

EXPLANATORY MEMORANDUM ON EUROPEAN UNION LEGISLATION AND DOCUMENTS

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities

Submitted by the Department for Culture, Media and Sport on 15 June 2016

SUBJECT MATTER

1. This proposal sets out to amend the EU Framework for television and television-like services, the Audiovisual Media Services Directive (AVMSD).
2. The proposal is accompanied by Staff Working Documents¹ providing an Impact Assessment and an Executive Summary of the Impact Assessment under the Commission's programme for ensuring that EU legislation remains fit for purpose and delivers the results intended by EU lawmakers (REFIT).
3. The Commission is proposing changes to AVMSD with a view to future proofing existing rules against convergence (change of access audiovisual content changes through the development of hardware devices and software services like apps, social media platforms and platforms for user generated content).

¹ **SWD(2016) 168** - COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT

Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities.

SWD(2016) 169 - COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities

Country of origin principle

4. The proposal maintains the country of origin principle (COO), under which a broadcaster can offer their services in multiple European Member States but only has to obtain a licence and observe regulatory standards in the country in which it is established. However, it allows for Member States to derogate from this in order to impose obligations on providers established elsewhere in relation to the imposition of levies on video on demand (VOD) services targeting national audiences. It also introduces the possibility to derogate on grounds of national security and public health for linear services. The proposed rules determining which country has jurisdiction for a service and the procedure of derogation are being clarified and simplified.

Extension of scope: video-sharing platforms

5. The existing rules apply to TV and VOD services. The Commission proposes a 'limited extension' of the scope of the Directive to 'video-sharing platforms'. "Video-sharing platform services" are defined in new Article 1(aa) AVMSD (Art. 1(1)(b) of the proposal): '... a service, as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, which meets the following requirements:
 - (i) the service consists of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform does not have editorial responsibility;
 - (ii) the organisation of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing;
 - (iii) the principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public in order to inform, entertain or educate;
 - (iv) the service is made available by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC.'

6. These are essentially video-sharing platforms like Youtube. Due to the "principal purpose" requirement, the occasional use of videos on websites and other social media would not be covered. The Directive introduces an obligation on Member States to ensure that such video-sharing platforms put in place consumer protection measures to: i) protect minors from harmful content; access to which would have to be restricted; and ii) protect all citizens from incitement to hatred. Such measures include, as appropriate, mechanisms for reporting such content, age verification procedures and parental controls. National regulatory authorities are to assess the appropriateness of measures.

7. In order to ensure compatibility with the e-Commerce Directive 2000/31/EC (ECD) the provisions on video-sharing platforms will require implementation via co-regulation, which will require the establishment of national codes of conduct. Such codes must be broadly accepted by stakeholders and provide for monitoring and evaluation of objectives, enforcement, and where appropriate. sanctions. However, the Commission and European Regulators Group for Audiovisual Media Services (“ERGA” - not the Member States) would set out templates and coordinate these codes of conduct. Member States would not be allowed to impose stricter rules on providers than those provided for in the Directive. Measures would also need to be compatible with the ECD (which limits the liability on internet intermediaries) or any general obligation to monitor content ex ante.
8. Provision is made for determining in which Member State where video-sharing platforms are established and Member States are required to notify the Commission of video-sharing platforms established on their territory.

Scope: Definition

9. The proposal removes the phrase ‘and the form and content of which are comparable to the form and content of television broadcasting’ from the definition of the concept of programme to help aligning the treatment of TV broadcasting and on-demand services.

Level of harmonisation

10. While the AVMSD was a minimum harmonisation directive, the proposal now limits the issues in respect of which Member States may impose stricter rules to Articles 5 (information obligations), 6 (hate speech), 6a (information on content impacting upon the development of minors), 9 (standards for commercial communications), 10 (sponsorship), 11 (product placement), 12 (protection of minors- technical measures), 13 (on-demand European quotas/financial contributions), 16 (TV - European quotas), 17 (TV - independent quotas), 19-26 (advertising and teleshopping rules), 30 (National Regulatory Authorities) and 30a (ERGA). In respect of the other provisions, AVMSD would now provide maximum standards with regard to the provisions that are specific to video-sharing platforms (chapter IXa), exclusive events and short news reports (chapter V) and right of reply (Art. 28).

Commercial Communications

11. The Commission proposes changes to the rules on audiovisual commercial communications.
 - While product placement is currently forbidden but might be allowed by member states, it will be now be allowed on all audiovisual media services

(except for news and current affairs, consumer affairs, religious and children's programmes). It will not be allowed in relation to tobacco, medicinal products and medical treatments. The requirement that product placements do not have "undue prominence" is being removed, leaving only the requirement to clearly inform the viewer of the existence of product placement. However member states will be allowed to set out stricter rules.

- For television
 - The current rule limiting advertising to 12 minutes per hour broadcast would be replaced by a daily limit of 20% of advertising during the period between 07:00 and 23:00.
 - Isolated advertising and teleshopping spots will be allowed.
 - Films made for television, cinematographic works and news could be interrupted every 20 minutes (currently every 30 minutes)
 - Advertising for own programmes, sponsorship announcements and product placements will not count towards the daily limit.

12. The draft Directive seeks to improve the the current protection of minors from inappropriate audiovisual commercial communications of high fat, salt/sodium and sugars (HFSS) food and beverages and alcohol beverages by enhancing current requirements. Self and co-regulatory codes of conduct are to be encouraged and must be used to reduce the exposure of children to such communications and should provide that such communications must not emphasise positive nutritional qualities of HFSS food and beverages. There is also scope for the Commission (with the support of ERGA) to facilitate the development of Union-level codes of conduct.

European works

13. An obligation on Member States to ensure a twenty percent quota for European works on video on-demand services and their prominence is being introduced, replacing a requirement to promote such works. The wide definition of European works (which not only includes all domestic UK productions, but also co-productions under co-productions treaties between the EU and third countries) will be kept as per the requirements for television in the current Directive. Exemptions apply to providers with low turnover or audiences and small and micro enterprises. Member States may also exempt providers where compliance would be impracticable or unjustified due to the nature of the service (e.g. Bollywood films or Japanese cartoons). The Government believes that all UK providers will meet this standard.

Protection of minors

14. Regarding the protection of minors, the draft Directive aligns the standards of protection for TV broadcasting and VOD services, increasing the obligations in

relation to VOD. The requirement is now in relation to “content that might impair the physical, mental or moral development of minors” rather than “content that might *seriously* impair”. Regardless of whether such programmes are broadcast by TV broadcasters or provided by on-demand media service providers they are only to be made available in such a way as to ensure that minors will not normally hear or see them. Examples of measures to be taken, which must be proportionate to the potential harm, include the time of broadcast, age verification or other technical tools. The most harmful content such as gratuitous violence and pornography is to be subject to the strictest measures, such as encryption and parental controls.

15. There is also a new requirement for Member States to ensure that sufficient information is provided to viewers about content which might impair the physical, mental or moral development of minors, and a system of descriptors may be adopted for this purpose. Co-regulation is encouraged and there is again the possibility of Union level codes of conduct.

Incitement to hatred

16. Existing requirements to ensure that audiovisual media services do not contain any incitement to hatred based on race, sex, religion or nationality are being extended to cover incitement to violence and the grounds are to include racial or ethnic origin, religion or belief, disability, age and sexual orientation.

Accessibility

13. The provisions on accessibility will be deleted in order to ensure a horizontal approach through the proposed European Accessibility Act (2015/0278(COD)) which sets stricter common accessibility requirements to media service providers than AVMSD.

National Regulators

17. The role of the regulators is being strengthened. The proposal requires a national regulatory authority to be designated, and sets out minimum requirements to ensure the authority’s independence, including a requirement that the head of the national authority may only be dismissed if they no longer fulfil the conditions for performance of their duties which must be laid down in law. National regulatory authorities will be required to exercise their powers impartially and transparently, and in accordance with the Directive’s objectives of media pluralism, cultural diversity, consumer protection, internal market and the promotion of fair competition. Their functions and powers must be established in law and carry with them enforcement powers. A right of appeal for viewers/end-users as well as service providers from decision of the authority must be provided. This requirement applies across all AVMS providers,

including video-sharing platforms. The proposal also formalises ERGA (which was established on the basis of a Commission Decision in 2014²), in response to a perceived need for greater senior level cooperation in European audiovisual policy developments.

SCRUTINY HISTORY

18. This proposal has not been considered by a Committee before, however it is part of the Commission's Digital Single Market Strategy and BIS submitted EM 8672/15 on 15 June 2015 on "COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS - A Digital Single Market Strategy for Europe". The Commons European Scrutiny Committee cleared it (Report of 25/11/2015). The Lords Select Committee on the EU cleared it (Letter of 14/10/2015)³. The Directive that this Proposal is looking to amend was subject to scrutiny under: 9436/09, "Proposal for a Directive of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)". The EM was submitted on 21 May 2009. It was cleared by the the Commons European Scrutiny Committee (Report of 08/09) and cleared by the Lords European Union Committee on 02 June 2009.

MINISTERIAL RESPONSIBILITY

19. The Secretary of State for Culture, Media and Sports has primary responsibility. The proposal has a wide scope and the following Secretaries of State also have an interest in broadcasting: the Secretary of State for Business, Innovation and Skills, the Chancellor of the Exchequer, The Secretary of State for Education, The Secretary of State for Health and the Home Secretary.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

20. Broadcasting and internet services are reserved matters under the the UK's devolution settlements. Nevertheless, the devolved administrations have an interest and have been consulted in the preparation of this EM.

² Commission Decision of 3.2.2014 on establishing the European Regulators Group for Audiovisual Media Services (C(2014) 462 final)

³Accessibility Act - <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:0615:FIN>
Platforms Communication - <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015SC0100>

LEGAL AND PROCEDURAL ISSUES

21. Legal basis

The AVMSD is based on the EU's powers to coordinate Member States' laws to bring about the freedom to provide services in the internal market (Article 53(1) TFEU in conjunction with Article 62 TFEU).

This proposal does not raise Justice and Home Affairs (JHA) issues.

22. European Parliament Procedure

The Ordinary Legislative Procedure is applicable.

23. Voting procedure

Qualified Majority Voting.

24. Impact on United Kingdom Law

The existing AVMSD is implemented in the UK via legislation, Ofcom codes and licence agreements, and the BBC Agreement. The UK has largely implemented at the minimum level required, adopting stricter rules in relation to some matters (e.g. protection of minors). While a thorough review of existing measures will be undertaken to determine the extent of the changes required, we do expect that some changes to legislation will be needed in relation to proposed changes on matters within the existing scope of the Directive (television and VOD).

25. In relation to the proposed extended application of the Directive to video-sharing-platforms, implementation will be required. As the proposal requires co-regulation in this context, further consideration will be given to exact manner of implementation, but we do expect there to be some legislation required.

26. Application to Gibraltar

AVMSD is applicable in Gibraltar.

27. Fundamental rights analysis

The proposals take account of the of the right to respect for private and family life and the protection of personal data (Article 7 and 8 of the Charter of Fundamental Rights of the European Union), the freedom of expression and information (Article 11), the freedom to conduct a business (Article 16) and the prohibition on discrimination (Article 21), the rights of the child (Article 24) and the right to an effective remedy and fair trial (Article 47). The Government does not consider the proposals raise concerns for these rights.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

28. The proposal has relevance for the EEA.

SUBSIDIARITY

29. The proposal sets out to simplify existing legislation and include new types of services. It complies with both the subsidiarity and proportionality principles by preserving, in general, a minimum harmonisation approach and improving the derogation and circumvention mechanisms. Given that the current AVMSD provides minimum harmonisation, any deregulation or simplification of the existing rules can only be done at EU level.

30. As regards extending the scope of the AVMSD to video-sharing platforms, EU action ensures consistency with the services already covered by that Directive. Maximum harmonisation in this field prevents any potential future fragmentation resulting from national intervention.

POLICY IMPLICATIONS

31. In his January 2015 paper, the Prime Minister called on the EU to “take bold steps to create an open, flexible market with a regulatory framework that reflects the dynamic nature of the digital economy”. In EM 8672/15, the government identified the Digital Single Market an area where the EU can add value in supporting growth, employment and productivity. As such, the government welcomed the Commission’s Digital Single Market strategy, but urged a focus on reducing the burdens of regulation on business, and a continued focus on better regulation and evidence based policy making.

32. The government set out the UK’s position on AVMSD in its response to the Commission’s consultation.⁴

In short the UK Government regards the regulation of the European audiovisual market through AVMSD as a success story. HMG observed that this broadcasting-focused framework is being challenged by convergence and the evolution of new players. It was suggested that any review of the AVMSD must be undertaken with a view to:

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/489539/bis-16-15-audio-visual-media-eu-consultation-response.pdf

- Maintain a stable regulatory framework for investment and competition in an increasingly converging audiovisual market through the regulatory certainty provided by preservation of the country of origin principle;
- Supporting the growth of European creative industries;
- Supporting consumer choice and protecting consumers adequately and giving them the right tools and frameworks to be able to safely navigate audiovisual and media content and services.

33. The primary purpose of the AVMSD is to ensure the effective operation of the internal market for audiovisual media services by ensuring the free movement of audiovisual media services throughout the EU. HMG is of the opinion that any caveats from the country of origin principle or enlarging the grounds for derogation endanger the single market for audiovisual services.

34. It is proposed that the new directive no longer contains any accessibility requirements - these will be replaced with the horizontal measure (COM(2015) 615, EM 14799/15). An analysis of the impacts from this proposal is currently being considered.

35. We will be considering the detail of this proposal. A more detailed assessment of the initiative is currently under consideration and an update will be submitted to Parliament in due course.

CONSULTATION

36. The Commission had issued a Green Paper in 2013 and a consultation in 2015 to which Government and key UK stakeholders responded.

37. HMG has not issued a formal consultation on this subject. However we have discussed the issues with business and consumer groups at several levels.

38. We will further consider whether a more formal consultation or call for evidence is appropriate.

IMPACT ASSESSMENT

39. The Commission's proposal is accompanied by an impact assessment and executive summary (ADDS 1 - SWD(2016)168 final and 2 - SWD(2016) 169 final) and these documents have been deposited in Parliament alongside the proposed Directive. According to this no precise indications of the costs to implement this provision can be provided. They would depend on the size of the company and on

the specific mechanisms that the company will decide to put in place. These mechanisms are also likely to evolve over time due to technology advancements. The main costs would be borne by on-demand services and video-sharing platforms. They would mainly relate to the implementation of the provisions intended to enhance consumer protection. However, these costs would be mitigated by the fact that some Member States have already put in place stricter rules and that large video-sharing platforms, pursuant to their corporate policies, have already voluntarily taken steps to protect consumers.

40. We will consider whether an Impact Assessment for UK industries is appropriate.

FINANCIAL IMPLICATIONS

41. The Commission Impact Assessment Indicates that the main impacts on national budgets and administration would derive from the implementation of co-regulation for the protection of minors on video-sharing platforms and from the introduction of legal requirement of independence of national regulatory authorities and a minimum set of features that regulators need to meet. In the latter case, the impacts will depend on the existing level of compliance of national regulatory authorities with the set of features.

TIMETABLE

42. After a Green Paper in 2013 and a consultation last year the Commission has published a proposal for a new AVMSD on 25 May 2016.

43. There has been an orientation debate at the Education, Youth, Culture and Sport (EYCS) Council meeting on 31 May 2016. We will work closely with the Commission and forthcoming Presidencies on the Commission's proposal.

There is a first first working group under the Dutch Presidency on 8 June 2016. Neither Malta nor Slovakia (the two forthcoming Presidencies) have communicated a special work programme for AVMSD.



Signed

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