflix, established in the Netherlands.

IMPACT OF BREXIT!

The UK voted to leave the EU on 23 June 2016. However, until the UK government formally provides an Article 50 notice, the UK will remain part of the EU and subject to EU law. As we expect that the revised AVMSD will not have to be implemented by the Member States into national laws before the end of 2017, it may be that the UK will decide to not implement these revisions into UK law.

If and when the UK formally leaves the EU, and subject to the deal eventually negotiated between the UK and the EU, broadcasters and VOD service providers established and licensed in the UK but targeting audiences in the EU may no longer profit from the country-of-origin principle and the obligation of the other Member States to permit in their territories the transmission of audiovisual media services established in other Member States, as provided for by the AVMSD. However, for TV broadcasters, international treaties such as the European Convention of Transfrontier Television of the Council of Europe may provide similar solutions, at least in some respects.

7. *What Else Is New?*

Protection of Minors. The rules for the protection of minors are aligned for all linear and non-linear services, while separate rules are introduced for video-sharing platform services as outlined above. On this issue, Member States and the Commission are required to encourage co-regulation and the exchange of best practices across the EU.

Regulatory Bodies. The Commission proposes that each Member State designate at least one independent national regulatory authority as responsible for ensuring compliance with the AVMSD. Furthermore, the proposed revision provides for a formalised role of the European Group for Audiovisual Media Services (ERGA), composed of independent national regulatory authorities, to advise the Commission in this area and to provide for an exchange of best practices.

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NEXT STEPS

Once adopted by the Commission, the revised Directive will need to be approved by the European Parliament and the Council. After the revised Directive enters into force, it is expected that the Member States will have a year in which to implement its provisions into their national laws.

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