The revised Audiovisual Media Services Directive 2018 – Has the EU learnt the right lessons from the past?

Dr. Jenny Weinand[*]

* Jenny Weinand (formerly Metzdorf) is Legal Counsel at the European Broadcasting Union. She would like to express her sincere gratitude to Amy Van Elderen for her revisions and valuable comments to this article.

UFITA 1/2018, DOI: 10.5771/2568-9185-2018-1-260

Abstract (deutsch)

Die novellierte Richtlinie über Audiovisuelle Mediendienste 2018 – hat die EU die richtigen Lehren aus der Vergangenheit gezogen?

Als die europäischen Institutionen Ende April 2018 eine politische Einigung über eine novellierte Richtlinie über Audiovisuelle Mediendienste[1] (AVMD-RL) erzielten, sagte Sabine Verheyen, eine der Verhandlungsführerinnen des Europäischen Parlaments: "Durch die Anwendung gleicher Regeln auf gleiche Dienste, egal ob die Medieninhalte online oder offline konsumiert werden, haben wir die EU-Regulierung für das digitale Zeitalter fit gemacht".[2] In der Tat findet die neue Richtlinie auf eine breitere Anzahl von Akteuren, wie den Video-Sharing-Plattformen Anwendung, die audiovisuelle Inhalte verbreiten. Es werden außerdem derzeit existierende regulatorische Unterschiede angeglichen, wodurch grundlegende Werte, wie der Schutz Minderjähriger oder der Kampf gegen Hassrede gestärkt werden.

Aber ist die revidierte Richtlinie auch zukunftssicher oder ist sie lediglich „alter Wein in neuen Schläuchen"?; eine Frage, die sich Valcke, Stevens, Lievens and Werkers bereits 2007 stellten, als die AVMD-RL in Kraft trat.[3] Die Genese der AVMD-RL ist nämlich von schrittweisen Anpassungen durch kontinuierliche Reformen des ursprünglichen EU Rechtsaktes, der Fernsehen ohne Grenzen Richtlinie von 1989, geprägt.[4] Bis heute ist sie das zentrale Rechtsinstrument, durch das die EU den audiovisuellen Sektor reguliert, was sich auch in der Strategie der Kommission für einen digitalen Binnenmarkt wiederspiegelt.[5]

Aufgrund ihrer Bedeutung für den gemeinsamen europäischen Markt befasst sich dieser Aufsatz mit dem Ausgang des gerade beendeten Revisionsprozesses, welcher auf einen Kommissionsvorschlag von 2016 zurückgeht und dessen endgültiges Ergebnis in der zweiten Jahreshälfte zu erwarten ist, und wirft insbesondere die Frage auf, ob die neue AVMD-RL ihren Zielen gerecht wird. Diese Analyse erfolgt vor dem Hintergrund ausgewählter nationaler Umsetzungen der Richtlinie von 2007 und berücksichtigt hierzu die Ergebnisse

1 Richtlinie 2010/13/EU des Europäischen Parlaments und des Rates vom 10. März 2010 zur Koordinierung bestimmter Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über die Bereitstellung audiovisueller Mediendienste, ABl. vom 15.4.2010, L95/1.

2 Europäisches Parlament, Pressemitteilung CULT, 20180423IPR02332, 27.4.2018, http://www.europarl.europa.eu/news/de/press-room/20180423IPR02332/audiovisuelle-medien-einigung-auf-eine-neue-mediendienste-richtlinie.

3 Peggy Valcke, David Stevens, Eva Lievens and Evi Werkers, Audiovisual Media Services in the EU. Next generation approach or old wine in new barrels? Communications & Strategies, 2008, vol. 1, issue 71, pp. 103-120.

4 Richtlinie 89/552/EWG des Rates vom 3. Oktober 1989 zur Koordinierung bestimmter Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über die Ausübung der Fernsehtätigkeit, ABl. vom 17.10.1989, L 298/23, geändert durch Richtlinie 97/36/EG, ABl. vom 30.7.1997, L 202/60.

5 Mitteilung der Kommission vom 6.5.2015, Strategie für einen digitalen Binnenmarkt für Europa, KOM(2015) 192 endg.

einer umfassenden Studie über bestimmte Umsetzungsmaßnahmen der britischen, französischen und deutschen Regulierungsbehörden.[6]
Es ist hier hervorzuheben, dass eine Bewertung der AVMD-RL, die auf nationale Umsetzungsakte beschränkt wäre, eine wichtige Dimension außer Acht lassen würde, denn die eigentliche Umsetzung und Anwendung der Richtlinie in den EU Mitgliedstaaten hängt in hohem Maße von den nationalen Regulierungsbehörden ab. Für Deutschland würde beispielsweise das nationale Gesetz, der Rundfunkstaatsvertrag zu untersuchen sein, als auch die konkrete Rechtsanwendung durch die Landesmedienanstalten.
Dieser Aufsatz bietet einen sehr zeitgemäßen Kommentar zu den vorgeschlagenen Änderungen, die durch die revidierte AVMD-RL vorgenommen und hier überblicksartig dargestellt werden. Das Hauptaugenmerk dieses Aufsatzes gilt sodann den modernisierten Vorschriften zum Anwendungsbereich, der nun neben audiovisuellen Mediendiensten auch Video-Sharing-Plattformen umfasst, sowie den neuen Vorschriften zum Jugendschutz. Der Aufsatz gibt einen kritischen Ausblick darüber, ob die richtigen Lehren aus den Erfahrungen der nationalen Regulierungsbehörden aus der Vergangenheit gezogen wurden.

Abstract (English)

The Revised Audiovisual Media Services Directive 2018 – Has the EU learnt the right lessons from the past?

When at the end of April 2018 the EU institutions reached a political agreement on a revised Audiovisual Media Services Directive[7] *(AVMSD), Sabine Verheyen, one of the European Parliament's lead negotiators said, "By applying similar rules to similar services, irrespective of whether the media content is consumed online or offline, we have made EU regulation fit for the digital era".*[8] *The new Directive will indeed apply to a broader range of actors disseminating audiovisual content, covering video-sharing platforms, and will adjust current regulatory imbalances, enhancing fundamental values such as the protection of minors and the fight against hate speech.*
But will it stand the test of time or is it yet again merely "old wine in new barrels"? This question was posed by Valcke, Stevens, Lievens and Werkers when the first AVMSD was ad-

6 Jenny Weinand, Implementing the EU Audiovisual Media Services Directive, Selected issues in the regulation of AVMS by national media authorities of France, Germany and the UK, Luxembourg Legal Studies 13, Nomos 2018. Siehe auch das Forschungsprojekt www.medialaw.lu der Universität Luxemburg zu den nationalen Umsetzungsakten aller EU Mitgliedstaaten bezüglich der AVMD-RL von 2007, als auch die in Kooperation mit der Europäischen Audiovisuellen Informationsstelle bereitgestellten Datenbank unter http://avmsd.obs.coe.int/cgi-bin/search.php.

7 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, codified version, OJ of 15.4.2010, L95/1.

8 European Parliament CULT press release of 26.4.2018, 20180423IPR02332, http://www.europarl.europa.eu/news/en/press-room/20180423IPR02332/audiovisual-media-agreement-reached-on-new-media-services-directive.

opted in 2007.[9] *Indeed, the Directive's genesis is characterized by incremental adaptations and continuous reforms of the original piece of legislation, the 1989 Television Without Frontiers Directive.*[10] *It still is the key EU legal instrument regulating the audiovisual sector and is instrumental to the Commission's Digital Single Market Strategy.*[11]

Given the Directive's significance for the EU internal market, in this article we examine the outcome of its latest review, aimed at adapting it to new market realities, and we inquire whether the new Directive – based on a proposal from 2016, to be formally adopted in the second half of 2018 – is fit for purpose. We will do so through the lens of national transpositions of the 2007 AVMSD, building on the findings of a comprehensive study into some of the implementing measures taken by the UK's, France's and Germany's national regulatory authorities.[12]

It is important to note that limiting the analysis to national transposition measures would not provide a complete picture of the AVMSD's functioning and effectiveness, because the actual implementation of the Directive depends a lot on the measures taken by national regulatory authorities. In Germany, for example, a full assessment would require analysing the national transposition carried out by the Rundfunkstaatsvertrag, but also the subsequent measures put in place by the regulatory authorities, the Landesmedienanstalten.

While providing a brief overview of the proposed changes to current legislation and thereby giving a very timely first comparison, this article focusses on the revised Directive's enlarged scope of application, now covering audiovisual media services and video-sharing platforms, as well as the revised rules protecting minors. It provides a critical view of whether the right lessons have been learnt from regulators' past experiences.

9 Peggy Valcke, David Stevens, Eva Lievens and Evi Werkers, Audiovisual Media Services in the EU. Next generation approach or old wine in new barrels? Communications & Strategies, 2008, vol. 1, issue 71, pp. 103-120.

10 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ of 17.10.1989, L298/23, as amended by Directive 97/36/EC, OJ of 30.7.1997, L202/60.

11 Communication from the Commission of 6.5.2015, A Digital Single Market Strategy for Europe, COM(2015) 192 final.

12 Jenny Weinand, Implementing the EU Audiovisual Media Services Directive, Selected issues in the regulation of AVMS by national media authorities of France, Germany and the UK, Luxembourg Legal Studies 13, Nomos 2018. See also the research project www.medialaw.lu of the University of Luxemburg, which compares all EU Member States' transposition measures of the 2007 AVMSD as well as the accompanying database made available in cooperation with the European Audiovisual Observatory at http://avmsd.obs.coe.int/cgi-bin/search.php.

I. Introduction

This summer, the royal wedding of Prince Harry and Meghan Markle in the UK as well as the Football World Cup hosted by Russia attracted millions of people around the world to their television screens, enabling them to enjoy, share and participate in these important social events. The power of audiovisual content, or to put it in an anachronistic way, television broadcasting, has not broken yet. Even if today, with mobile devices, content is consumed on the go and we get annoyed by bad Internet connections, the power of audiovisual content, the power of television broadcasting as a facilitator of social cohesion, inclusive societies and international understanding has not ebbed away.

Due to its special role in society, broadcasting and other on-demand audiovisual media services like Netflix, Maxdome or the BBC's iPlayer have been subject to regulation which has been crafted to a great extent at the EU level. The key EU legal instrument regulating this sector is the Audiovisual Media Services Directive (AVMSD),[13] which was conceived from the 1989 Television without Frontiers Directive (TWFD).[14] The Directive sets common rules concerning, for example, the amount and insertion of television advertising, the promotion of European works in providers' programmes, the protection of minors or the free-to-air transmission of important societal events.

For the past almost 30 years, the Directive has been in force and its third and most recent revision has just been agreed by EU institutions in June 2018,[15] adapting the Directive to new market realities: while subscription-based on-demand services are now well-estab-

13 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27, as codified by Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15.4.2010, p. 1. See also Corrigendum to Directive 2010/13/EU, OJ L 263, 6.10.2010, p. 15.

14 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23.

15 On the final agreement for a revised AVMSD, see the Council's press release of 13.6.2018, at http://www.consilium.europa.eu/en/press/press-releases/2018/06/13/audiovisual-media-services-agreement-on-a-new-directive-to-boost-competitiveness-and-promote-european-content/. On the preliminary political agreement reached in April, see the European Parliament's press release of 26.4.2018, at http://www.europarl.europa.eu/news/en/press-room/20180423IPR02332/audiovisual-media-agreement-reached-on-new-media-services-directive. The European Parliament's lead committee endorsed the agreement at the beginning of July, see the European Parliament's press release of 11.7.2018, at http://www.europarl.europa.eu/news/en/press-room/20180709IPR07552/cult-committee-confirms-the-agreement-on-new-audiovisual-media-rules. The agreement still needs to be formally approved by the European Parliament sitting in plenary as well as the Council. The Directive will enter into force upon its publication in the EU's Official Journal, expected in the second half of 2018.

lished players on the market, new market participants such as YouTube or Dailymotion have entered the competition for users' eyeballs and attention. In this article we examine the outcome of this latest revision and we inquire whether the new Directive is fit for purpose.

Directives are not directly applicable and EU Member States are obliged to transpose them in to their national legal orders, whereby they dispose of a certain margin of discretion in the choice of measures. The Directive's application and enforcement is ultimately ensured by national regulatory authorities (NRAs). We therefore carry out our analysis through the lens of the national transpositions of the 2007 AVMSD, building on the findings of a comprehensive study into some of the implementing measures taken by the UK's, France's and Germany's NRAs.[16]

This study shows that differences in the application of secondary EU law may arise in the Member States, even if a sector is regulated by very detailed rules established at the EU level. It moreover demonstrates that NRAs influence to a large extent the application and enforcement of Union law in the Member States, notably when national legislation reproduces, sometimes in a copy/paste manner, the formulations contained in EU legal instruments.

In order to understand and examine the AVMSD's functioning and effectiveness, a full assessment should take into account not only national transpositions, but also the measures taken by national regulatory authorities (NRAs). In this article, we provide some examples of how NRAs have shaped national legal landscapes with a view to ensuring a more transparent and secure business environment for the service providers established in their markets and ensuring a high level of consumer protection as well as a pluralistic and diverse media landscape.

We start with an overview of the Directive's genesis, which is important not only to understand its significance for the media sector but also the reasons for its most recent reform. In this context, we provide a brief outlook on the proposed changes to current legislation and thereby give a very timely first comparison – even before the final text has been formally approved and published in the EU's Official Journal. The article then focusses on the revised Directive's enlarged scope of application, now covering audiovisual media services and video-sharing platforms, as well as the revised rules protecting minors. In doing so, it provides a critical view of whether the right lessons have been learnt from regulators' past experiences.

16 Jenny Weinand, Implementing the EU Audiovisual Media Services Directive, Selected issues in the regulation of AVMS by national media authorities of France, Germany and the UK, Luxembourg Legal Studies 13, Nomos 2018. See also the research project www.medialaw.lu of the University of Luxemburg, which compares all EU Member States' transposition measures of the 2007 AVMSD as well as the accompanying database made available in cooperation with the European Audiovisual Observatory at http://avmsd.obs.coe.int/cgi-bin/search.php.

II. An overview of the Directive's genesis – thirty years of cross-border television

1. Television without frontiers

The Directive's origins can be traced back to the mid-1980s when commercial television first set foot on national markets where it has since co-existed with public service broadcasting in a dual broadcasting system. At that time, technological progress in satellite and cable transmission facilitated cross-border reception of TV programmes and commercial broadcasters increasingly ventured into adjacent countries, often in those sharing the same language.

In a Green Paper published in 1984, the European Commission began to consider regulating the broadcasting market at the then Community level.[17] Just a few years earlier, the Court of Justice had rendered two landmark judgments in the *Sacchi*[18] and *Debauve*[19] cases, which clarified that television broadcasting and television advertising were considered a "service" within the meaning of EU primary law. It followed that any ensuing Community action would be based on the free movement of services. The Court's remark that broadcasting and advertising were "subject to widely divergent systems of law in the various Member States" foreshadowed the Commission's regulatory action in the mid- and late 1980s.[20]

Interestingly, the Commission, in its Green Paper, did not fail to highlight the fact that broadcasting was as much a cultural commodity as it was an economic activity.[21] Recognising broadcasting's dual nature is important as the EU has limited competence in the cultural field, whereas it is empowered to take measures to harmonise the provision of services.[22] This is also the reason Member States retain exclusive power to regulate public service broadcasting, which serves a fundamental democratic role in the general interest.[23]

Furthering economic integration and removing obstacles to the free flow of information in the single market have been the primary objectives of the EU's involvement in the broad-

17 Cf. European Commission, Green Paper on the Establishment of the common market for broadcasting, especially by satellite and cable, COM(84) 300 final, 14.6.1984.

18 CJEU, Case 155/73 *Giuseppe Sacchi*, Judgment of 3.4.1974, EU:C:1974:40.

19 CJEU, Case 52/79 *Procureur du Roi v Marc J. V. C. Debauve and others*, Judgment of 18.3.1980, EU:C:1980:83.

20 CJEU, Case 52/79 *Debauve*, para. 15.

21 European Commission Green Paper of 1984, p. 28-33.

22 Before the Maastricht Treaty was adopted in 1992, cultural policy was a matter exclusively governed by the Member States. Today, Member States still remain primarily in charge of cultural policy, even if Art. 167(1) TFEU allows the EU to "contribute to the flowering of the cultures of the Member States", excluding, in its paragraph (5) "any harmonisation of the laws and regulations of the Member States".

23 Cf. Protocol No. 29 to the TFEU on the system of public broadcasting in the Member States.

casting sector.[24] Nonetheless, cultural objectives such as media pluralism and diversity as well as the respect for fundamental rights such as the freedom of expression and information have undoubtedly become part of the *raison d'être* of the EU's legal instrument regulating the broadcasting sector.

The Television Without Frontiers Directive (TWFD) was adopted in 1989, following roughly three years of negotiations among EU institutions. From the beginning, many elements were present in the Directive which still today form an integral part of the Audiovisual Media Services Directive (AVMSD) and which will be briefly outlined here.

The TWFD laid down minimum rules for the pursuit of broadcasting activities in certain coordinated fields.[25] These minimum rules provide a basis which cannot be undercut by Member States, while conversely, Member States remain free to adopt stricter or more detailed rules in these areas, applicable to broadcasters established in their territory. The initial areas to which this applied encompassed rules regarding the promotion and distribution of European works, television advertising and sponsorship, the protection of minors and the prohibition of incitement to hatred, as well as the right to reply.

The TWFD's building block was the country of origin principle, which facilitated the cross-border transmission of broadcasts. In brief, the country of origin principle (or "home country control") implies that the Member State from which the broadcast emanates[26] has jurisdiction and is responsible for the broadcaster's lawful dissemination of programmes within the internal market.[27] While the jurisdictional criteria were refined during the TWFD's first revision in 1997, taking into account the Court of Justice's case law on the

24 This rationale sharply contrasts with the rationale for the Council of Europe's Convention on Transfrontier Television (CTT). The CTT, which was also adopted in 1989 and amended in 2002, is firmly anchored in the promotion of fundamental rights, in particular the freedom of expression as enshrined in Art. 10 European Convention on Human Rights. On the future of the CTT, see Udo Fink, Tobias Keber and Przemyslaw Roguski, Die Zukunft der Medienregulierung im Europarat, Zeitschrift für Urheber- und Medienrecht, 2011, p. 293-295.

25 The Commission's 1986 TWFD proposal also included copyright-related rules for broadcast retransmission. As the Community's competence for copyright was, however, contested at the time the TWFD was negotiated, these rules were withdrawn from the TWFD and a separate legal instrument was drawn up. As a result, the SatCab Directive was adopted in 1993 (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15). For an overview of the EU's copyright acquis, see also Bernd Justin Jütte, Reconstructing European copyright law for the digital single market: Between old paradigms and digital challenges, Luxembourg Legal Studies 10, Nomos 2017, chapter 2.B.

26 Cf. preamble to the TWFD of 1989.

27 Mark D. Cole, The country of origin principle – from state sovereignty under public international law to inclusion in the Audiovisual Media Services Directive of the European Union, in: Werner Meng/Georg Ress/Torsten Stein (eds), Europäische Integration und Globalisierung, Festschrift zum 60-jährigen Bestehen des Europa-Instituts, Nomos 2011, p. 118.

notion of "establishment",[28] the country of origin principle has since served as a model to harmonise national laws in other areas, such as e-commerce.

Given the fact that Member States were prohibited from effectuating control over incoming broadcasts (from other Member States), certain safeguards were put in place that guaranteed Member States' sovereignty, such as the minimum harmonisation approach as well as a mechanism that permits Member States to provisionally derogate from the free flow of information.[29]

The success of the country of origin principle in the TWFD therefore needs to be closely paired with these safeguards which recognise the existence of different national values, cultures and particularities.

As mentioned above, the rules and compromises agreed under the 1989 TWFD have generally proven sustainable and the core regulatory matters have been retained throughout consecutive revisions of the Directive necessitated by adjustments to market developments.

The Directive's first revision in 1997 was essentially a response to advancements in satellite transmission and digitisation, allowing for a greater number of new services, in particular pay TV, new channels, and new forms of television programming and advertising such as teleshopping.[30] These developments prompted the 1997 TWFD introduction of the listed events rule. This allows Member States to notify to the Commission a list of events of major importance which are not allowed to be marketed on an exclusive basis and would thus have to be shown on free-TV. The Directive henceforth also included specific rules on teleshopping.

28 See generally CJEU, Case C-221/89, *The Queen vs. Secretary of State for Transport, ex parte Factortame Ltd a.o.,* Judgment of 25.7.1991, EU:C:1991:320. More specifically, regarding the broadcasting sector, CJEU, Cases C-222/94 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Judgment of 10.9.1995, EU:C:1996:314; C-56/96 *VT4 v Vlaamse Gemeenschap*, Judgment of 5.6.1997, EU:C:1997:284; C-11/95 *Commission of the European Communities v Kingdom of Belgium*, Judgment of 10.9.1996, EU:C:1996:316; Joined Cases C-34-36/95 *Konsumentombudsmannen v De Agostini, Förlag AB and TV-Shop I Sverige AB*, Judgment of 9.7.1997, EU:C:1997:344.

29 The TWFD of 1989 included the possibility for derogation from the free flow of information, allowing Member States to provisionally suspend retransmission of an infringing broadcast. The revised TWFD of 1997 additionally introduced a specific mechanism, allowing Member States to take measures against broadcasters circumventing national rules. These safeguards helped to protect national values and prevented Member States from entering into a "race to the bottom" by establishing ever more liberal broadcasting regimes to attract business and investments into national markets. Cf. Cole, The country of origin principle, p. 121; see also Jackie Harrison and Lorna Woods, European Broadcasting Law and Policy, p. 173 et seq.; Anna Herold, Country of origin principle in the EU market for audiovisual media services: consumer's friend or foe?, Journal of Consumer Policy, 31, 1, 2008, p. 6.

30 Mark D. Cole, The country of origin principle, p. 118.

2. The Directive's extension to audiovisual media services in 2007

A more fundamental overhaul of the Directive took place in 2007, which resulted in the Directive's name change to accommodate its broader scope of application.[31] As the AVMSD's preamble acknowledges, broadcasters already then faced growing competition from providers of on-demand audiovisual media services.[32] The underlying rationale for including "television-like" services in the Directive was the attempt to establish fairer conditions, or in other words, a level playing field for providers offering similar services.[33]

Since the mode of transmission is immaterial to the classification of a service, the AVMSD defines audiovisual media services in a technology-neutral manner.[34] The Directive distinguishes three types of audiovisual media services: first, linear (broadcasting) services, second, non-linear (on-demand) services and third, audiovisual commercial communications. We focus here on the first two types and what differentiates them.

Given the prevalence of TV broadcasting in the early years of the new millennium and the still nascent on-demand audiovisual media services industry, the Directive is based on a graduated regulatory approach, leaving room for innovation and market developments.[35] This implies that a basic (i.e. more lenient) set of rules applies to on-demand audiovisual media services, while broadcasters remain more heavily regulated.[36] Several regulatory fields coordinated by the Directive were thus extended to providers of non-linear services, while certain fields continue to apply exclusively to broadcasters.[37]

31 The AVMSD was codified in 2010 for the sake of clarity and readability. All references to the existing and currently still applicable Directive are thus based on the AVMSD 2010.

32 Recital 24 AVMSD of 2010.

33 Idem.

34 This was different from the 1989 TWFD which had defined television broadcasting in Art. 1(a) in relation to specific modes of technology, referring to transmission by "wire or over the air, including that by satellite".

35 The graduated approach was originally referred to in Commission Communication on Principles and guidelines for the Community's audiovisual policy in the digital age, para. 3 (3), p. 12. See also Peggy Valcke and David Stevens, Graduated regulation of 'regulatable' content and the European Audiovisual Media Services Directive, One small step for the industry and one giant leap for the legislator?, Telematics and Informatics, 2007, 24, p. 291.

36 In actual fact, the AVMSD slightly lowered the standards for broadcasters in comparison with the TWFD (by liberalising certain rules such as those applicable to TV advertising), while it raised the requirements for on-demand service providers, which had previously been mostly unregulated.

37 The rules on listed events and the newly introduced right to short news reports (Arts. 14 and 15 AVMSD), for example, are only applicable to TV broadcasters, as is the right of reply (Art. 28 AVMSD). On the right to short news reports, see Peter Matzneller, Short reporting rights in Europe: European legal rules and their national transposition and application, in: Susanne Nikoltchev (ed),Exclusive Rights and Short Reporting, IRIS Plus 2012/4; Claudia Wildmann, Das Europäische Kurzberichterstattungsrecht im Lichte der Richtlinie über audiovisuelle Mediendienste, Schriften zum Medienrecht 28, Kovač, 2011. See also CJEU, Case C-283/11 *Sky Österreich,* Judgment of 22.1.2013, EU:C:2013:28.

As a result, non-linear service providers are required to comply with certain information requirements; they are prohibited from disseminating programmes inciting to hatred, they are encouraged to facilitate accessibility of their services to persons with disabilities, they must respect certain basic rules regarding commercial communications, including in relation to sponsored content and programmes containing product placement, they must promote European works in their catalogues and protect minors from seriously harmful content.

3. Further broadening of the Directive's scope during the 2018 reform

By the time the AVMSD was adopted (December 2007) and transposed in the national legal orders (in some Member States as late as 2011),[38] timid calls for yet another revision were already being heard. This was, not least, due to rapid technological progress that is so typical of media markets, leading to new types of services as well as changing viewing habits and consumption patterns.

The Commission's Green Paper "Preparing for a fully converged audiovisual world" of April 2013[39] and the public consultation on the effectiveness of the AVMSD in mid-2015[40] were harbingers of renewed EU legislative activity which materialised in the Commission's proposal for a revised Directive in May 2016.[41] After roughly two years of negotiations among EU institutions, an agreement on the revised Directive was reached in June 2018.[42]

The most striking novelty of the revised Directive is the extension of its scope of application to a new category of services, namely video-sharing platforms (VSPs). The rationale is similar to the one employed in 2007 when the Directive was opened up to non-linear service providers:

38 In Poland, Portugal and Slovenia, for instance, transposition was significantly delayed. See the list of national transpositions at https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32007L0065&qid=1530106744684. See also the University of Luxembourg's research project at www.medialaw.lu, as well as the accompanying database at http://avmsd.obs.coe.int/cgi-bin/search.php.

39 European Commission Green Paper, Preparing for a fully converged audiovisual world: growth, creation and values, 24.4.2013, COM(2013) 231 final.

40 See https://ec.europa.eu/digital-single-market/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st.

41 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, 25.5.2016, COM(2016) 287 final.

42 In May 2017, the European Parliament adopted its report, which was prepared by the two rapporteurs Sabine Verheyen and Petra Kammerevert of the Committee on Culture and Education, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0192+0+DOC+PDF+V0//EN and the Council agreed on its general approach, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN.

Given the fact that VSPs make available audiovisual content to the general public, they have become an important medium to access and share information, particularly for young people, VSP providers compete for the same audiences and advertising revenues[43] as media service providers and should thus be subject to similar rules, to ensure that certain values enshrined in the Directive, such as the protection of minors, are upheld on VSP platforms.

It is worth pointing out that VSP providers do not bear the same kind of responsibility as media service providers for the content distributed on their platforms. While media service providers have editorial responsibility over the programmes they disseminate, VSP providers do not. But VSP providers are not neutral either, in contrast to mere providers of infrastructure, such as hosting providers within the meaning of the e-Commerce Directive.[44] The revised AVMSD recognises that VSP providers exercise an "organisational responsibility" in that they organise, including by automatic means and algorithms, the content they make available, for example by displaying, tagging or sequencing content.[45]

In acknowledging the differences in responsibility between media service providers and VSP providers, the updated Directive applies a new set of rules to VSPs. VSP providers are thus forbidden from making certain content available on their platforms, such as content that incites to violence or discrimination or other content that is considered illegal under Union law.[46]

VSP providers must also take appropriate measures to protect minors from harmful content, for instance by putting in place age verification systems, parental controls, rating systems or easy-to-use flagging or reporting mechanisms.[47] In addition, VSP providers are required to conform to certain advertising standards in relation to audiovisual commercial communications which they themselves market, sell or arrange.[48] In case of user-generated content, where VSP providers have limited control and usually do not have knowledge

43 Recital 3a AVMSD 2018. All references to the revised AVMSD are based on the consolidated version of the Directive as drawn up by the Council General Secretariat of the Council in June 2018. The numbering and structure of this Council working paper may not correspond to the revised Directive which will be published in the EU's Official Journal during the second half of this year. See also the European Audiovisual Observatory's Yearbook 2015, p. 28; Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Ismail Rabie and Sophie Valais, The legal framework for video-sharing platforms, European Audiovisual Observatory, IRIS Plus 2018/1, p. 16-18.

44 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1.

45 Cf. the definition of a VSP service in Art. 1(1)(aa) AVMSD 2018.

46 This includes, for example, material inciting to commit a terrorist offence, that is racist or xenophobic or that constitutes child pornography.

47 Art. 28a AVMSD 2018.

48 The qualitative requirements of Art. 9(1) AVMSD 2010 applicable to media service providers are extended to audiovisual commercial communications that are marketed, sold or arranged by VSP providers.

about the inclusion of commercial communications, VSP providers are required to offer a functionality whereby uploaders can declare whether videos contain any such commercials.

Apart from the new rules applicable to VSPs, the revised Directive will maintain and reinforce its underlying values of protecting audiences from certain content, contributing to media pluralism and diversity and ensuring access to information. The same rules are now applicable to broadcasters and on-demand media service providers in relation to the obligation to protect minors from harmful content; however the rules promoting the production and distribution of European works as well as the requirements for audiovisual commercial communications and advertising still differ for linear and non-linear service providers. Broadcasters remain more heavily regulated in these areas, even if the TV advertising rules, notably the limit placed on advertising time, have been slightly liberalised and on-demand service providers have to secure at least a 30% share of European works in their catalogues.[49]

Another interesting development brought about by the revised AVMSD is the inclusion of rules concerning national regulatory authorities' (NRAs) independence and the formalisation of their role at EU level as the European Regulators Group for Audiovisual Media Services (ERGA). Requirements securing NRAs' independence from the government as well as from other partisan interests, be they political or economic, is to be welcomed.[50] In a similar vein, the clarification of ERGA's role and responsibilities, previously set out in a Commission decision of 2014, is a positive feature of the revised Directive.[51]

In the following sections, we look at two aspects in more detail, the notion of an on-demand audiovisual media service as well as the requirements to protect minors in on-demand services. We take into account the relevant provisions of the AVMSD 2010 and provide examples from regulators' practice before analysing the changes made in the AVMSD 2018 and offering a critical analysis of the new rules in place.

III. Audiovisual media services – which services are regulated?

Due to audiovisual media services' importance for society as a channel of communication and an enabler of freedom of expression and information, the AVMSD regulates those which are mass media in character, i.e. which potentially have a "clear impact on a significant proportion of the general public".[52] Hence, an audiovisual media service is "a service

49 Art. 13 AVMSD 2018.

50 Art. 30 AVMSD 2018.

51 Art. 30a AVMSD 2018. Cf. also Commission Decision of 3.2.2014 on establishing the European Regulators Group for Audiovisual Media Services, C(2014) 462 final. On ERGA's origins and its important role, see Weinand, Implementing the EU Audiovisual Media Services Directive, p. 680-683.

52 Recital 21 AVMSD 2010. Recital 21 therefore excludes services which are "primarily non-economic and which are not in competition with television broadcasting, such as private websites and

[within the meaning of EU law], which is under the editorial responsibility[53] of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks".[54]

As mentioned above, the AVMSD distinguishes between different types of audiovisual media services, notably broadcasting and on-demand services.[55] Making this differentiation is important as different rules are attached to each type of service. The linear/non-linear classification is maintained in the revised AVMSD of 2018.

The definition of broadcasting in the 2010 Directive is upheld in the AVMSD 2018. Accordingly, broadcasting implies "simultaneous[56] viewing of programmes on the basis of a programme schedule" that is determined by the broadcaster.[57] This is often referred to as point to multi-point communication.

By contrast, on-demand audiovisual media services are characterised as a point-to-point form of communication because the user, at their individual request, chooses to view a programme on the basis of a catalogue offered by the media service provider.[58]

The rationale for this differentiation, which has often been criticised as artificial and incomprehensible from a user's perspective,[59] is that users have more control over content consumed on-demand and at their convenience than when watching TV which follows a

services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest".

53 On the notion of editorial responsibility, see Wolfgang Schulz, Editorial responsibility, European Audiovisual Observatory IRIS Special 2008; Raf Schoefs, Connected TV: Editorial responsibility in a converged media environment, Auteurs & Media, 2014, 5, p. 348–355.

54 Art. 1(1)(i) AVMSD 2010.

55 On the notion of an audiovisual media service and the distinction between linear and non-linear services, see Mark D. Cole, The EU legal framework for on-demand services, in: Susanne Nikoltchev (ed), The regulation of on-demand audiovisual services: Chaos or coherence?, p. 35–45, European Audiovisual Observatory IRIS Special 2011, p. 35–45; Michael Kogler, Fernsehähnliches TV On-Demand, Was ist (k)ein audiovisueller Mediendienst auf Abruf?, Medien und Recht 2011, 4, p. 229–237, Alexander Scheuer, Convergent devices, platforms and services for audiovisual media, Challenges set by Connected TV for the EU legislative framework, in: Susanne Nikoltchev (ed), Converged media: Same content, different laws?, European Audiovisual Observatory, IRIS Plus 3/2013, p. 7–22; Peggy Valcke, Aleksandra Kuczerawy, Katrien Lefever, Eva Lievens, David Stevens and Evi Werkers, The EU regulatory framework applicable to broadcasting, in: Laurent Garzaniti, and Matthew O'Regan (eds), Telecommunications, Broadcasting and the Internet, EU Competition Law & Regulation, third edition, Sweet & Maxwell 2010, paras. 2.22-2.41.

56 Recital 30 AVMSD 2010 clarifies that broadcasting also covers quasi-simultaneous viewing where short time lags occur due to different transmission technologies.

57 Art. 1(1)(e) AVMSD 2010.

58 Art. 1(1)(g) AVMSD 2010.

59 Cf. for example Monica Arino, Content regulation and new media: A case study of online video portals, Communications & Strategies 2007, 66, 2, p. 117, 123; Andreas Breitschaft, Evaluating the linear/non-linear divide – Are there any better factors for the future regulation of audiovisual

programme grid determined by the broadcaster. This distinction may have served its purpose during the first years following the AVMSD's adoption, but it begs the question of its usefulness and effectiveness in light of continuing media convergence which produces services that increasingly blur the definitional boundaries. The next section examines how NRAs have applied the Directive's notions to such hybrid services.

1. National regulatory authorities' practice – the UK example

a) The principal purpose criterion

It is a common phenomenon attributed to media convergence that website providers offer a variety of content on their websites to make their services more appealing to users, be it text or image, audio or audiovisual, professionally produced or user-generated. This mixing of content types challenges the very foundations of media regulation and the hitherto clear categories of the press, broadcasting and the Internet.

NRAs throughout the EU have struggled to apply existing legal "tags" to new kinds of services, such as providers of online newspapers and magazines that offer audiovisual material, sometimes compiled in dedicated video sections, and other interactive functionalities alongside written articles. In several countries, NRAs have qualified video sections of online newspapers as non-linear audiovisual media services.[60] This is remarkable as Recital 28 AVMSD 2010 expressly excludes "electronic versions of newspapers" from its scope of application.

The above-mentioned study into the practices of the French, German and UK regulatory authorities and their application and interpretation of the notion of an audiovisual media service as transposed in national law likewise underlines this point.[61] A good illustration of NRAs' difficulties in classifying service types is provided by the UK, where regula-

media content?, Entertainment Law Review 2009, 20, 8 p. 292; Peggy Valcke and David Stevens, Graduated regulation of 'regulatable' content and the AVMSD, p. 297–300; Nico Van Eijk, Scope of application of the modernised Directive, in: Regulating the new media landscape. A Directive for Audiovisual Media Services without Frontiers, Schriftenreihe des Instituts für Europäisches Medienrecht 36, Nomos 2008, p. 22.

60 See for example the practice of the Slovak, Swedish or Flemish regulatory authorities. Cf. Jenny Weinand, Implementing the EU Audiovisual Media Services Directive, p. 326-328. See also Irini Katsirea, Electronic press: 'Press-Like' or 'Television- Like', International Journal of Law and Information Technology, 2015, p. 1–23; Jenny Metzdorf (now Weinand), The implementation of the Audiovisual Media Services Directive by national regulatory authorities – National responses to regulatory challenges, Journal of Intellectual Property, Information Technology and Electronic Commerce Law 2014, 5, 2, paras. 6–11, p. 90–92, available at http:// www.jipitec.eu/issues/ jipitec-5-2-2014/3998; Peggy Valcke and Jef Ausloos, What if television becomes just an app, Reconceptualising the legal notion of audiovisual media service in the light of media convergence, ICRI Research Paper 2013/17, available at https://ssrn.com/abstract=2375666.

61 Cf. Weinand, Implementing the EU Audiovisual Media Services Directive, in particular chapters 4 and 6.

tors developed a great bulk of practice under a co-regulatory scheme from 2010 to 2016. During this period, the Office of Communications (Ofcom), the UK's primary communications and media regulator delegated the regulation of on-demand services to the Authority for Television On-Demand (ATVOD) in a co-regulatory framework. Ofcom retained certain backstop powers and served as the appeal instance to ATVOD's decisions (so-called determinations). Since 2016, Ofcom is again the sole regulator for broadcasting and on-demand audiovisual media services.[62]

In the UK, the classification as a non-linear service was not only important to determine the applicable set of rules and distinguish non-linear services from other online services excluded from media regulation. It also triggered providers' obligation to notify the non-linear service to the competent authority (i.e. previously ATVOD, now Ofcom).[63]

As co-regulator for content standards in non-linear services, ATVOD initiated a number of proceedings against providers of online newspapers and online magazines, considering that a separate video section constituted an on-demand audiovisual media service within the meaning of the Communications Act.[64]

In determining the nature of these services, ATVOD focussed on the principal purpose criterion which implies that a service is TV-like if it principally aims at providing programmes.[65] In this respect, ATVOD pointed out that newspaper website providers aggregated the videos in a particular section of the website which could be regarded as a "consumer destination in its own right".[66] It also stressed that the video sub-sites were sufficiently in-

62 For an overview of the UK's media authorities and the genesis and termination of the co-regulatory regime, see Weinand, Implementing the EU Audiovisual Media Services Directive, p. 186-218. While Ofcom today ensures compliance with content standards, co- and self-regulatory arrangements between Ofcom and the Advertising Standards Authority as well as the Committee of Advertising Practice exist in relation to advertising standards. Cf. Weinand, Implementing the EU Audiovisual Media Services Directive, p. 201.

63 The Communications Act adopted in 2003, which among others, regulates audiovisual media services, was amended in 2009, 2010 and 2014 by virtue of three regulations that transpose the AVMSD. The requirement to notify an on-demand programme service is laid down in Sec. 368BA of the Communications Act. It is interesting to note that notification systems do not exist in all Member States. In Germany, for instance, no such system has been put in place. Recital 19 AVMSD 2010 clarifies that the Directive is without prejudice to Member States powers to organise the audiovisual media services market, for example by licensing or authorisation/notification systems.

64 Instead of the term "on-demand audiovisual media service", Sec. 368A of the Communications Act uses the term "on-demand programme service". For the purpose of simplicity, this article retains the AVMSD's terminology.

65 Art. 1(1)(b) AVMSD 2010 defines a programme as "an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting".

66 While ATVOD's determination in the case of Sun Video is no longer accessible, Ofcom summarises ATVOD's findings in para. 20 of its appeal decision. Cf. Appeal by News Group Newspapers

dependent of the written material as the videos "could be viewed, enjoyed and made sense of without reference to the newspaper offering".[67]

Service providers challenged ATVOD's findings before Ofcom. The first of these cases decided by Ofcom was the *Sun Video* case of December 2011 and which served as a precedent for future cases.[68] In its decision, Ofcom upheld News Group's appeal, overturning ATVOD's determination. Ofcom contended that the principal purpose part entailed two questions: whether "any of the audio-visual material comprises something that in its own right is a 'service' whose 'principal purpose' is the provision of that material", and whether it "is ancillary to the provision of some other service".[69] In answering the first question, Ofcom outlined several criteria indicative of principal purpose. It stressed that the list of criteria is non-exhaustive and that no single criterion is determinative on its own. Rather than serving as a mere "checklist exercise", the criteria are intended to provide a general analytical framework.[70]

In more detail, Ofcom considered that an on-demand audiovisual media service would likely have its own homepage, that the audiovisual material would be catalogued in a discrete section of the website and would be "presented or styled (and marketed) as a television channel", the amount of audiovisual material would be "of substantial duration and/or comprise complete programmes" which are independent of other content provided.[71] There would also be a great number of access and content links between the audiovisual material and other content. Where audiovisual content is provided alongside written material, "(i) the balance of the material is more likely significantly to lean towards the audiovisual, (ii) the written material is brief and/or merely an introduction to, or summary of, the audio visual material and (iii) the audio visual material is the primary means of conveying to users the information sought to be conveyed".[72] Finally, an overall assessment (or "step back" test) is required to determine whether the audiovisual material is integrated into or ancillary to another service.[73]

Limited against a notice of determination by ATVOD that the provider of the service Sun Video has contravened Section 368BA of the Communications Act 2003, 21.12.2011.

After the end of ATVOD's co-regulatory term, all Ofcom scope appeal decisions are available at http://webarchive.nationalarchives.gov.uk/20160704204456/http://stakeholders.ofcom.org.uk/broadcasting/on-demand/atvod-archives/scope-appeals/ and most of ATVOD's determinations are available at http://webarchive.nationalarchives.gov.uk/20160704204536/http://stakeholders.ofcom.org.uk/broadcasting/on-demand/atvod-archives/determinations/.

67 Cf. Ofcom, Appeal decision Sun Video, 2011, para. 20, p. 6.

68 Cf. Ofcom, Appeal decision Sun Video, 2011. For a detailed analysis of Ofcom's appeal decision in the Sun Video case, cf. Weinand, Implementing the EU Audiovisual Media Services Directive, p. 324-331.

69 Ofcom, Appeal decision Sun Video, 2011, para. 72, p. 24.

70 Ofcom, Appeal decision Sun Video, 2011, paras. 82-83, p. 26.

71 Ofcom, Appeal decision Sun Video, 2011, paras. 90a-90d, p. 27-28.

72 Ofcom, Appeal decision Sun Video, 2011, para. 90g, p. 28-29.

73 Ofcom, Appeal decision Sun Video, 2011, para. 90g, p. 29.

In applying the criteria, Ofcom found that the principal purpose of the Sun's video section was not to provide audiovisual programmes. It pointed out that, inter alia, the videos were not sufficiently independent from the text-based material, meaning that users could not understand most of them without reading the articles provided alongside the videos.[74] Thus, the audiovisual material offered on the Sun's website was "more likely integrated into, and an ancillary part of, an electronic version of The Sun newspaper".[75]

Ofcom made clear that its decision in the Sun Video case did not amount to a "blanket exclusion" of all online newspapers from being regulated under the Communications Act.[76] Strikingly, during the period of the co-regulatory scheme, Ofcom upheld a great number of appeals against ATVOD's determinations, which not only reveals differences in regulatory approaches between ATVOD and Ofcom but also illustrates that the classification as an on-demand service is indeed linked to a special regulatory regime imposing particular responsibilities on service providers.[77]

The criteria[78] from Ofcom's principal purpose test identified in 2011 have hence been used in both regulators' decisional practice and, were subsequently codified in guidelines,[79] and may have served as inspiration for NRAs in other Member States. On the one hand, the criteria are sufficiently flexible, broad and open, recognising a plethora of new services and business models yet to enter the market. They therefore allow adaptations to market developments, taking into account the particularities of a specific industry. On the other hand, the criteria are qualitative, thus inherently subjective, and their interpretation is subject to interpretation. It is unclear which criteria are decisive in individual cases as all criteria are considered equally and no single criterion is determinative on its own. This approach hence begs the question of when does the balance tip in favour of avms-style regulation.[80] Thus, legal certainty for service providers operating in this market is to a certain extent curtailed by the flexibility that stems from an approach based on criteria. It is also of utmost impor-

74 Ofcom, Appeal decision Sun Video, 2011, paras. 151-153, p. 40-41.

75 Ofcom, Appeal decision Sun Video, 2011, para. 159, p. 42.

76 Ofcom, Appeal decision Sun Video, 2011, paras. 78, 183, 186, p. 25, 46-47.

77 Cf. Katsirea, Electronic press: 'Press-Like' or 'Television-Like'?, p. 20; Metzdorf (now Weinand), Regulierung der elektronischen Presse in Großbritannien? Ein Anwendungsbeispiel zum Erwägungsgrund 28 der AVMD-RL, in: Jürgen Taeger (ed), Law as a Service, Recht im Internet- und Cloud-Zeitalter, Oldenburger Verlag für Wirtschaft, Informatik und Recht 2013, p. 511; Weinand, Implementing the EU Audiovisual Media Services Directive, p. 213-216, 364.

78 Ofcom likewise devised criteria indicative of comparability, the second prong of the statutory test as stipulated in Sec. 368(1)(a) of the Communications Act. The comparability test requires that the programmes provided are similar, in form and content, to those commonly broadcast on TV. For a detailed analysis of the UK's regulators' decisional practice, see Weinand, Implementing the EU Audiovisual Media Services Directive p. 343-373.

79 Ofcom, Guidance notes on who needs to notify an on-demand programme service to Ofcom, 18.12.2015, available at https://www.ofcom.org.uk/__data/assets/pdf_file/0028/71839/guidance_on_who_needs_to_notify.pdf.

80 Cf. Katsirea, Electronic press: 'Press-Like' or 'Television-Like'?, p. 21.

tance that the criteria are applied in a consistent manner and that regulators' decisions are well-reasoned, transparent and objectively justified.

The UK regulators' approach to specifying the definitional criteria of an on-demand audiovisual media service is also interesting in the context of the *New Media Online* case, which dealt with the classification as a non-linear service of a video section of an Austrian online newspaper and which we will briefly analyse below.

b) Guidance by the Court of Justice of the European Union

The *New Media Online* judgment of the Court of Justice of the European Union (CJEU) provides some guidance on the notion of an audiovisual media service, notably the principal purpose criterion, within the meaning of the AVMSD.[81] The case concerned the website of a newspaper offered in Austria. Due to the independent function of the video subdomain of the *Tiroler Tageszeitung*'s online edition, the Austrian NRA, the KommAustria, classified this part of the website as an on-demand audiovisual media service.[82]

The CJEU confirmed the Austrian regulator's approach, finding that the AVMSD, as transposed in national law, could apply to a part of a website in which videos were compiled.[83] In quoting the Directive's preamble, the Court noted that a service will only fall under the AVMSD's scope if the audiovisual elements are not incidental or complementary to the text-based material.[84] The CJEU was also critical of the Directive's Recital 28 excluding online newspapers from its scope, stressing, as did Ofcom in the UK, that an automatic and all-encompassing exemption failed to take account of the myriad of online services and their multimedia nature.[85]

The Court furthermore made clear that the provider's principal activity was immaterial to the assessment of the service's nature. Instead, the principal purpose of a service must be examined "regardless of the framework in which it is offered".[86] It was thus for the referring court to determine whether "form and content" of the video subdomain were "independent" of the sub-domains featuring written articles. This would not be the case if the written

81 CJEU, Case C-347/14 New Media Online v Bundeskommunikationssenat, Judgment of 21.10.2015, EU:C:2015:709.

82 KommAustria, Bescheid KOA 1.950/12-048, 10.9.2012. KommAustria's decision was confirmed by the Bundeskommunikationssenat (Entscheidung GZ 611.191/0005-BKS/2012, 13.12.2012). New Media Online challenged this decision before the Austrian Verwaltungsgerichtshof (Administrative Court) which stayed proceedings and referred two questions to the CJEU, entertaining doubts as regards the interpretation of the notions of "programme" as well as "principal purpose" as defined by the AVMSD. For a comprehensive analysis of the judgment as well as Advocate General Szpunar's opinion, see Weinand, Implementing the EU Audiovisual Media Services Directive, p. 295-311.

83 CJEU, Case C-347/14 New Media Online, para. 36.

84 Recitals 22 and 28 AVMSD 2010. CJEU, Case C-347/14 New Media Online, paras. 26-27.

85 CJEU, Case C-347/14 New Media Online, paras. 28-29.

86 CJEU, Case C-347/14 New Media Online, para. 33.

articles were "indissociably complementary to the journalistic activity of that publisher, in particular as a result of the links between the audiovisual offer and the offer in text form".[87]

Interestingly, the CJEU applied this approach directly to the case, offering a preliminary assessment which it had previously attributed to the national court.[88] It found that the great majority of videos were not connected to the written articles and could be accessed and consumed on their own. As a result, it tentatively agreed with the Austrian regulators that the audiovisual service comprising the video section was sufficiently independent from the newspaper publisher's journalistic activity and thus constituted a distinct service that would be captured by the AVMSD.[89]

This is the backdrop against which to assess the modifications introduced by the revised AVMSD in 2018 and evaluate whether NRAs' application of the Directive's rules in converging media markets will be more straightforward, ultimately leading to more legal certainty for service providers.

2. Changes to the scope of application brought about by the revised AVMSD

a) Changes to the notion of an audiovisual media service

At first glance, the changes made to the relevant definitions appear rather modest in that they simply codify the CJEU's case law, notably the findings derived from the *New Media Online* decision. Hence, the definition of an audiovisual media service now specifies that the principal purpose of the service or "a dissociable section thereof" is devoted to providing audiovisual programmes.

Additional guidance on the interpretation of a "dissociable section" of a service is offered in the preamble which clarifies that this criterion is met if "the service has audiovisual content and form which is dissociable from the main activity of the service provider, such as stand-alone parts of online newspapers".[90] The assessment of whether a service is self-standing or rather, in the words of the CJEU, an "indissociable complement" to the main activity, will be made on the basis of the links between the audiovisual offer and the main activity.

87 CJEU, Case C-347/14 New Media Online, para. 34.

88 Following the CJEU's judgment in the New Media Online case, the Austrian Administrative Court confirmed the Austrian regulatory authorities' assessment in a decision of 16.12.2015, Zl 2015/03/00049, see in particular p. 12-13. The Austrian court stressed that the video subdomain was independent, in form and content, from the press products and was no longer connected to the publisher's journalistic activities. Although some videos had previously accompanied certain articles, the court did not find any existing links between the videos and articles and pointed out that the majority of videos was accessible independent of the written material.

89 CJEU, Case C-347/14 New Media Online, para. 36.

90 Recital 3 AVMSD 2018.

In a similar vein, the definition of "programme" was adapted to the *New Media Online* case,[91] now meaning an individual item, "irrespective of its length", within a media service provider's schedule or catalogue. The list of examples was complemented by a reference to "video clips". Hence, short-form content, offered, for example in a video-only sub-domain of a website may be considered as a "programme" within the meaning of the AVMSD.[92]

The revised definitions and accompanying recital confirm the status quo of several regulators' practices. They clarify that the principal purpose criterion should be interpreted in a dynamic way. Indeed, the generic exclusion of "electronic versions of newspapers" contained in the preamble of the AVMSD 2010 is no longer up-to-date nor justified in view of services with a multi-purpose nature. The principal purpose criterion, in its extended version, remains relevant for classifying services in the future, even if it will inevitably become more difficult to draw distinctions as media continue to converge and new services develop.

This begs the important question of whether the updated criteria will provide sufficient guidance for NRAs in practice. The new formulations referring to a "dissociable" or "stand-alone" part of a service, which comprises the "audiovisual offer" and which is independent from a provider's "main activity" as a result of the absence of links, indeed represents a good starting point; however a more detailed and comprehensive assessment of a service's nature will be required, and notably the characteristics underlying its independent function.

b) Introduction of a new category of VSP services

Under the AVMSD 2018, NRAs will have wider competences in relation to the supervision of VSP providers. They may be confronted to similar problems when applying the definitional criteria in practice. According to the AVMSD 2018, a VSP service is defined as a service where "the principal purpose of the service or of a dissociable section thereof or an

91 In the *New Media Online* case concerning an Austrian online newspaper, the CJEU had clarified that the notion of "programme" as defined in Art. 1(1)(b) AVMSD 2010 included videos of short duration. In doing so, the CJEU underscored, by reference to Recitals 11, 21 and 24 of the AVMSD of 2010, that the Directive's purpose is to apply, in a particularly competitive media landscape, the same rules to actors competing for the same audience and to prevent on-demand audiovisual media services, such as the video collection at issue in the main proceedings, from engaging in unfair competition with traditional television". CJEU, Case C-347/14 New Media Online, para. 22.

92 More recently, in February 2018, the CJEU was again called upon to clarify the definition of "programme" in the *Peugeot* case, which concerned Peugeot's promotional YouTube channel. The Court considered that a short promotional video clip neither constituted a "programme" nor "audiovisual commercial communications" within the meaning of the Directive. Such clips could not be regarded as being included in or accompanying programmes as required by the AVMSD. Thus, Peugeot's YouTube channel, which featured only self-standing videos as "individual elements independent of one another" did not constitute an on-demand audiovisual media service. CJEU, Case C-132/17 *Peugeot Deutschland v Deutsche Umwelthilfe,* Judgment of 21.2.2018, in particular paras. 22-24, 28, 30.

essential functionality of the service is devoted to providing programmes, user-generated videos, or both".[93] It is necessary that the principal purpose criterion, which in and of itself does not seem entirely appropriate to capture the multi-purpose and multi-functional nature of an online platform, is broadened.

The fact that the clarifications regarding the notion of a "dissociable section" in the Directive's preamble refer to the generic term "service", rather than audiovisual media service, may indicate that they are also valid in relation to the definition of VSPs. The CJEU's *ratio decidendi* in the *New Media Online* case would thus be transferred to the platform environment.

What is more, the notion of "essential functionality" broadens the Directive's scope, notably the definition of VSPs in relation to social media services. Social media services are different from VSPs in that they provide many services or functionalities to users, allowing them to exchange and share information. This information may take many different forms, such as pictures/photos/images, text messages as well as audiovisual content, user-generated or professionally made. Recognising the importance of social media as facilitaters for accessing and sharing information, thus contributing to and having the potential to influence public opinion forming, the revised Directive's preamble makes clear that social media services are covered if they meet the definitional criteria of a VSP service.

The new Directive furthermore indicates that the provision of programmes or user-generated content is considered an "essential functionality" if it is not "merely ancillary to or constitutes a minor part of the activities of that social media service".[94] Anticipating that the practical application of the "essential functionality" criterion may pose difficulties, the relevant recital mandates the European Commission to provide guidance in order to ensure "clarity, effectiveness and consistency of implementation".[95]

In brief, the revised Directive makes some necessary clarifications in relation to the definition of an audiovisual media service. These clarifications primarily flow from the CJEU's *New Media Online* decision and introduce the "independent function test"[96] as devised by the Austrian regulatory authority. Time will tell whether this test is sufficiently future-proof and adaptable to new kinds of services. Similar concerns may be raised in relation to the new definition of a VSP service. At the time of writing, it seems indispensable that further guidelines be drawn up, if not by the Commission, then by ERGA or individual NRAs.

93 Art. 1(1)(aa) AVMSD 2018.

94 Recital 3b AVMSD 2018.

95 Idem.

96 Cf. Weinand, Implementing the EU Audiovisual Media Services Directive, p. 301.

IV. Protecting minors in non-linear services – what is content that seriously impairs minors and which measures to put in place?

Safeguarding the rights of children, as stipulated by Art. 24 Charter of Fundamental Rights has been an overarching objective of the EU, even before the Charter's entry into force. EU institutions have adopted various legal acts (including soft law instruments) that underscore the significance of the protection of minors, which is often coupled with the aim of protecting human dignity.[97] These twin objectives are also reflected in the sector-specific AVMSD.

As mentioned above, the AVMSD applies a graduated regulatory scheme depending on the nature of the service. The AVMSD 2010 contains two separate provisions, one applicable to broadcasting (Art. 27), and the other to on-demand services (Art. 12). Art. 27 AVMSD 2010 is stricter in that it prohibits the broadcasting of seriously harmful content, such as pornographic or excessively violent programmes. It also requires broadcasters to take measures to ensure that minors do not normally hear or see harmful content on TV, for instance by selecting the time of the broadcast or putting in place technical measures, such as PIN codes or other access restrictions.[98]

Art. 12 AVMSD 2010 imposes a lighter regime on non-linear service providers, who are required to ensure that programmes that "might seriously impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services". In contrast to broadcasters, on-demand service providers are permitted to disseminate seriously harmful content to adults, provided they make sure that minors do not have access to such programmes.

Even if Art. 12 AVMSD 2010 does not specify the kind of content that is to be regarded as "seriously impair[ing]", it may be deduced from Art. 27 AVMSD that it includes, at least, pornographic and gratuitously violent content. The Directive does not specify the notions of "pornography" and "gratuitous violence" so it pertains to each Member State to interpret them in accordance with prevailing national socio-cultural norms and perspectives. Since

97 See for example European Commission, Communication on Illegal and harmful content on the Internet, COM(96) 487 final, 16.10.1996; European Commission, Green Paper on the Protection of minors and human dignity in audiovisual and information services, COM(96) 483 final, 16.10.1996; Recommendation 2006/952/EC of European Parliament and of the Council on the Protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry, OJ L 378, 27.12.2006, p. 72; On the genesis of the recommendation, see in more detail Eva Lievens, Protecting children in the digital era, The use of alternative regulatory instruments, International Studies in Human Rights 105, Martinus Nijhoff Publishers 2010, p. 101-122.

98 On the protection of minors in television broadcasting, see in more detail, Jörg Ukrow, Article 22 TWFD (Protection of Minors), in: European Media Law, Oliver Castendyk, Egbert Dommering and Alexander Scheuer (eds), Kluwer Law International 2008; Weinand, Implementing the EU Audiovisual Media Services Directive, p. 494-495.

their interpretation is likely to differ across the EU and is moreover subject to change over time, the EU legislature refrained from introducing uniform definitions in the Directive.

Moreover, Art. 12 AVMSD 2010 does not itemize the measures service providers are required to put in place to discharge their responsibility. The Directive's preamble provides some indications, listing "personal identification numbers (PIN codes), filtering systems or labelling".[99] Interestingly, it also refers to the 2006 Recommendation on the protection of minors and human dignity, which encourages industry action, such as "systematically supplying users with an effective, updatable and easy-to-use filtering system when they subscribe to an access provider or equipping the access to services specifically intended for children with automatic filtering systems".[100] Again, any concrete measures service providers are obliged to take are defined at the national level.

Although the Directive, in outlining these rules, ensures its relevance in rapidly evolving media markets, the vague language employed by Art. 12 AVMSD may present a challenge, notably to NRAs, for the effective protection of minors. This is why NRAs have issued guidance on the type of content considered seriously harmful as well as the kind of measures non-linear service providers are expected to employ in order to restrict such content to adult audiences. We will examine below the German regulators' activities as an example of how NRAs have interpreted and applied Art. 12 AVMSD 2010 in a national context.

1. National regulatory authorities' practice – the German example

In Germany, the protection of minors is ensured through a co-regulatory system, often referred to as "regulated self-regulation", which was established in 2003.[101] The Kommission für Jugendmedienschutz (Commission for the protection of minors, KJM) is the central regulatory authority monitoring compliance with the rules protecting minors in broadcasting and on-demand services in accordance with the Jugendmedienschutz-Staatsvertrag (In-

99 Recital 60 AVMSD 2010. See in more detail Alexander Scheuer, Additional youth protection measures in the EU: Filters, children's networks, media literacy, in: Susanne Nikoltchev (ed), Protection of minors and audiovisual content on-demand, European Audiovisual Observatory, IRIS Plus 6/2012, p. 41-48.

100 Idem. Cf. Annex III of Recommendation 2006/952/EC on the Protection of minors and human dignity and on the right of reply.

101 See generally on the German co-regulatory scheme for the protection of minors, Mark Cole, Der Dualismus von Selbstkontrolle und Aufsicht im Jugendmedienschutz, Zum Verhältnis von FSF und KJM im System der ‘regulierten Selbstregulierung, Zeitschrift für Urheber- und Medienrecht, 2005, p. 464; Helge Rossen-Stadtfeld, Die Konzeption regulierter Selbstregulation und ihre Ausprägung im Jugendmedienschutz, Archiv für Presserecht, Zeitschrift für Medien- und Kommunikationsrecht, 3, 2004, p. 6; Dorit Bosch, Die "Regulierte Selbstregulierung" im JMStV, Eine Bewertung des neuen Aufsichtsmodells anhand verfassungs- und europarechtlicher Vorgaben, Studien zum deutschen und europäischen Medienrecht 22, Peter Lang 2006, p. 86–118.

terstate Treaty on the Protection of Minors, JMStV).[102] In addition, the KJM acts as a "quasi-MOT",[103] formally recognising (i.e. certifying) self-regulatory bodies, so-called Einrichtungen der Freiwilligen Selbstkontrolle (organisations of voluntary self-regulation).[104] The KJM also supervises self-regulatory organisations, providing guidance and ensuring that these operate within the legislative framework provided by the JMStV and do not exceed their mandate.[105]

Self-regulatory organisations serve as shields to the affiliated service providers and protect them from direct regulatory action by the KJM.[106] During the most recent reform of the JMStV in the fall of 2016,[107] certified self-regulatory organisations were strengthened and

102 Due to the federal structure of Germany, the German Länder (states) are competent to regulate the dissemination of audiovisual media services (including the protection of minors in such services), which have adopted interstate treaties in order to ensure the uniform application of rules throughout Germany. Within the system of the 14 German Landesmedienanstalten (state media regulatory authorities), the joint Commission of these Landesmedienanstalten, the KJM constitutes a quasi-federal organ, which aims at coordinating the protection of minors in audiovisual media services at the national level on behalf of the state media authorities pursuant to Art. 14-17 JMStV. On the German media authorities, see in more detail, Weinand, Implementing the EU Audiovisual Media Services Directive, p. 240-263. On the KJM, see Mark Cole, Das Zusammenwirken von Selbstkontrolle und hoheitlicher Kontrolle im Jugendmedienschutz, Recht der Jugend und des Bildungswesens, 3, 2006, p. 299-307; Murad Erdemir, Die Kommission für Jugendmedienschutz – Ein zentrales Aufsichtsorgan für Rundfunk und Telemedien, Recht der Jugend und des Bildungswesens 3, 2006, p. 285-298; see also commentaries on relevant provisions in the JMStV in: Reinhard Hartstein, Wolf-Dieter Ring, Johannes Kreile, Dieter Dörr, Rupert Stettner, Mark Cole and Eva Wagner (eds),, Rundfunkstaatsvertrag, Jugendmedienschutz-Staatsvertrag, Kommentar, Looseleaf commentary, C.F. Müller.

103 Cole, Der Dualismus von Selbstkontrolle und Aufsicht im Jugendmedienschutz, ZUM 2005, p. 462.

104 Art. 19 JMStV. Cf. also commentaries on relevant provisions in the JMStV in: Hartstein, Ring, Kreile, Dörr, Stettner, Cole and Wagner (eds), Jugendmedienschutz-Staatsvertrag, Kommentar.

105 Art. 19b JMStV. Cf. also commentaries on relevant provisions in the JMStV in: Hartstein, Ring, Kreile, Dörr, Stettner, Cole and Wagner (eds), Jugendmedienschutz-Staatsvertrag, Kommentar. On the scope of self-regulatory organisations' margin of discretion, see Cole, Der Dualismus von Selbstkontrolle und Aufsicht im Jugendmedienschutz, ZUM 2005, p. 469- 470.

106 Providers having undergone an ex ante control of the programmes they intend to disseminate are privileged as the KJM cannot initiate proceedings against the provider unless the self-regulatory organisation, in exercising the control, exceeded its scope of discretion. The KJM consequently exercises a limited form of supervision of self-regulatory organisations' decisions, focussing on the review of misuse or reasonableness in cases of grave errors or misjudgement. Cf. Cole, Das Zusammenwirken von Selbstkontrolle und hoheitlicher Kontrolle im Jugendmedienschutz, RdJB 2006, p. 305; Alexander Scheuer, Das neue System des Jugendmedienschutzes aus der Sicht der Selbstkontrolleinrichtungen, Recht der Jugend und des Bildungswesens 3, 2006, p. 312-314.

107 The most recent version of the JMStV in the version of the 19th Treaty for amending the Interstate Treaties with regard to broadcasting law is in force since 1 October 2016. An English version is available at https://www.kjm-online.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Treaty_on_the_Protection_of_Minors_in_the_Media__JMStV_in_English___19th_Interstate_Broadcasting_Treaty.pdf. On the need to reform the JMStV as well as

they are now in charge of assessing "the suitability of technical systems for the protection of minors".[108]

Both, the KJM as well as certified self-regulatory organisations, within their mandated tasks, apply and enforce Art. 12 AVMSD 2010, which is transposed in Articles 4 and 5 JMStV. While Art. 4(1) JMStV lists illegal material that is banned from dissemination, Art. 5 JMStV prescribes restrictions to the dissemination of harmful material. A specific rule, on which we focus here, is outlined in Art. 4(2) No. 3 JMStV, which permits the dissemination of content "evidently suited to seriously impair the development of children and adolescents or their education into self-responsible and socially competent personalities" in so-called "closed user groups".

We will first look at the KJM's guidance on the nature of the content of which dissemination must be restricted to adults, notably the notion of "pornography". We will then examine the regulator's criteria for technical tools to protect minors, focussing on age verification systems.

a) Seriously harmful content

The KJM's supervision criteria, updated in 2016, serve as a compass for the assessment of content.[109] The KJM makes clear that the JMStV distinguishes between different degrees of harm (with different legal consequences) and that the formulation "evidently suited to seriously impair"[110] implies a stronger effect on minors' development as compared to the formulation "suited to impair".[111] This corresponds to the rationale of the AVMSD 2010 and it is interesting to note that the language employed by the JMStV seems slightly stricter than the Directive's formulations.[112]

The JMStV does not spell out the notion of content that is "evidently suited to seriously impair" minors' development, and the KJM, for the purpose of providing examples of such

the necessity to align the rules for online and offline media, see Mark Cole, Kontrolle und Aufsicht im Jugendmedienschutz, Einrichtungen und Verfahren nach dem JMStV im Vergleich zum JuSchG – Eine Untersuchung der aktuellen Rechtslage im Blick auf den Novellierungsbedarf, 2015, available at https://www.kjm-online.de/fileadmin/user_upload/KJM/Publikationen/Gutachten/Kontrolle_und_Aufsicht_Jugendmedienschutz.pdf.

108 Art. 19(a)(2) JMStV.

109 KJM, Kriterien für die Aufsicht im Rundfunk und in den Telemedien, September 2016, available at https://www.kjm-online.de/fileadmin/user_upload/KJM/Publikationen/Pruefkriterien/Kriterien_KJM.pdf.

110 Art. 4(2) No. 3 JMStV.

111 Art. 5(1) JMStV. See KJM, Kriterien für die Aufsicht, para. B.1, p. 4-5.

112 Compare the formulation "evidently suited to seriously impair" (Art. 4(2) No. 3 JMStV) to "might seriously impair" (Art. 12 or Art. 27(1) AVMSD 2010) and "suited to impair" (Art. 5(1) JMStV) to "likely to impair" (Art. 27(2) AVMSD 2010). As the Directive establishes minimum rules, Member States are allowed to adopt more detailed or stricter rules such as the formulations contained in the JMStV.

content, refers to the Jugendschutz-Gesetz (Protection of Young Persons Act, JuSchG), a federal law, which regulates media-related aspects to the extent that these are not covered by the law of the German Länder as well as all non-media related aspects of the protection of minors.[113] According to the JuSchG, the notion covers "immoral and brutalising content (…), instigating violence, crime and racism" as well as "presentation in detail of acts of violence, murder and massacre for their own purpose" and material which "recommends self-justifying behaviour and vigilantism as the only means to obtain justice".[114]

Furthermore, the KJM emphasises that the potential harm associated with certain material, be it harmful or seriously harmful, is contingent on and may even be enhanced by certain factors, distinguishing between recipient-specific and offer-specific factors. Recipient-specific factors relate to the social context of the recipient, gender and age.[115] Offer-specific factors encompass the extent to which content is realistic, its link to daily life, the extent to which incentives are presented to identify with the actors or find guidance in their behaviour as well as the interactivity of a service.[116]

With respect to seriously harmful content that may be made available in closed user groups preventing access to minors, the KJM provides detailed guidance on the notion of "pornography". The regulator stresses that "pornography" is not legally defined as it is subject to social change, and makes clear that the notion of "pornography" pursuant to the JM-StV corresponds to the criminal law notion.[117] According to established case law, a presentation is pornographic if it "focuses on the portrayal of sexual activities to the exclusion of all human relationships in an exaggerated and obtrusive manner with the primary purpose of sexual arousal".[118]

The KJM furthermore makes several clarifications. In terms of substance, a depiction is pornographic if its sole purpose is the attainment of pleasure and sexual lust, the reduction to impersonal sexuality as well as the degradation of a person to a replaceable object.[119] In terms of form, pornography means an overly clear and detailed depiction of sexual acts that is conveyed in an unaltered and obtrusive manner.[120] The regulator also lists several characteristics, in substance and form, which would indicate that a programme is pornographic.[121]

113 The JSchuG protects minors in the context of media, for example as regards movie performances (including cinema performances) and regulates the distribution of films or games using data media (e.g. DVDs).

114 Second sentence of Art. 18(1) JuSchG. KJM Kriterien für die Aufsicht, para. B.1, p. 4.

115 KJM, Kriterien für die Aufsicht, para. B.2, p. 5-7.

116 KJM, Kriterien für die Aufsicht, para. B.2, p. 7-9.

117 KJM, Kriterien für die Aufsicht, para. C.2, p. 34.

118 KJM, Kriterien für die Aufsicht, para. C.2, p. 35, translated by the author. See also BGH, Urteil vom 22.7.1969, 1 StR 456/68 and BVerwG, Urteil vom 20.2.2002, 6 C 13/01.

119 KJM, Kriterien für die Aufsicht, para. C.2, p. 35.

120 Idem.

121 KJM, Kriterien für die Aufsicht, para. C.2, p. 35-37. Cf. also Weinand, Implementing the EU Audiovisual Media Services Directive, p. 578-579.

In brief, the KJM's criteria for supervision are very comprehensive and detailed. They provide useful guidance as regards the nature of content, such as pornographic material. The criteria also show that the exact nature of a programme may be difficult to determine. This is especially true for the distinction between harmful and seriously harmful content and the threshold that must be reached for content to be considered "evidently suited to seriously impair" minors' development. Such distinctions are difficult to make, in particular, for example when programmes include (extremely) violent and/or sexually explicit scenes but have not reached the pornography threshold. A careful assessment is required on a case-by-case basis, which gives justice to the fundamental rights and values at stake: the protection of minors on the one hand and the freedom of expression on the other hand.

b) Technical tools to protect minors

The JMStV obliges service providers to restrict the dissemination of seriously harmful content to closed user groups accessible only to adults. The KJM has therefore identified criteria for technical tools that prevent minors from accessing adult material, such as age verification systems (AVS).[122] Although the JMStV does not prescribe a formal certification of AVS providers, the KJM assesses such systems, on a voluntary basis and upon request, in a so-called "Positivbewertung" (positive assessment).

In establishing its criteria, the KJM takes into account the kinds of access granted to users. Those applicable to one-time access, giving users a so-called one-off key ("Einmalschlüssel") are more lax than those allowing users repeated access, where the user receives a master key for subsequent use after identification ("Generalschlüssel").

122 KJM, Kriterien zur Bewertung von Konzepten für Altersverifikationssysteme als Elemente zur Sicherstellung geschlossener Benutzergruppen in Telemedien nach § 4 Abs. 2 S. 2 JMStV, 10.9.2014, available at https://www.kjm-online.de/fileadmin/user_upload/KJM/Aufsicht/Technischer_Jugendmedienschutz/KJM-AVS-Raster.pdf. Jugendschutzprogramme (technical systems for the protection of minors) are another technical tool mentioned by Art. 11 JMStV. These are software programmes which read out age ratings and allow access to content for different age groups. According to Art. 11(2) JMStV, such systems may also be used in the context of closed user groups. Prior to the 19th amendment to the Interstate Broadcasting Treaty, the KJM was responsible for assessing the suitability of such systems and formally certifying them. In an effort to promote the up-take of such technical systems and incentivise the industry, this responsibility was transferred to the certified self-regulatory organisations in 2016 (see Art. 19a(2) JMStV). The self-regulatory bodies conduct their assessment on the basis of criteria drawn up by the KJM in consultation with the former. Cf. KJM, Kriterien für die Eignungsanforderungen nach § 11 Abs. 3 JMStV für Jugendschutzprogramme, 12.10.2016, available at https://www.kjm-online.de/fileadmin/user_upload/Pressemitteilungen/KEK/Dokumente/Kriterien_fuer_die_Eignungsanforderungen_fuer_Jugendschutzprogramme_12.10.2016.pdf. See also Andreas Marx, Mark Bootz and Friedemann Schindler, Perspektiven des technischen Jugendschutzes, Aktuelle Herausforderungen und zukunftsfähige Konzepte, 2016, p.22-24, available at https://www.kjm-online.de/fileadmin/user_upload/KJM/Publikationen/Gutachten/Perspektiven-technischer-Jugendschutz.pdf.

With respect to one-off access systems, the KJM requires that providers verify with great probability that the user has reached the age of majority.[123] In practice, such verification may be carried out through the electronic ID as included in the new German identity card.[124] Another option would be an online inspection performed by trained staff that identifies the user via a webcam provided that the image quality is sufficient and methods to circumvent the procedure, like using a mask or playing a film, are excluded.[125] The KJM furthermore makes clear that a mere checking of an ID or passport number or the presentation of a (certified) copy thereof are insufficient.[126]

For repeated access, providers are required to put in place a two-step protection measure.[127] This procedure encompasses first, the identification, at least once and through personal contact, of the service recipient and second, authentication each time the user accesses the service.

At the identification stage, the user's age is verified to ensure that they are not a minor. The KJM considers that face-to-face control which identifies the user by means of official documents such as the ID card or passport is necessary.[128] This identity check may be carried out at the post office (so-called Postident procedure) or through comparable methods.[129] Under certain circumstances, reference to previous identity checks may be made, for example those performed for the purpose of concluding a contract for a mobile phone or bank account.[130]

In a second step, the user must be authenticated before each session. Renewed authentication is necessary, according to the KJM, to minimise the risk that minors obtain access rights.[131] Typically, the user receives a password that is individually allocated.[132] In addition, providers are required to take sufficient measures to prevent the multiplication of access data or its passing on to unauthorised third parties. In this respect, the KJM provides several examples, such as authentication by means of biometric data (fingerprints or iris recognition) registered in advance, active (e.g. ID-Chip, SIM card) and passive hardware

123 KJM, Kriterien zur Bewertung von Konzepten für Altersverifikationssysteme, p. 3.

124 Idem, p.3.

125 Idem, p. 4.

126 Idem, p.4.

127 KJM, Kriterien zur Bewertung von Konzepten für Altersverifikationssysteme, p. 1, 5. The requirement of a two-step procedure is in line with the state media authorities' joint guidelines for the protection of minors. Cf. Gemeinsame Richtlinien der Landesmedienanstalten zur Gewährleistung des Schutzes der Menschenwürde und des Jugendschutzes vom 8./9.3.2005, para. 5.1.1, available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/Jugendschutzrichtlinien.pdf.

128 KJM, Kriterien zur Bewertung von Konzepten für Altersverifikationssysteme, p. 5-6.

129 KJM, Kriterien zur Bewertung von Konzepten für Altersverifikationssysteme, p. 6.

130 Idem.

131 KJM, Kriterien zur Bewertung von Konzepten für Altersverifikationssysteme, p. 1.

132 KJM, Kriterien zur Bewertung von Konzepten für Altersverifikationssysteme, p. 9.

(e.g. passive chip cards, DVD, CD-ROM), one-time PINs or through a query of the processor ID of the user's computer.[133]

In a ruling of 2007, the German Federal Court[134] confirmed the KJM's two-step procedure. Yet, it appears that this strict and rather rigid process presents high hurdles in practice[135] and one wonders whether a more flexible approach may not serve the objective of protecting minors just as well.[136]

Bearing in mind the German example, we now examine the changes to the rules protecting minors, which will take effect with the entry into force of the revised AVMSD.

2. Changes brought about by the revised AVMSD

a) Changes regarding the protection of minors in audiovisual media services

The most striking modification to the protection of minors in the revised AVMSD is the alignment of rules applicable to broadcasters and providers of on-demand services. This takes the form of a levelling up of the rules applicable to non-linear service providers which are now subject to stricter rules.

More specifically, the AVMSD 2018 requires media service providers of linear as well as non-linear services to take appropriate measures to ensure that programmes which "may impair" the physical, mental or moral development of minors "are only made available in such a way as to ensure that minors will not normally hear or see them"[137] and the revised

133 KJM, Kriterien zur Bewertung von Konzepten für Altersverifikationssysteme, p. 9-10.

134 BGH, Urteil vom 18.9.2007, I ZR 102/05, upholding the decision of the lower instance court, the OLG Düsseldorf (OLG Düsseldorf, Urteil vom 24.5.2005, I-20 U 143/04). For an overview of this jurisprudence, see Weinand, Implementing the EU Audiovisual Media Services Directive, p. 555-560.

135 Cf. Michael Köhne, Jugendmedienschutz durch Alterskontrollen im Internet, Neue Juristische Wochenschrift, 2005, p. 795; Marc Liesching, Anforderungen an Altersverifikationssysteme, Zugleich eine Replik auf Vassilaki, Kommunikation und Recht, 2006, p. 395–97; Liesching, Sicherstellung des Erwachsenenzugangs bei pornografischen und sonst jugendgefährdenden Telemedien, Multimedia und Recht, 2008, p. 804.

136 Inspiration may be drawn from the practice and guidelines of other EU regulators. In the UK, for instance, the use of payment methods which are restricted to adults is considered as a sufficient indication that the user is of age. The French NRA, the Conseil Supérieur de l'Audiovisuel established in its guidance a specific procedure which includes the creation of a personal code in combination with recurrent authentication for repeated access. For an overview and comparison of the UK and French regulators' practice and guidelines, see Weinand, Implementing the EU Audiovisual Media Services Directive, chapter 5. Cf. also Jenny Metzdorf (now Weinand), Jugendmedienschutz in Abrufdiensten – Am Beispiel 'Playboy TV' aus Großbritannien, in: Jürgen Taeger (ed), Law as a Service (LaaS) – Recht im Internet- und Cloud- Zeitalter, Oldenburger Verlag für Wirtschaft, Informatik und Recht, 2013, p. 673–92; Alexander Scheuer and Cristina Bachmeier, The protection of minors in the case of new (non-linear) media, European legal rules and their national transposition and application, in: Susanne Nikoltchev (ed), Protection of minors and audiovisual content on-demand, European Audiovisual Observatory, IRIS Plus 6/2012, p. 7–27.

137 Art. 6a AVMSD 2018.

Directive lists, inter alia, age verification tools or other technical measures. Service providers must also provide "sufficient information" about programmes which may impair minors' development, using a "system describing the potentially harmful nature of the content".[138] This is meant to empower parents and minors alike to make informed decisions about the nature of the content. The revised rule also makes clear that providers' measures must be "proportionate to the potential harm of the programme".

In addition, "the most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures".[139] The accompanying recital specifies that the "strictest measures" imply "encryption *and* effective parental controls" even though the nature of the content covered by this rule is not necessarily illegal or constitutive of a criminal offence.[140]

In contrast to the AVMSD 2010, which banned such programmes from TV, broadcasters are henceforth allowed to disseminate this type of content provided that "the strictest" protection measures are put in place. Member States, in accordance with the Directive's minimum harmonisation approach, may nonetheless continue prohibiting "the most harmful content" from TV.[141]

The new provision protecting minors in audiovisual media services is in large parts similar to the rule applicable to broadcasters as stipulated by the AVMSD 2010. Applying the same rule to providers of linear and non-linear services seems justified against the backdrop of media convergence. Current consumption patterns show that while users still watch more linear content (albeit on diverse platforms and devices), consumption of non-linear services continues to increase.[142] Younger audiences also tend to turn more frequently to on-demand forms of viewing (whether on-demand audiovisual media services, video-shar-

138 Idem. See also Recital 9 AVMSD 2018 which mentions content descriptors as an example, alongside acoustic warnings, visual symbols or "any other means, describing the nature of the content".

139 Idem.

140 Recital 9-a AVMSD 2018.

141 See also, André Lange, Vers une révision a minima de la Directive SMA, 2016, available at https://www.academia.edu/27935361/VERS_UNE_REVISION_A_MINIMA_DE_LA_DIRECTIVE_SMA; Weinand, Implementing the EU Audiovisual Media Services Directive, p. 741-744, analysing in detail the Commission's proposal as regards the rules protecting minors in audiovisual media services; Bruno Zambardino, Monica Sardelli and Marco Bassini, AVMSD- Refit or reform? Audio visual media services in the digital era, September 2016, p. 19, 28-32, available at https://www.i-com.it/wp-content/uploads/2016/09/avmsd_refit_or_reform-audio_visual_media_services_in_the_digital_era-paper_i-com.pdf.

142 See Zambardino, Sardelli and Bassini, AVMSD- Refit or reform? Audio visual media services in the digital era, 2016, p. 19, 28-32. See also Ofcom's Media Nations Report of July 2018, available at https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2018/streaming-overtakes-pay-tv; on the penetration of on-demand service providers in the EU, see Agnes Schneeberger and Gilles Fontaine, Linear and on-Demand Services in Europe 2015, Mavise Extra, European Audiovisual Observatory, June 2016, p.36-40, available at https://rm.coe.int/linear-and-on-demand-audiovisual-media-services-in-europe-2015/1680789871.

ing services, or any other information society service).[143] Increasingly, it seems that users regard broadcast and non-broadcast content as interchangeable.

Under the new provision Member States continue to retain a large margin of discretion when transposing it into their national legal orders, notably as regards the nature of the content considered harmful or most harmful as well as the measures service providers are required to take to protect minors. Although this may reflect the differences in national cultural sensitivities across Member States, it is regrettable that the formulations remain as unclear as in the 2010 Directive. The categories of content remain as vague as before, a concern that NRAs had raised through ERGA early on in the reform process.[144] Our recently published study examining the measures taken by the France's, Germany's and the UK's regulatory authorities demonstrates that a common set of minimum criteria might be defined in relation to each content category (i.e. harmful and most harmful).[145]

In addition, the AVMSD 2018 mostly refers to tools which service providers already employ at present, and fails to provide a more future-oriented outlook, which in turn could have set incentives for the industry to invest in and develop secure technical tools that do not present a disproportionate burden on service providers and that are adaptable to the nature of the content as well as parents' attitudes as regards the kind of content they consider suitable for their children.

b) Extending the protection of minors to VSPs

The protection of minors remains an important objective of the revised Directive. This is also reflected in the new obligations imposed on VSP providers. They are now required to take appropriate measures to protect minors from harmful content. Given VSP providers' limited influence over the content they make available, the burden imposed on them by the revised Directive is lower than on media service providers. It clarifies that ex ante control mechanisms or upload-filtering of content are prohibited pursuant to the e-Commerce Directive.

The new provision furthermore stipulates that the measures VSP providers are required to take should be "practicable and proportionate, taking into account the size of the [VSP] service and the nature of the service that is provided". The rule also specifies that the suit-

143 See Ofcom's Media Nations Report of July 2018; Ofcom, Children and Parents: Media use and attitudes report, November 2017, in particular p. 21-31, available at https://www.ofcom.org.uk/__data/assets/pdf_file/0020/108182/children-parents-media-use-attitudes-2017.pdf; Zambardino, Sardelli and Bassini, AVMSD- Refit or reform? Audio visual media services in the digital era, 2016, p. 19.

144 ERGA, Opinion on AVMSD proposals, ERGA (2016)03, 5.10.2016, p. 11, available at http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=17994; See also theme 2 of the ERGA Report on the protection of minors in a converged environment, ERGA (2015)13, 27.11.2015, available at http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=13248.

145 Weinand, Implementing the EU Audiovisual Media Services Directive, p. 657-658, 708-712.

ability of measures is contingent on the "nature of the content (…), the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake".[146]

By way of example, the revised Directive refers to several measures, such as the provision of information in VSP services' terms and conditions, the establishment of easy-to-use reporting or flagging mechanisms, age verification systems, rating systems, parental controls or the introduction of efficient and user-friendly complaints handling procedures.

The new provision applicable to VSP providers follows the same rationale as that applicable to media service providers, using the same kind of broad language. One can expect that Member States and ultimately NRAs, when applying and enforcing this new provision at the national level, will encounter similar problems as those brought to light in relation to the protection of minors in audiovisual media services. Regarding VSPs, the balancing exercise may even be more difficult as VSP providers exercise a different type of responsibility over the content they make available and conflicts with the current limited liability regime set out in the e-Commerce Directive appear inevitable. The rules applicable to VSPs will necessarily have to be reviewed during the next revision of the Directive, and perhaps even earlier, in the context of the e-Commerce Directive, which may potentially undergo a revision under a newly elected Commission.

V. Conclusion

In this article, we shed light on the most recent revision, finalised in June of this year, of one of the key legal instruments with which the European Union regulates media markets. We show how the AVMSD has served as a building block for the cross-border dissemination of audiovisual content. What started as television broadcasting without frontiers thirty years ago, today includes audiovisual media services and, in the near future, video-sharing platform services. The gradual extension of the Directive's scope to new kinds of actors providing similar services and occupying a similarly important social role in informing the public and providing a platform for free expressions is characteristic of this legal instrument.

In order to examine whether the revised Directive is fit for purpose, we provide some examples from the practice of NRAs, focusing on the interpretation of the notion of an on-demand audiovisual media service as well as rules protecting minors in non-linear services. We find that NRAs have often had to specify the rules contained in the Directive in order to apply and enforce them in their national markets. Regulators in the UK and Germany, for instance, have established criteria and detailed guidance to provide more clarity and legal certainty to service providers operating in these markets.

We consider that the updated AVMSD is a first step in the right direction, adapting legislation to a changed business environment and viewing habits. The modifications made to

146 Art. 28a(1)(a) in conjunction with Art. 28a(2) AVMSD 2018.

the notion of audiovisual media service, as well as to the provision protecting minors in audiovisual media services, remain modest and do not seem to offer solutions to existing difficulties in the application of such rules by NRAs. And these difficulties may even be exacerbated as NRAs apply similar rules to an entirely new category, that of VSP providers.

The modest changes introduced in the AVMSD 2018 also reflect the complexities of EU legislation-making. The Commission's 2016 proposal, which was based on academic studies and reports, a comprehensive impact assessment as well as public consultations, already represented a compromise, reflecting stakeholders' different positions. And the revision necessarily calls for a balancing exercise in which obligations are carefully weighed on the basis of the interests and fundamental rights of those concerned. The final outcome of negotiations is evidence of the Commission's well-balanced proposal. Politically, the Commission's approach was therefore a success, even if certain amendments may be viewed critically in substance.

Further, technology and innovation will continue to challenge existing and newly crafted definitions and classifications and put a strain on the substantive rules, so that further adaptations to market developments will likely prove inevitable. Legislatures and regulators at the EU and national levels alike should not, however, shy away from rule-making on account of the Directive's inherent complexities or the difficulty of crafting effective rules for actors operating on the Internet. Today, it is too soon to throw the AVMSD overboard and succumb to the calls for more horizontal or principles-based regulation.

As we have demonstrated here and in our earlier comprehensive study on the implementation of the AVMSD, broad principles defined at the EU level necessarily come in tandem with less clarity and certainty, imposing an even greater burden on national legislatures, and more importantly on NRAs, to make sense of the principles and apply them to concrete situations.

Even if the current revision of the Directive may appear to be a small step rather than a giant leap, this approach has enabled the sector to strive and bring to the fore new kinds of services to the benefit of consumers. It has also purported to ensure regulatory fairness among providers offering similar services, while recognising small, but important differences. Thus, the AVMSD will remain the backbone for media regulation at the EU and national levels for years to come. It will provide a solid framework, albeit one that requires specifications and adaptations at the national level. In a field that is characterised by so many tensions at different levels, in which different rights and interests regularly clash, this construct may indeed have its merits.