



Council of the
European Union

035237/EU XXVII. GP
Eingelangt am 14/10/20

Brussels, 14 October 2020
(OR. en)

11836/20

AUDIO 38
DIGIT 94
CONSOM 167
TELECOM 180

COVER NOTE

From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

date of receipt: 13 October 2020

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.: SWD(2020) 228 final

Subject: COMMISSION STAFF WORKING DOCUMENT Reporting on the application of Directive 2010/13/EU "Audiovisual Media Services Directive" for the period 2014-2019

Delegations will find attached document SWD(2020) 228 final.

Encl.: SWD(2020) 228 final

11836/20

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EUROPEAN
COMMISSION

Brussels, 13.10.2020
SWD(2020) 228 final

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Reporting on the application of Directive 2010/13/EU "Audiovisual Media Services Directive" for the period 2014-2019

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1. INTRODUCTION

Article 33 of the Audiovisual Media Services Directive (Directive 2010/13/EU, hereinafter ‘the AVMSD’) provides that, not later than 19 December 2011, and every three years thereafter, the Commission must submit a report to the European Parliament, the Council and the European Economic and Social Committee on the application of the AVMSD. This report, covering two reporting periods (2014-2016 and 2017-2019), constitutes the Commission’s third report on the implementation of the AVMSD.

The main objective of the report is to describe how Member States have applied the AVMSD during the years 2014-2019. It takes into account input received from Member States based on a questionnaire sent by the Commission services, recent Court cases in the relevant area as well as other recent developments in the area of audiovisual media services in Europe.

The report covers the following areas: scope of application of the AVMSD, the application of the country of origin principle and free circulation of audiovisual media services within the EU, accessibility of audiovisual media services by people with visual or hearing disabilities, protection of minors, promotion of European works, audiovisual commercial communications, events of major importance, self-regulatory initiatives at national level, cooperation between national media regulators and media literacy.

The year 2019 marked the 30th anniversary of the Television without Frontiers/Audiovisual Media Services Directive. In these 30 years, the media landscape and viewing habits have shifted dramatically, with the explosion of online content services available both at home and on mobile devices. These changes have been particularly visible in the recent years, with the exponential development of online content consumption and the emergence of video-sharing platforms.

To adapt the existing regulatory framework to these ever-changing market realities, the Commission proposed a revised Audiovisual Media Services Directive in May 2016 that encompasses a new regulatory approach to online platforms disseminating audiovisual media content. The revised Directive was adopted by the European Parliament and the Council on 14 November 2018¹ with a transposition deadline set for 19 September 2020.. The present report will focus on the application of the rules of Directive 2010/13/EU, while referring, where appropriate, to the main changes brought about by the 2018 revision.

2. APPLICATION OF THE DIRECTIVE

2.1. Material scope of application of the AVMSD

Article 1(1)(a)(i) of the AVMSD provides the definition of “audiovisual media service”. According to this article, an audiovisual media service falling within the scope of the AVMSD is: (i) a service, (ii) under the editorial responsibility of a media service provider,

¹ Directive 2018/1018/EU.

(iii) the principal purpose of which is, (iv) the provision of programmes, (v) to inform, entertain or educate, (vi) the general public, and (vii) by electronic communications networks. Audiovisual commercial communications² are also considered as audiovisual media services under Article 1(1)(a)(ii) of the AVMSD.

Since the last reporting period (2011-2013), according to the input received from Member States, most Member States have not encountered any major issues with regard to the definition of traditional audiovisual media services and the scope of the current Directive. However, several Member States reported difficulties in classifying certain over-the-top (OTT) media services³ within the scope of Article 1(1)(a)(i).

For instance, two Member States reported problems in assessing whether on-demand services that occasionally offer audiovisual content, for example broadcasting of sports matches on online betting platforms, should be covered by the AVMSD or whether a service providing livestreamed videos constitutes an audiovisual media service. In the latter case, the national audiovisual regulator concluded that such a service was not to be considered as an audiovisual media service since it was based on a peer-to-peer connection rather than on targeting a broader audience.

One Member State also reported about ongoing judicial proceedings regarding a service claiming to be only enabling the transmission of programmes for which the editorial responsibility lies with third parties. The question in these cases was whether the service at stake should be considered an audiovisual media service. Similarly, another Member State reported the challenging classification of services by electronic communication providers that offered audiovisual and media content bundled with their core telecommunication services.

One Member State referred to problems in relation to the qualification of radio websites including catalogues of on-demand videos (video recordings of the radio programmes and music videos) and with the qualification of services that offer purchasing and downloading digital copies of audiovisual content but without options of accessing such content on the service itself.

During the reference period, the Court of Justice of the European Union (CJEU) issued two relevant judgments concerning the definition of audiovisual media services and hence the material scope of the Directive. In the *New Media Online* case,⁴ the CJEU clarified that videos that are short in length (such as local news bulletins and sports and entertainment clips) and provided under a subdomain of the website of a newspaper can qualify as programmes under the AVMSD. The CJEU also clarified that the assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of that of the journalistic activity of the operator of the website at issue, and is not merely an indissociable

² Pursuant to Article 1(1)(a)(h) AVMSD they are defined as “images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement”.

³ Media services provided over the Internet

⁴ [Judgment of 21 October 2015, *New Media Online*, C-347/14.](#)

complement to that activity. This could be ascertained, in particular, as a result of the links between the audiovisual offer and the offer in text form.

The definition of “audiovisual media service” has been then further clarified in case C-132/17 - *Peugeot Deutschland*⁵ where the CJEU clarified that the definition of audiovisual media service covers neither a video channel on a video sharing platform on which internet users can view short promotional videos for specific products, (the case concerned promotional videos of new passenger car models), nor a single video of that kind considered in isolation. The CJEU specified that in the present case the services could not be considered as audiovisual commercial communications as they would not be accompanying a programme as required by the respective definition under Article 1(1)(a)(h) AVMSD.

Concerning the New Media Online case, most of the Member States reported that the CJEU’s ruling was already in line with their existing regulatory approach and therefore considered its impact as rather limited. However, some Member States underlined and welcomed the clarifications provided by this ruling, and three of them reported that the judgment influenced their practice concerning the identification of on-demand services. In particular, one Member State reported that based on the judgment it decided to qualify a service that, as a part of its activity, provides a catalogue of short duration videos as an audiovisual media service.

2.2. Free circulation of services across Member States

The AVMSD is based on the ‘country of origin’ principle. Under this principle, audiovisual media service providers are, as a rule, subject only to the rules and jurisdiction of the Member State where they are established. By abiding by these rules, the services providers can freely provide their services across the EU as Member States are to ensure freedom of reception and not to restrict retransmission on services from other Member States for reasons that fall within the fields coordinated by the Directive.⁶ As such, the AVMSD has facilitated the cross-border transmission of television channels and video-on-demand (VOD) services. The AVMSD sets some minimum harmonisation standards, which implies that Member States are free to enact stricter or more detailed rules at national level, provided that such rules are in compliance with Union law.

A significant number of Member States reported that during the relevant period they have encountered issues in relation to incitement to hatred or protection of minors with regard to audiovisual service providers originating in other Member States. Several Member States also flagged that they have had recourse to the cooperation mechanisms provided for by the Directive (Article 3 and 4). Some of these Member States found that the outcome of the cooperation was not entirely satisfactory, either because the procedures were cumbersome and

⁵ Judgment of 21 February 2018, *Peugeot Deutschland*, C-132/17.

⁶ The CJEU held in this respect that it is solely for the Member State from which audiovisual media services emanate to monitor the application of the law of the originating Member State applicable to those services and to ensure compliance with Directive 89/552 as amended by Directive 97/36, and that the receiving Member State is not authorised to exercise its own control for reasons which fall within the fields coordinated by that directive (see, to that effect, judgment of 22 September 2011, *Mesopotamia Broadcast and Roj TV*, C-244/10 and C-245/10, paragraph 36 and the case-law cited). See, more recently, also the judgment of 4 July 2019, *Baltic Media Alliance*, C-622/17, paragraph 72.

time consuming or because the authority of the country of origin did not grant their request. Several Member States reported on issues regarding providers originating from third countries and the measures taken in these cases.

Article 2 of the AVMSD identifies a number of criteria to determine whether a service falls under a Member State's jurisdiction (e.g. where the provider has its head office, where editorial decisions are taken or where a significant part of the workforce operates). If none of these criteria applies, Article 2(4) of the AVMSD sets out the place of the satellite up-link or the satellite capacity as subsidiary criteria. Given that an important satellite operator is established on its territory, one Member State reported several issues about incitement to hatred with satellite channels originating from third countries (but under its jurisdiction pursuant to the 'satellite' criteria). The same Member State reported about the issues it encountered with regard to the application of the jurisdiction criterion related to the location of the satellite up-link⁷. In particular, it observed that providers under investigation for incitement to hatred modified even several times the location of the up-link. This has had an impact on the identification of the competent regulator and thus on the efficiency of the procedure.

The AVMSD contains some limited exceptions to the operation of the country of origin principle. Member States can restrict the reception and retransmission of audiovisual media services on their territory only in limited cases and following the procedures laid down in Articles 3 and 4 of the AVMSD. For television broadcasting, derogations may apply, under Article 3, when a broadcaster infringes AVMSD rules on incitement to hatred or protection of minors on at least two occasions. The procedure includes a first cooperation phase where the Member State concerned contacts the transmitting Member State with a view to finding an amicable settlement. In cases where the Member States and the broadcaster concerned fail to reach an amicable settlement, and the infringement persists, the Member State can adopt measures and notify them to the Commission, which is to take a decision on whether such measures are compatible with Union law.

In relation to incitement to hatred, the Latvian and Lithuanian national audiovisual media regulators have applied the above derogation procedure to suspend the re-broadcasting of certain Russian-language television channels retransmitting from another Member State. The Lithuanian authorities adopted such measures on three occasions (i.e. in 2015, 2017 and 2018)⁸ and the Latvian authorities once in 2019.⁹ In all these cases, the Commission considered that suspension of the retransmission decided by Lithuania and Latvia on the basis of incitement to hatred was compatible with EU law.

On 4 July 2019, the CJEU issued a preliminary ruling on the interpretation of Article 3(1) and 3(2) of the AVMSD. The CJEU held that a public policy measure adopted by a Member State, consisting in an obligation to distribute or retransmit, for a period of 12 months, a television channel from another Member State only in pay-to-view packages, without however

⁷ Up-link is the communication link leading from a ground station to a satellite.

⁸ See Commission decisions C(2018) 2665 final of 4 May 2018, C(2017) 814 final of 17 February 2017 and C(2015) 4609 final of 10 July 2015.

⁹ Commission decision C(2019) 3220 final of 3 May 2019.

restricting the retransmission as such of the television programmes of that channel, is not covered by those provisions.¹⁰

In case a Member State has adopted stricter rules in an area coordinated by the AVMSD and encounters issues with a television broadcast mostly or wholly directed towards its territory, it can use the procedure provided for in Article 4(2) AVMSD. The Member State has to demonstrate that the broadcasters in question established themselves in a given Member State in order to circumvent such rules. The procedure includes first a cooperation phase where the Member State concerned contacts the transmitting Member State to try to reach an amicable settlement. In cases where the Member States and the broadcaster concerned fail to reach an amicable settlement, the Member State can notify to the Commission its intention to apply adequate measures.

In the period covered by this report, the Commission issued one decision pursuant to Article 4 of the AVMSD concerning the application of stricter rules on alcohol advertising in Sweden.¹¹ The AVMSD does not prohibit alcohol advertising, but allows Member States to apply stricter rules, including a full ban, on broadcasters under their jurisdiction. Such a ban exists in Sweden. In 2017, Sweden notified the Commission with its intention to apply its stricter rules on broadcasters established in the United Kingdom. In order to impose such a ban on the UK broadcasters, Sweden should have demonstrated, under the specific procedure contained in Article 4 of the AVMSD, that the broadcasters in question established themselves in the UK in order to circumvent such rules. The burden of proof lying with the Member State concerned, the Commission found in this case that Sweden failed to prove circumvention on the part of the two broadcasters. This was the first time that the Commission decided on the application of Article 4 of the AVMSD.

Both procedures pursuant to Article 3 and 4 provide for a prior cooperation phase whereby Member States concerned try to find an amicable solution to the cross-border problem identified. The majority of Member States consulted did not raise specific concerns with regard to the application of these cooperation procedures. At the same time, some consider that the overall procedures are too complicated, burdensome and time consuming. This view is also reflected in a document recently produced by the European Regulators Group for Audiovisual Media Services (ERGA) on the implementation of the revised AVMSD.¹²

If an audiovisual media service provider falls under the jurisdiction of a third country, the AVMSD and its procedures will not be applicable. Most Member States do not report any issues with broadcasters located outside the EU, even though some have reported issues with regard to third country services spreading illegal content, such as incitement to violence or hatred, or adult content. As for on-demand audiovisual media services provided from outside the EU, the few cases mentioned concern services that offer adult programmes and do not have the necessary safeguards in terms of protection of minors.

¹⁰ Judgment of 4 July 2019, *Baltic Media Alliance*, C-622/17.

¹¹ Commission decision C(2018) 352 final of 31 January 2018.

¹² ERGA SG3 – Report on Implementation of the revised AVMS Directive, 2019, available on erga-online.eu.

2.3. Accessibility of audiovisual media services for visually and hearing impaired persons

Under Article 7 of the AVMSD, Member States must encourage all media service providers to ensure that their services are gradually made accessible to people with a visual or hearing disability.

The number of audiovisual media services accessible to people with visual or hearing disabilities has increased in the recent years. Almost all Member States have introduced statutory rules requiring service providers to adopt measures to facilitate the accessibility of audiovisual media services to visually and hearing impaired persons. However, differences exist between Member States with regard to the implementation of such obligation for linear and non-linear service providers.

As regards linear services (broadcasters), a further distinction needs to be made between public and private providers. The general tendency is to set higher standards of compliance for public broadcasters and lower or no requirements for private ones. Nevertheless, there are some Member States that apply the same rules to private and public broadcasters.

In general, Member States also tend to apply different obligations in consideration of the nature of the content, in particular if it is of public interest, informational or merely for entertainment. For instance, news, public debates and economic programmes are subject to higher accessibility obligations than other kind of content in both quantitative (quotas) and qualitative (means and techniques) terms.

With regard to the content of the accessibility obligation, most Member States that have established a specific regulation impose a quantitative obligation for media service providers, requiring them to ensure that a minimum percentage of content be made accessible to persons with visual or hearing disabilities.

As regards non-linear service providers, eight Member States adopted a specific regulation requiring on-demand audiovisual media service providers to ensure that certain programmes are gradually made accessible to persons with disability. Within this group, two Member States imposed quantitative obligations setting quotas for accessible content.

As far as monitoring is concerned, in general, national authorities are performing controls on a periodic or occasional basis, either *ex officio* or following complaints. Common is also the obligation for providers to submit compliance reports. A number of Member States reported that no specific measure was adopted for the verification of the compliance with the accessibility obligations.

The revised AVMSD strengthens the provisions on accessibility by obliging all media service providers to make their services continuously and progressively more accessible to persons with disabilities (under the new Article 7). The means to achieve the accessibility of audiovisual media services should include, but not be limited to, sign language, subtitling for the deaf and hard of hearing, spoken subtitles and audio description.¹³ Under the new rules,

¹³ Recital 23 of Directive 2018/1808.

Member States will have an obligation to report on these measures and to encourage the development of accessibility action plans.

It is important to note that Directive (EU) 2019/882 on the accessibility requirements for products and services was adopted in 2019. This directive complements the AVMSD by setting accessibility requirements for services providing access to audiovisual media services, such as websites, online applications, set-top box-based applications, downloadable applications, mobile device-based services, including mobile applications and related media players, connected television services as well as accessibility features of electronic programme guides (EPGs).

2.4. Protection of minors

Since the Commission's second AVMSD application report,¹⁴ the majority of Member States have not put in place additional legislative provisions to ensure protection of minors on linear and on-demand services under the relevant rules (Article 12 and 13 of the AVMSD), but continued applying and implementing the existing ones.

Most Member States continue to use techniques based on the time at which the content is transmitted¹⁵, accompanied by on-screen icons, content rating and special warnings for viewers. Some Member States also use parental control measures and other technical means.

Several Member States have nevertheless modified some criteria to protect minors from harmful content on linear services. In particular, they introduced watersheds criteria better tailored to the harmful nature of the content, with additional time limits and more granular age categories. Some Member States have also complemented these measures with visual symbols and a descriptive classification system for content. As regards non-linear services, some Member States have strengthened the protection of minors by extending the measures provided for linear services (notably content rating, age verification and parental control systems) also to on demand services.

In relation to new monitoring and enforcement initiatives to ensure compliance with the requirements on protection of minors, most Member States did not launch new general or sector-specific initiatives in the period examined. In the majority of Member States, monitoring is carried out on the basis of complaints or on the authorities' own initiative where there are reasons to suspect that a breach may be committed. Only a few Member States have conducted systematic monitoring, focusing on compliance of the requirements on protection of minors on linear services.

In the reference period, only few Member States have reported infringement cases in linear services, notably regarding pornographic material. One Member State reported difficulties in assessing what characteristics content must have to be considered pornographic. Some

¹⁴ Annex to the AVMSD Refit evaluation: <https://ec.europa.eu/digital-single-market/en/news/ex-post-refit-evaluation-audiovisual-media-services-directive-201013eu>

¹⁵ Also often referred to as "watershed-based limits".

Member States reported issues regarding seriously harmful content (violent pornographic content) on on-demand services.

One Member State reported difficulties encountered in enforcing parental control and age verification-related obligations with regard to on-demand audiovisual media service providers.

2.5. Events of major importance

Pursuant to Article 14 of the AVMSD, Member States may take measures to ensure that events they consider being of major importance for society are available to a substantial proportion of their public on free television.

In the period following the publication of the previous application report, the Commission approved the lists of such designated events for Hungary¹⁶ and Ireland.¹⁷

2.6. Promotion of European works

In the reference period, there has been an increase in the number of VOD services in the EU together with the appearance of the first pan-European and pan-regional offers (e.g. the expansion of Netflix in all Member States has taken place since early 2016).¹⁸ The 2019-2020 European Audiovisual Observatory (EAO) Yearbook¹⁹ confirms the continuing growth of on-demand services within the audiovisual market: while representing 5% of the market, subscription video-on-demand services (SVOD) accounted for more than 82% of the sector's growth in 2018, while in 2019 the number of subscribers to SVOD in Europe exceeded for the first time 100 million.

The flexible obligations applicable so far to on-demand services under Article 13(1) of the AVMSD resulted in a diverse implementation by Member States and in VOD service providers not contributing significantly to the objective of promoting European works yet. This has also implied an unfair competitive disadvantage for broadcasters who have been subject to stricter obligations as regards promotion of European works.²⁰

To remedy this situation, under the revised AVMSD, the provisions on the promotion of European works have been reinforced by imposing stricter obligations on VOD providers.

¹⁶ Commission Decision of 8 May 2017 on the compatibility with Union law of the measures taken by Hungary pursuant to Article 14 of the 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 (Audiovisual Media Services Directive) OJ C 214, 4.7.2017, p 3-5

¹⁷ Commission Decision of 8 May 2017 on the compatibility with Union law of the measures to be taken by Ireland pursuant to Article 14 of 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 (Audiovisual Media Services Directive) OJ C 8, 11.1.2018, p. 10–11

¹⁸ Yearbook 2015 Key Trends, European Audiovisual Observatory (Council of Europe), Strasbourg 2016

¹⁹ Yearbook 2019-2020 Key Trends, European Audiovisual Observatory (Council of Europe), Strasbourg 2020

²⁰ Yearbook 2015 Key Trends, European Audiovisual Observatory (Council of Europe), Strasbourg 2016.

Under the new rules, VOD providers must secure at least 30% of European works in their catalogues and give prominence to those works. The combination of share and prominence obligations for on-demand services is expected to have a positive impact on cultural diversity by leading their audiences to being more exposed to European works than they are today and by offering more opportunities for European creators to reach EU viewers.

The obligations for broadcasters to ensure a share of European works have, instead, remained unchanged. They are obliged to reserve for European works a majority proportion of their transmission time, where practicable and by appropriate means, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping.

In its 2019/2020 Yearbook, the EAO found that in 2019,²¹ for the analysed sample, European works accounted for 30% of content available on TVOD and 26% of content on SVOD, when counting TV titles or seasons, and 27% on TVOD and 20% on SVOD when TV episodes are considered.²² The first reporting by Member States to the Commission regarding the implementation of the revised AVMSD rules is required by 19 December 2021²³.

In 2014, in the context of a State aid procedure, Germany notified the Commission, of an amendment to its Film Promotion Act (Filmförderungsgesetz), which included the possibility to apply levies to on-demand service providers established in other Member States and targeting German audiences. On 1 September 2016, the Commission found that this amendment was compatible with the EU internal market within the meaning of State aid rules and with the AVMSD.²⁴

In its decision, the Commission noted that the Directive does not prohibit the application of such taxes on certain VOD providers established in another Member State. Exempting VOD providers, which specifically target the audience of one Member State, but are established in another Member State, from a contribution to the promotion of European works “would discriminate against providers established in the former Member State which are subjected to a tax, while they are competing on the same market”.²⁵

The Commission also referred to its proposal (at the time) to amend the Directive’s rules on the promotion of European works. Apple and Netflix introduced actions for annulment against

²¹ For film, data from 146 TVOD and 136 SVOD catalogues was collected in June 2019. For TV content, data from 118 SVOD and 53 TVOD catalogues was collected in October 2019.

²² 2019-2020 Yearbook-Key Trends, European Audiovisual Observatory (Council of Europe), Strasbourg 2020.

²³ Article 13(4) of the revised AVMSD

²⁴ Commission Decision of 1 September 2016 on the Aid Scheme SA.38418 - 2014/C (ex 2014/N) which Germany is planning to implement for the funding of film production and distribution, C(2016) 5551 final, JOCE L/314/2016.

²⁵ “The Commission considers the proposed wording of Article 13 of Directive 2010/13/EU as a clarification of what could already be possible under the Directive currently in force. This article, also when applied for the purpose of this Decision, could not be considered as attributing an exclusive competence to the Member State where the provider is established for the taxation of on-demand media service providers so as to contribute to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service. Indeed, its wording is not categorical and unreserved. Furthermore the taxation of on-demand audiovisual media services providers is only an example of measures which can be taken by the Member State which has jurisdiction.”

the Commission's decision, but the General Court found the actions inadmissible.²⁶ The revised AVMSD now provides that Member States may impose financial contribution obligations on cross-border media service providers targeting audiences in their territories, as long as they are proportionate and non-discriminatory and otherwise comply with Union law.

The implementation of the rules for the promotion of European works is subject to a separate reporting exercise, as required under Article 13 and 16 of the AVMSD. The reporting for the period 2011-2014 is issued in parallel to this report, while for the period 2015-2019 the Commission is currently in the process of awarding the contract for the independent study required to support its next reporting exercise with regard to on-demand services.

2.7. Commercial communications

In February 2016, the CJEU gave a preliminary ruling²⁷ on the requirement to distinguish television advertising and teleshopping from other parts of the programme by optical and/or acoustic and/or spatial means (Article 9(1) of the AVMSD) and the quantitative restrictions of such advertising (Article 23 of the AVMSD). The case concerned an instance where a broadcaster presented upcoming programmes on a split screen during the closing credits of another programme. In its ruling, the CJEU held that for television advertising and teleshopping to be readily recognisable and distinguishable from editorial content as required by the AVMSD, it might be sufficient for providers to use only one of the means referred to in the AVMSD (optical, acoustic or spatial).

In the same judgment, the CJEU found that sponsorship signs presented in programmes other than the sponsored programme should be regarded as advertising spots for which the maximum broadcasting time applies. Finally, the CJEU ruled that "black seconds" which are used to separate advertising spots from each other and from the upcoming programmes are also to be included in the maximum advertising time.

The judgment touches upon topics that have been causing issues in several Member States during the reporting period. In their reply to the questionnaire, four Member States reported issues concerning the maximum advertising time. Infringement procedures were launched at national level in this respect. Furthermore, some Member States identified issues related to requirements of the separation and recognisability of advertising.

Regarding specific types of advertising, several Member States reported violations of product placement rules (Article 11 of the AVMSD) and the prohibition of surreptitious audiovisual commercial communications (Article 9(1)(a) of the AVMSD).

A few Member States reported about complaints received by their national self-regulatory organisations regarding advertisements that are prejudicial to child audiences. This included,

²⁶ See Judgement of the General Court of 16 May 2018 in case T-818/16, *Netflix* and Order of the General Court of 27 July 2018 in case T-101/17, *Apple*.

²⁷ Judgment of 17 February 2016, *Sanoma Media Finland – Nelonen Media v. Viestintävirasto*, C-314/14

in particular, gambling advertising, a sponsorship announcement of a male potency product and advertising exploiting the credulity of minors and their trust towards their parents.

Two Member States flagged national debates regarding the status of so-called ‘advertisorials²⁸’ and overlays under the AVMSD. One Member State identified issues with regard to ‘Dynamic Ad Insertion’, which is a technology enabling advertisers to serve personalised video advertisement into linear and non-linear content.

None of the Member States reported issues with the prohibition of audiovisual communications for cigarettes and other tobacco products (Article 9(1)(d) of the AVMSD). However, two Member States reported difficulties in applying the prohibition of audiovisual commercial communication for medicinal products and medical treatment available only on prescription (Article 9(1)(f) of the AVMSD).

The rules regarding maximum advertising time on television broadcasting have been relaxed in the revised AVMSD. In particular, while the hourly limit for advertising will not be applicable anymore, the general advertising limit of 20% of broadcasting time will apply under the new rules from 6:00 to 18:00 (i.e. broadcasters can devote up to 20% of the viewing time in that period to advertising) and the same share is allowed during prime time (from 18:00 to midnight).

2.8. Co-/self-regulatory initiatives

Half of the Member States reported that no new co-regulatory or self-regulatory schemes have been put in place since the last application report.

Where Member States did report new initiatives, this was often attributed to the national self-regulatory organisations. For example, a Member State mentioned the creation of an ethical committee, which assesses compliance with a self-regulatory instrument on responsible commercial communications of food and drinks. In addition, some Member States highlighted that their self-regulatory organisations have adopted revised rules concerning advertising and social media directed at children and advertising of food products.

A few Member States mentioned activities taken by their national regulatory authorities that could facilitate self-regulation. These measures consisted of e.g. issuing information, contributing to relevant research, leading the creation of charters of voluntary commitments, monitoring the implementation of the relevant codes of conduct and adopting decisions regarding food advertising. One Member State highlighted a self-regulatory and industry-led measure involving their largest television broadcasters and aimed at prohibiting advertising of unhealthy food next to programmes for children aged up to 12 years.

²⁸ Advertisorial refers to cases where a programme provides information or journalistic review of a product, which may *de facto* be considered as a form of advertising.

In 2019, the Commission’s Joint Research Centre published a study²⁹ that could help and encourage media service providers to develop effective codes of conduct regarding inappropriate audiovisual commercial communications of unhealthy foods and beverages accompanying children’s programmes. The aim of the study is to evaluate the nutritional composition of the pre-packaged food offer in selected categories sold at scale in the EU. The study used the criteria of two nutrient profile models – that of the private sector EU Pledge and that of the World Health Organisation’s Regional Office for Europe – intended to restrict food marketing to children. The results showed that a large number of food products selling at scale in the EU do not meet the criteria of these two nutrient profile models (48% and 68%, respectively). Given the considerable market share of many such products, they are likely to be consumed widely and in some cases regularly, including by children, even without being marketed to them. The study concludes that nutrient profile models could serve as benchmarking tools for monitoring and evaluating efforts to reformulate food products.

2.9. European Regulators Group for Audiovisual Media Services (ERGA)

ERGA has been established³⁰ with the aim to advise the Commission on the implementation of the AVMSD, to facilitate cooperation between national media regulators and to allow for the exchange of experience and good practices.

In the reference period, ERGA produced several reports and recommendations³¹ on a variety of issues related to the audiovisual media framework. In two reports on jurisdiction, the group assessed the territorial³² and material³³ aspects of jurisdiction in the context of a converged media environment. The independence of national regulatory authorities³⁴ and the accessibility to audiovisual media services for persons with disabilities³⁵ were addressed by two reports referring to specific provisions in the AVMSD. ERGA also accompanied the revised AVMSD proposal with its own opinion,³⁶ analysing the amended provisions from the perspective of regulatory bodies. At a later stage, it adopted two consecutive reports on the implementation of the revised AVMSD.³⁷

²⁹ Storcksdieck Genannt Bonsmann, S., Robinson, M., Wollgast, J. and Louro Caldeira, S., The ineligibility of food products from across the EU for marketing to children according to two EU-level nutrient profile models, PLOS ONE, ISSN 1932-6203 (online), 14 (10), 2019, p. 1-17, JRC110668.

³⁰ Commission decision C(2014) 462 final.

³¹ https://erga-online.eu/?page_id=14.

³² ERGA report on territorial jurisdiction in a converged environment (2016), https://erga-online.eu/wp-content/uploads/2016/10/report_terr_2016.pdf

³³ ERGA report on material jurisdiction in a converged environment (2016), <https://erga-online.eu/wp-content/uploads/2020/06/ERGAreportonmaterialjurisdiction.pdf>

³⁴ ERGA Report on the independence of NRAs (2016), https://erga-online.eu/wp-content/uploads/2016/10/report_indep_nra_2015.pdf

³⁵ ERGA Special Task Report on the provision of greater accessibility to audiovisual media services for persons with disabilities (2016), https://erga-online.eu/wp-content/uploads/2016/10/report_accessibility_2016.pdf

³⁶ ERGA Opinion on AVMSD Proposals (2016), https://erga-online.eu/wp-content/uploads/2016/10/Opinion_avmsd_0916.pdf

³⁷ ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive (2018), <https://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf>

ERGA Subgroup 3 “Implementation of the revised AVMS Directive” – Final Report (2019), https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_SG3_Report-1.pdf

ERGA also produced a report on media plurality³⁸ and an overview document of principles for designing co-regulatory regimes for video-sharing platforms.³⁹ ERGA was particularly active in the area of the protection of minors, where it published reports with a specific focus on the converged environment⁴⁰ and on the tools, trends and practices⁴¹ of audiovisual media services in this field. In addition, workshops were organised with representatives of the national audiovisual media regulatory authorities, Commission's representatives and selected experts active in the field of protection of minors, on the measures in place, on the effectiveness of age verification⁴² and on tackling advertising of unhealthy foods to children.

ERGA was also specifically requested by the Commission to prepare a report on gender diversity in the audiovisual sector.⁴³ Furthermore, in the context of the EU initiatives to tackle disinformation, ERGA was tasked to help the Commission in assessing the implementation of the Code of Practice on Disinformation by the signatories.⁴⁴

Considering the importance of the independence of regulatory authorities for the implementation of the AVMSD specifically and their importance for democratic societies, the RADAR study was published in 2015 to give the latest overview on the independence and efficiency of the audiovisual media services regulatory authorities.⁴⁵ The results of the report were part of the input for the AVMSD revision process.

The revised AVMSD has codified and strengthened the role of ERGA by expressly regulating its composition and tasks, particularly those related to providing technical expertise to the Commission and opinions on some specific jurisdiction related issues. The revised Directive also introduced new provisions on the independence of national regulators. It provided, in particular, that national regulatory authorities have to be legally distinct from the government and functionally independent from the government and any other public or private body. Specific requirements have been laid down concerning, in particular, the impartiality of the national regulatory authorities, the transparent appointment and dismissal of the authorities'

³⁸ Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices (ERGA Report) (2018), <https://erga-online.eu/wp-content/uploads/2019/01/ERGA-2018-07-SG1-Report-on-internal-plurality-LQ.pdf>

³⁹ A Framework for Effective Co-regulation of Video Sharing Platforms (2018), https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2018-09-SG4-Framework-for-Effective-CR-of-VSPs-vz_3.pdf

⁴⁰ Report on the Protection of Minors in a Converged Environment (2016), https://erga-online.eu/wp-content/uploads/2016/10/report_minors_2015.pdf

⁴¹ Protection of Minors in the Audiovisual Media Services: Trends & Practices (ERGA report) (2017), <https://erga-online.eu/wp-content/uploads/2016/10/ERGA-PoM-Report-2017-wordpress.pdf>

⁴² ERGA Academy 2018 Workshop – Protecting Children in Audiovisual Media Services – The effectiveness of age verification and media literacy (Activity Report) (2018), https://erga-online.eu/wp-content/uploads/2019/05/ERGA-Academy-2018-Workshop-PoM-Effectiveness-of-age-verification-and-media-literacy_03-10-2018.pdf

⁴³ Study on Industry-led Good Practices related to Gender Diversity in the European Audiovisual Sector (2019), https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_SG4_Report.pdf

⁴⁴ Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation (ERGA Report) (2019), https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf

⁴⁵ RADAR Study – “Audiovisual Media Services - Regulatory Authorities’ Independence And Efficiency Review”. The study was based on the INDIREG study from 2011, which provided a list of key characteristics of an independent regulatory body based on the AVMSD and a detailed picture on the legal framework and its implementation in Member States, in candidate and potential candidate countries to the European Union and in the EFTA countries as well as four non-European countries.

heads or members of the collegiate bodies fulfilling that function, the adequacy of resources and effective appeal mechanisms.

3. MEDIA LITERACY

Since the last Report, only a few Member States have carried out a formal assessment of media literacy levels and have been capable to provide data in this regard.

The great majority of Member States, even if currently involved in projects and measures for the development of media literacy among their citizens, do not have specific tools for the assessment of media literacy levels in their territories. This confirms the difficulty in establishing objective and empirical criteria. Some Member States have put in place different actions and initiatives that were assessed independently. Other Member States used private surveys while developing more structured measurement methods that should be adopted in the next years.

Those Member States where an assessment is performed, generally adopt systems of measurement differentiated on subjective conditions (age, vulnerability etc.) and special attention seems to be given to children and adolescent population.

In general, it appears that only three Member States have assessed the level of media literacy for their entire population in a systematic way. Consequently, general data about levels of media literacy in the Member States is lacking. Even if different Member States referred to various studies, surveys and research carried out in their territories, only five Member States provided some data.

The unprecedented exposure of citizens to a large amount of disinformation, especially in times of major crises or elections, has emphasised the importance of a systematic approach to the development of media literacy skills for EU citizens. Media literacy has therefore been high on the political agenda of the EU for the past years.

The Commission recognised media literacy as a key skill to enable citizens to make informed decisions in the digital age, where disinformation has found fertile ground. In its Communication on “Tackling Online Disinformation: a European approach” the Commission put forward a number of actions related to the promotion of media literacy, including the launch of the European Media Literacy Week. The first edition of the European Media Literacy Week, organised by the Commission in March 2019, featured more than 320 events taking place around Europe⁴⁶.

In 2017, the EAO published a report entitled “Mapping of media literacy practices and actions in EU-28”⁴⁷ commissioned by the European Commission. The objective of this report was to provide a mapping of the most significant projects, of national or regional coverage, to promote media literacy in the EU-28 Member States, since January 2010.

⁴⁶ <https://ec.europa.eu/digital-single-market/en/news/european-media-literacy-week-2019>

⁴⁷ <https://rm.coe.int/media-literacy-mapping-report-en-final-pdf/1680783500>

Recognising the need for a strengthened media literacy policy, the revised AVMSD for the first time includes an obligation for Member States to promote and take measures for the development of media literacy skills. In addition, in view of the central role played by video-sharing platforms in giving access to audiovisual media content, it obliges video-sharing platforms to provide for effective media literacy measures and tools and raise users' awareness of these measures and tools.

4. CONCLUSION

The Report confirms that the Directive has generally been very effective in ensuring the free circulation of audiovisual media services across Member States. It has brought legal certainty by subjecting media service providers in the EU to harmonised rules, enabling providers to exploit economies of scale and facilitating the cross-border provision of television channels and VOD services.

The creation of ERGA in 2014 has been instrumental for the development of the European regulatory environment for the audiovisual and media sector. Through the exchange of experience and best practices, stocktaking of national initiatives and the analysis of various issues related to the AVMSD, ERGA assisted the Commission in its task to ensure a coherent implementation of the AVMSD across the EU.

The increased level of harmonisation brought by the AVMSD implementation has contributed to the effective fulfilment of EU media content standards and regulatory goals. However, some issues called for special attention during the reporting period, such as in particular the mechanisms for effective cooperation amongst regulators in cross-border cases, the classification of certain emerging OTT services within the Directive's scope, the effective promotion of European works on on-demand services and the protection of minors in the online environment.

With particular regard to cooperation in cross-border cases, a significant number of Member States reported that during the reporting period they have encountered difficulties in relation to incitement to hatred or protection of minors with regard to audiovisual service providers originating in other Member States. Some of these Member States, however, found that the outcome of the cooperation initiated in the context of such cases was not entirely satisfactory, either because the procedures were cumbersome and time consuming or because the authority of the country of origin did not grant their request.

As regards the promotion of European works, the reference period was characterised by a fast development of on-demand services, which put into question the approach in the Directive 2010/13/EC. As a result, the revised Directive has introduced stricter requirements for on-demand service providers. The new rules will foster cultural diversity and guarantee viewers' exposure to a wider selection of European works in on-demand catalogues.

With reference to the protection of minors, the tendency to extend to non-linear service providers the same obligations and technical measures required for linear services must be welcomed, so as to ensure that minors will not be exposed to harmful content on such services. The revised AVMSD now indeed sets forth the same rules for both linear and non-

linear services, and extends certain obligations in terms of minors' protection also to video-sharing platforms.

Most Member States have recognised the important role played by national self-regulatory organisations in developing new self-regulatory initiatives in the audiovisual sector. Particularly important developments have been reported in some Member States with regard to initiatives aimed at protecting children from unhealthy food and beverages and advertising on social media.

The amount of audiovisual media services accessible to people with visual or hearing disabilities has overall increased, even if differences continue to exist in the way Member States regulate their linear and non-linear providers, as well as public and private broadcasters. The strengthened Directive's provisions in this regard will certainly contribute to better accessibility of media services across the EU.

Finally, media literacy programmes have spread in all Member States addressing different issues. Their relevance has been growing in view of new ways of content distribution and consumption offered by the online environment. Despite progress, a clear and comprehensive assessment of the level of media literacy in all Member States is still not possible. The new media literacy provisions in the revised Directive will hopefully remedy the situation.