

How the Updated AVMS Directive Will Impact European Media Services

Changes to the AVMS Directive are important for pan-European broadcast and on-demand services.

The European Commission proposed the directive amending the Audiovisual Media Services Directive (2010/13/EU) (AVMS Directive) in May 2016. Much has been written in the interim about the potential changes and stakeholders' lobbying positions. This *Client Alert* summarises the key points that have been passed into European law. Part 1 of this *Client Alert* sets out a guide to the key changes, including increasing the scope of the AVMS Directive to cover video-sharing platform services, and clarifications to the establishment test. Those already familiar with the key changes should skip ahead to Part 2, which describes the introduction of a European works quota for on-demand services, and the possibility for Member States to impose financial duties on on-demand service providers. These financial obligations raise concerns both from a State aid point of view and ultimately for the integrity of the EU internal market in audiovisual services. Part 3 then deals with the "country of origin" principle and provides some observations on the impact of Brexit. The bedrock of the country of origin principle remains, but with the majority of European broadcast and on-demand services currently being licensed in the UK, businesses are already deploying Brexit contingency plans.

Part 1: AVMS reform

Background

In July 2015, the European Commission (the Commission) published a consultation on the reform of the AVMS Directive. The consultation acknowledged (amongst other points) the changing market reality of the audiovisual media services industry, the imbalanced regulatory playing field between linear and non-linear services, the increasing amounts of audiovisual material on almost all websites, and the difficulty in regulating on-demand services supplied by providers from outside the EU. Directive EU 2018/1808 (amending Directive) amending the AVMS Directive came into force on 18 December 2018, several weeks after being published in the Official Journal of the European Union. Member States must transpose the changes into their national laws by 19 September 2020.

The amendments

1. Increasing the scope of the AVMS Directive to cover video-sharing platform services

The AVMS Directive has been expanded so that certain provisions now apply to “video-sharing platform services”. The principal purpose of these services (or a dissociable section of them), or an “essential functionality”, is to provide programmes, user-generated videos, or both, to the public. This provision of programming must happen in circumstances in which the platform provider does not have editorial responsibility, but does determine the organisation of the service (e.g., by algorithmic means).

Importantly, the jurisdiction test that applies to video-sharing platform providers is different from the test that applies to providers of “audiovisual media services” (i.e., encompassing linear and on-demand services). In the first instance, a video-sharing platform provider established in a Member State according to the E-Commerce Directive (2000/31/EC) will be treated as established in that Member State for the purposes of the AVMS Directive. Video-sharing platform providers not established in a Member State according to the E-Commerce Directive will be deemed established in a Member State if the provider (a) has a parent or subsidiary undertaking established in that Member State, or (b) is part of a company group and another group undertaking is established in that Member State. Further provisions govern which Member State has jurisdiction if different group entities are established in different Member States. The jurisdiction test clearly limits a group’s ability to structure around the rules.

As a result, certain US and other non-EU-owned video-sharing and social media platforms likely will be in-scope, provided they meet the definition of a video-sharing platform service. How the essential functionality test should be interpreted remains to be seen; however, the recitals to the amending Directive shed some light on the matter by stating that the test could be satisfied if the audiovisual content is not merely ancillary to, or does not constitute a minor part of, a social media service’s activities. Nevertheless, the amending Directive acknowledges that the Commission should, if needed, issue guidelines for clarity and consistency of implementation.

In terms of the rules that apply to video-sharing platform services, Member States must ensure that such services take appropriate measures to protect minors from harmful content and to protect the public from content containing incitement to violence, hatred, terrorism, and other criminal offences under EU law. Such services must also comply with certain rules concerning commercial communications (e.g., restricting surreptitious advertising, advertising of cigarettes (and now also, e-cigarettes), and advertising alcohol to minors).

Importantly, the EU safe harbour provisions (for acting as a mere conduit, caching, and hosting) contained in the E-Commerce Directive continue to apply to such services. The E-Commerce Directive also restricts Member States from imposing a general obligation on service providers to monitor information. Therefore, the measures that a video-sharing platform service provider must take to protect the public — particularly minors — relate to the organisation of the content, rather than to the content itself. The amending Directive includes a list of 10 measures providers must take, including functionality for users who upload videos to indicate whether they contain commercial communications; mechanisms for users to report content; and age verification and parental control systems. Member States may impose stricter measures so long as the measures comply with EU law (including the E-Commerce Directive mentioned above).

2. Other clarifications to the scope of application

The definition of “programme” has been revised expressly to include clips and to remove the requirement for in-scope programming to be comparable in terms of form and content to television broadcasts. These changes are helpful from an interpretation perspective, given the subjectivity of the previous “TV-like” test.

The definition of audiovisual media service has also been revised to clarify that a dissociable section of a broader service offering may fall within the scope of the AVMS Directive (following a string of decisions on the same issue). For example, a standalone programming section within a news website, where the content and form of that part of the website are dissociable from the service provider’s main activity. Further, channels under the editorial responsibility of a provider can constitute audiovisual media services even if they are offered via a video-sharing platform (otherwise characterised by a lack of editorial responsibility). In such case, the provider with editorial responsibility must ensure compliance with the AVMS Directive.

3. Clarifications to the establishment test

The AVMS Directive contains a detailed test to determine which Member State has jurisdiction over a linear or on-demand service provider. Aspects of the test have been difficult to interpret and the amending Directive clarifies certain elements. Under the AVMS Directive, a service provider is deemed established in a Member State if the provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State. The amending Directive provides a definition for editorial decisions, clarifying they are decisions taken on a regular basis for the purpose of exercising editorial responsibility and are linked to the audiovisual media service’s day-to-day operations.

Alternatively, if the head office and place of editorial decision-making are in different Member States, then the location of a “significant part of the workforce” will determine jurisdiction. The amending Directive clarifies that this significant part of the workforce must be involved in the pursuit of the “programme-related” service activity.

One consequence of the country of origin principle (described at section 4 below) is forum shopping. The AVMS Directive permits Member States to impose stricter rules than those set out in the Directive, provided such rules comply with EU law. The AVMS Directive already includes measures to guard against establishment in a given jurisdiction in order to avoid stricter rules in a jurisdiction where the applicable service is actually targeted. These anti-avoidance measures have been bolstered by the amending Directive, including as regards information-sharing between Member States.

Audiovisual media service providers will be required to inform the relevant national regulator about any changes that may affect the determination of jurisdiction according to the establishment test. Member States must maintain lists of the audiovisual media service providers (and video-sharing platform providers) under their jurisdiction, which will be subject to publication by the Commission. Member States may also adopt measures requiring audiovisual media service providers under their jurisdiction to make accessible information concerning their ownership structure, including beneficial owners. The rationale for allowing access to this information is that users will be able to make an informed judgment about the content they watch.

4. Derogations from the country of origin principle

The country of origin principle remains the same, meaning service providers are generally subject to the regulations in their country of origin only (rather than having to be licensed and comply with the regulations in each Member State of service reception). The exceptions to this principle have, however, been revised. Previously, the potential remit for derogations was wider for on-demand services than for

linear broadcast services. Under the amending Directive, the same narrower set of derogation scenarios and conditions apply to both linear and on-demand services. Broadly, a Member State may derogate from the country of origin principle if an audiovisual media service provided under another Member State's jurisdiction:

- Manifestly, seriously, and gravely infringes the prohibition on incitement to violence, hate speech, or terrorism, or the provisions concerning protection of minors, or
- Prejudices or presents a serious and grave risk of prejudice to public health or security.

A derogation will be subject to various conditions (e.g., a notification and consultation process as to the measures to be taken) and a prescribed timetable.

5. ERGA

The amending Directive formally recognises and reinforces the role of the European Regulators Group for Audiovisual Media Services (ERGA). ERGA is composed of representatives from national regulatory authorities with responsibility for overseeing audiovisual media services. ERGA will continue to provide technical expertise to the Commission on matters relating to audiovisual media services and continue to ensure consistent implementation of the AVMS Directive across Member States. The group should allow for the exchange across Member States of experience and best practices on the practical application of the regulations (including accessibility and media literacy, which are expressly called out in the amending Directive). ERGA is also designed to facilitate the exchange of information necessary for the proper application of the AVMS Directive, including as regards the anti-avoidance rules (mentioned above). Lastly, ERGA must opine on matters referred to it by the Commission. For instance, ERGA may be asked to provide an opinion if there is disagreement as to which Member State has jurisdiction over a given service provider.

6. Tougher protections for minors

The provisions contained in the AVMS Directive on protection of minors from content that may impair their physical, mental, or moral development have been consolidated, placing linear and on-demand services on an equal footing. Measures to protect minors may include selecting the time of broadcast, age verification tools, and other technical measures. The measures should be proportionate to the potential harm of the programme, so the most harmful content (e.g., containing gratuitous violence) must be subject to the strictest measures (e.g., encryption and parental controls). The personal data of minors collected or otherwise generated pursuant to such measures must not be processed for commercial purposes (e.g., direct marketing, profiling, or targeted advertising). Service providers must also give viewers information about content that may be harmful to minors (e.g., through a system of content descriptors, an audio warning, or a visual symbol).

7. Commercial communications

The amending Directive contains various changes relating to commercial communications in and around programming (including advertising, sponsorship, and product placement), including the following:

- Member States are to encourage self-regulation among stakeholders and co-regulation (as between industry self-regulation and the national legislator), with the aim of reducing the exposure of minors to advertising for alcohol, food, and drink that is high in fat, salt, and sugar.
- The emphasis of the product placement rules is now permissive, rather than restrictive, although the rules have not been materially altered.
- In terms of advertising break patterns, the advertising and teleshopping limit of 20% of broadcasting time per clock hour will instead apply as a cap in average between 06:00 and 18:00. The same 20%

share will be permitted during prime time (*i.e.*, 18:00 to midnight). These patterns give broadcasters more flexibility and will potentially allow for longer advertising breaks during peak viewing hours.

- Cross-promotions in connection with a broadcaster's programmes and ancillary products derived from those programmes (and the same from other entities belonging to the same broadcasting group) are excluded from the cap on advertising/teleshopping time.
- Member States must implement appropriate and proportionate measures to ensure that linear and on-demand services are not overlaid for commercial purposes or modified, without the relevant service provider's explicit consent.

Part 2: New European works quota for on-demand services and financial contributions

The new obligation

The amending Directive imposes an obligation on on-demand audiovisual media services to ensure 30% of the works in their catalogues are European works, and to ensure prominence of those works. This obligation is in addition to the existing quotas for linear channels of 50% of transmission time for European works and 10% of transmission time or programming budget for independent European works. The recitals to the amending Directive elaborate on the meaning of prominence in on-demand catalogues. The intention is to facilitate access to European works, which may be achieved through various means, including a dedicated European works section on the homepage of a service, the functionality to search for European works, and the use of European works in campaigns for a service.

From a UK perspective, the European works test is satisfied if a qualifying programme originates from a non-EU country that is party to the Council of Europe Convention on Transfrontier Television (Convention). The UK's position as a party to the Convention should not be affected by its exit from the EU. Therefore, UK-produced works will continue to count towards European works quotas.

Furthermore, Member States have the option to require linear and on-demand service providers under their jurisdiction to invest in European works, including via direct investment in content and contributions to national funds. A Member State may also require audiovisual media service providers targeting audiences in that Member State, but under the jurisdiction of another Member State, to make financial contributions. In this case, financial contributions will be based on the revenues earned by the service in the targeted Member State. According to the recitals to the amending Directive, factors to take into account when assessing if an on-demand platform targets a given Member State include advertisements or other commercial communications aimed at customers in that Member State, and the service's primary language. In order to avoid double contributions, if the Member State in which a service is established imposes a financial contribution, then that Member State must take into account any financial contribution imposed by a targeted Member State.

The 30% quota and financial requirements in respect of audiovisual media service providers targeting audiences in other Member States will not apply to service providers with a low turnover or audience. Member States may also waive these requirements if they would be impractical or unjustified by reason of a service's nature or theme. The Commission is due to issue guidance on the calculation of the 30% quota and on the definitions of low audience and low turnover.

Interplay with State aid rules and the impact on the internal market

These new financial requirements raise several concerns and potential conflicts with other areas of EU law, in particular State aid rules. Member States may decide to impose financial duties on on-demand

service providers, the revenues of which can be used to finance national support schemes for the preparation or production of audiovisual works, for instance. Such measures may trigger State aid control and notification requirements. State aid rules authorise financial support from Member States for promoting culture and heritage conservation, including audiovisual works — also referred to as a cultural exemption. Under State aid rules, such support is regarded as aid compatible with the EU internal market. However, the definition of European works is based on a set of criteria that are mostly linked to the European nature of the audiovisual production. This approach seems to serve an economic objective, rather than the intended cultural purpose of the amending Directive. Therefore, whether the financial measures Member States impose under the amending Directive fall within the ambit of the cultural exemption, rendering the aid compatible with State aid rules, is questionable. The European Court of Justice (Court) appears nonetheless to be willing to support Member States' efforts to set up these quotas and financial obligations. Following a recent decision, the Court sided with the Commission and declared a German aid scheme for the funding of film production, financed by a levy imposed on foreign on-demand service providers, compatible with State aid rules.

The financial obligations may also have discriminatory effects on foreign on-demand service providers and may possibly run counter to the core principles of the EU single market, ultimately leading to its fragmentation. These obligations can be imposed both by a Member State in which an on-demand service provider is established, and by Member States in which the provider renders services targeted at their audience, by exception to the country of origin principle. Even though each Member State has to take into account the financial obligation that such provider bears in a country of destination, there is a risk that on-demand service providers would be submitted to an unreasonable financial burden. This burden could be seen not only as a discriminatory measure, but also as a restriction on the fundamental freedom to provide services across the EU. The possibility for Member States to apply different percentages between foreign and national providers, or the mere fact that foreign providers could be required to contribute to national funds that would in reality benefit national providers, would likely undermine the principle of equal treatment and generate unfair competition.

The amending Directive also raises concerns about a lack of legal certainty stemming from the ambiguity of its terms, which could lead to further distortion of the internal market. Terms such as European works, “targeting audiences in their territory”, “revenues”, or “investments” have a wide meaning, leaving Member States a substantial amount of room for interpretation. Given that the Directive aims at minimal harmonisation, Member States may reach diverging interpretations of those terms, thus bringing about different legal regimes. Discrepancies could foster market segmentation within the EU and may be detrimental to the Directive's purpose. Overall, the amending Directive — the purpose of which was to implement a clearer legal regime for the promotion of European works by taking into account the development of on-demand audiovisual media service providers — may or may not provide the most appropriate legal mechanisms to achieve such goal.

Part 3: Country of origin and Brexit

Summary of the issues

As those within the industry will be acutely aware, the country of origin principle is one of the major benefits afforded by the AVMS Directive and is central to the functioning of the broadcasting and on-demand industries within the EU. Post-Brexit, the UK will become a third (non-EU) country. In a “no-deal” scenario (or after a transition period if a deal is agreed), then in the absence of a new UK-EU reciprocal arrangement, audiovisual media service providers established in the UK will cease to benefit from the country of origin principle. Instead, such service providers will be required to comply with applicable national legislation in each Member State in which they offer their services. According to the recitals to

the existing AVMS Directive, Member States are free to take whatever measures they deem appropriate with regard to audiovisual media services that come from third countries, provided they comply with EU law and the international obligations of the EU. Alternatively, service providers may be compelled to restructure their operations in order to establish themselves and become licensed in another Member State. Notably, in the context of Brexit, if a service provider has its head office in a third (non-EU) country (e.g., the UK post-Brexit), with decisions on the service taken in a Member State, or vice versa, then the service provider will be deemed established in that Member State, provided a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State. The implication of this scenario, coupled with the desire to maintain free movement of creative talent, is that television and on-demand service providers may elect to move roles away from the UK to other Member States.

To give a sense of the scale of the issue, the European Audiovisual Observatory reports that the UK is the leading country of establishment (for the purposes of the AVMS Directive) for television channels and on-demand services, with 29% of EU28 television channels and 27% of EU28 on-demand services (as at the end of 2017). A number of top European audiovisual media companies (including Sky, BBC, and ITV) are based in the UK, as well as international on-demand services and subsidiaries of the major US networks. As of December 2018, approximately 1,040 cable and satellite channels were licensed in the UK, and Ofcom listed 322 on-demand services within its jurisdiction. From a country of origin perspective, the interesting statistic is the number of UK-established services targeting other Member States — according to the European Audiovisual Observatory, roughly 40% of the TV channels established in the UK target audiences in at least one other European market (relying on the country of origin principle if that European country is a Member State).

One consolation is that the UK is party to the Convention (defined above). The Convention provides for freedom of reception and retransmission in respect of linear services as between Convention countries. Post-Brexit, the Convention could be relied upon as between the UK and the 20 other EU countries that ratified the Convention. However, for the seven non-Convention countries, additional licences/consents will likely be required subject to local law requirements. Further, on-demand services are outside of the scope of the Convention. There is also a lack of clarity as to how the Convention would be enforced in the event of any disagreement. For these reasons, currently, the Convention is not a replacement for the benefit afforded by the country of origin principle. However, with amendments, the Convention could become a possible solution.

How has Brexit affected UK licensed service providers thus far?

For the past couple of years, UK-established service providers have been contingency planning for a scenario in which the UK exits the EU without a reciprocal arrangement akin to the country of origin benefit. Those contingency plans are now being put into action, as service providers require legal certainty in their licensing arrangements to provide cross-border services in the event of a no-deal Brexit. In 2018, it was reported that various multinational media corporations had obtained certain broadcast licences in other European territories. A major American media conglomerate has confirmed certain licence applications in Germany, and the Irish media regulator has confirmed receipt of a licence application from a UK-based broadcaster.

Countries that serve as potential alternatives for licences include the Netherlands (where Netflix's main European office is based) and Luxembourg (home to the Astra satellite system), as well as existing countries that license large numbers of pan-European channels, such as Spain, France, and the Czech Republic. Countries including Ireland and Estonia have also positioned themselves as alternatives. What

will happen over the coming weeks remains unclear, but the possibility that licensing activity will ramp up is becoming increasingly real.

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