

European Commission
DG Communication Networks,
Content & Technology / Unit G1
Avenue de Beaulieu 25, 05/174
B-1049 Brussels

E-Mail: cnect-g1-avmsd-refit@ec.europa.eu

Vienna, 30th September 2015

ISPA CONTRIBUTION TO THE PUBLIC CONSULTATION ON DIRECTIVE 2010/13/EU ON AUDIOVISUAL MEDIA SERVICES (AVMSD) A MEDIA FRAMEWORK FOR THE 21ST CENTURY

Dear Sir/Madame,

ISPA (Internet Service Providers Austria; Identification Number: 56028372438-43) is pleased that the European Commission has issued this public consultation on Directive 2010/13/EU on audiovisual media services – a media framework for the 21st century.

ISPA believes that the traditional expectations for mass broadcast media do not reflect public expectations for Internet content. In ISPA's opinion the protection of minors is taken very seriously by providers. Moreover ISPA believes that providing an optimal level of consumer protection does not imply the extension of broadcast regulation to Internet content. ISPA emphasises that the protection of European heritage does not justify distribution practices fragmenting the availability of content throughout the EU.

1. The traditional expectations for mass broadcast media do not reflect public expectations for Internet content

Are you aware of issues (e.g. related to consumer protection or competitive disadvantage) due to the fact that certain audiovisual services are not regulated by the AVMSD?

In ISPA's opinion in order to attain the single market objectives the EU legislator should carefully consider the long term impact of extending the obligations of the AVMSD on intermediaries and platforms, because imposing "editorial control" would burden especially SME und start-ups. This measure would restrain the development of innovative services and would bring disadvantages to the European digital economy. The E-commerce- Directive and the AVMS Directive are complementary and regulate different layers, e.g. network infrastructure or the "physical layer" services such as social networks or video on demand (VOD) services – and "applications" layer on

the one hand and services such as the ARD, the BBC or France Televisions as the “content layer” on the other hand. Each layer plays a fundamentally different role, and this is reflected in different EU regulatory tools - such as the AVMS Directive (content layer) and the E-commerce Directive¹ (applications and “physical” layers).

By extending the scope of the AVMS Directive, the Commission would mainly burden SMEs, which are the engines of the European economy and new entrants to the market. This was the reason why the AVMSD by updating the regulatory framework for TV and ‘television-like’ services (e.g. Video on Demand services), explicitly excluded a broader range of services for example provided on the Internet, such as user generated content, electronic versions of newspapers and magazines, websites containing video in an ancillary manner etc.

Content providers such as the ARD, the BBC, Arte, Le Monde or RAI exercise editorial control over the content shown on their websites, on their apps or on VOD sites. Operating systems such as Android or iOS provide tools, upon which apps can be built to enable content providers to present their content. The E-commerce Directive and the AVMS Directive are thus complementary - in manners which were intended at the time they were first designed. Using one to interfere with the other would invariably lead to inconsistencies and unwanted consequences. Much like the AVMS Directive, the E-Commerce Directive is an umbrella covering rules for a wide array of social values: protecting intellectual property, regulating hate speech, defamation and a host of other forms of rights.

ISPA believes that online services and intermediaries create a more open and levelled playing field. Such online services and intermediaries enable creators and traditional creative industries to reach a global audience, on multiple devices, at no or little cost. New creators and entrepreneurs compete with traditional or legacy players, as they avail themselves of those opportunities. This also generates competition for instance between broadcasters and news publishers, between new creators and established creative industries. For example many broadcasters such as Arte or the BBC take advantage of these opportunities with an iOS App, and Android App, and a presence on Apple TV. Moreover the provision of intermediary services is incredibly competitive and offers a wealth of choice² for the consumers.

ISPA emphasises that online platforms and intermediaries are not “TV like” or traditional audio visual services. The content on Internet platforms is very diverse and serves different purposes. Intermediaries and online services drive social and expressive value as they allow citizens to communicate back - whether talking back to governments, corporations or cultural products. For example WordPress users produce about 36.3 million new posts and 63.1 million new comments each month, there are more than 77,000 active contributors to Wikipedia working on more than 22,000,000 articles in over 280 languages. Berlin-based SOUNDCLOUD, which allows users to upload, record, promote and share their originally created content, has 40 million registered users and 200 million listeners (2013).

¹ 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 ('Directive on electronic commerce'), OJ L 178/1, 17.07.2000.

² E.g. Netflix, iTunes, DailyMotion (France), Vimeo, ClipFish (RTL's subsidiary), MyVideo (ProSieben Sat's subsidiary started in Bucharest), Soundcloud (Berlin), Facebook, YouTube.

The AVMS Directive was originally introduced to update regulation that traditionally applied to the broadcasting industry to take into account new technological developments in that sector, in particular the appearance of Video-on-Demand services, and to apply a degree of harmonisation across the European market in broadcasting. Nonetheless, AVMSD represents a fundamental continuity with traditional broadcasting regulation, reflecting public expectations for broadcasting. It is a form of regulation quite alien to the online sector, and to both the public telecommunications and publishing sectors from which the online sector is synthesised. The measures that AVMSD provides - for example, to regulate the time, duration and subject matter of advertising, to provide for a right of reply, to provide for "watershed times" for content intended for mature audiences, and to reserve minimum period for European works, reflect the traditional expectations for mass broadcast media. They do not reflect public expectations for Internet content.

ISPA believes that the distinction drawn by the AVMSD between linear/VOD services, on one side, and non-linear services, on the other, is still valid and justified. Although few borderline cases may give rise to uncertainty, normally at implementation level, the two categories of services remain clearly different in terms of editorial responsibility, accessibility, audience, business model and remuneration. Such important and objective differences justify the different applicable frameworks. It would however be misleading to state that non-linear services (subject to the E-commerce Directive) are deregulated with respect to linear ones: there is a difference of regulation justified by the above objective reasons. Regulating platforms, online and sharing services, as audiovisual services, ignores their very nature, imposing "editorial control" - the cornerstone of AVMSD - is to change their nature. Because of that ISPA sees no reason to turn the Internet into TV.

Even when similar problems occur in both sectors this should not be a reason to justify an enlarged application of the AVMSD. The Internet environment successfully developed instruments, in line with the E-commerce-directive, able to tackle the potential problems, with no need to refer to the AVMSD. For instance, in the case of alcohol commercials, the most important social platforms have developed effective and strict self-regulatory policies. The same can be said with respect to hate speech and discrimination, racism campaigns, and minors protection.

Notwithstanding the above, ISPA considers useful to analyse whether the current AVMSD obligations laid down for linear/VOD services are still appropriate. While the market has evolved, such obligations reflect a traditional broadcasting market with little competition inside and without possibility to use digital networks to provide linear services (IPTV and VOD). Detailed regulation of maximum duration and frequency for advertising slots, for example, may have made sense as a consumer protection measure when there were relatively few choices in TV channels and market entry was limited because rights to broadcast were awarded by governments or regulators. In the current context of multiplication of channels and the emergence of linear online content, one should analyse whether such obligations are still effective and necessary.

2. Providing an optimal level of consumer protection does not imply the extension of broadcast regulation to Internet content

Are you aware of issues (e.g. related to consumer protection or competitive disadvantage) caused by the AVMSD's rules governing commercial communications?

Detailed regulation of maximum duration and frequency for advertising slots, for example, may have made sense as a consumer protection measure when there were relatively few choices in TV channels and market entry was limited because rights to broadcast were awarded by governments or regulators. In the Internet sector, however, there are no regulatory constraints on market entry and the actual economic cost of market entry is very much reduced. This removes the theoretical justification for apply such rules to this sector, because consumers have the opportunity to select their preferred service from a limitless range in an extremely competitive market. Detailed regulation of content, for example for origin, accuracy and balance may have made sense for a broadcast sector where there was a public expectation that you should be able to trust what's on TV.

However the Internet is primarily a 'communications' service, and the public expectation prioritises their right to participate fully and freely over regulation to ensure the quality of any particular publication. In this sense, the Internet sector follows the traditions of publishing. This expectation of freedom continues even as technology allows ordinary members of the public to engage in audio-visual content creation and distribution: uploading a video rant to YouTube is the modern equivalent of the street preachers and political pamphleteers of previous centuries.

As the online sector develops, it is enhancing the measures for consumer protection that it offers. Many of these enhancements are adopted as a matter of market pressure and corporate social responsibility; some are requirements of the general law, and others are regulatory provisions and cooperative co-regulation that have been designed for this sector (for example, the Telecommunications Framework package, the E-commerce Directive and the Safer Internet programme). It would be most unhelpful, and entirely inappropriate, to extend a line of regulation from a traditional sector - the broadcast world - into the complexities of online sector by extending broadcast regulation to Internet content.

It may be, as the online and broadcast sectors develop, and as the public start to consume Internet content on the living room TV, that the traditional expectations for regulation of broadcast content start to fall away. No doubt the broadcast industries, which compete for the time, attention and purchasing power of the consumer with the online industries, will wish to place on a level regulatory playing field. But such rebalancing cannot come from mindlessly extending their regulatory expectations to an entirely new sector, without either objective rationale or public support. Instead, ISPA believes that relaxation of the kinds of measures contained in AVMSD should be considered even for traditional broadcast content.

Consumers have greater control of what they watch in on-demand services, justifying a continued difference between on-demand services and non-linear services. The existing strong framework of consumer protection does not show any particular gaps or flaws that would require changing the rules. Europe has a strong level of consumer protection embedded in existing EU laws. These

horizontal laws provide for strong, principle-based protection, namely the Unfair Commercial Practices Directive³, the Consumer Rights Directive⁴, the Unfair Terms Directive⁵, the Misleading and Comparative Advertising Directive⁶ and the E-commerce Directive.

3. The protection of minors is taken very seriously by providers

In relation to the protection of minors, is the distinction between broadcasting and on-demand content provision still relevant, effective and fair?

ISPA believes that in relation to minors the regulatory graduation between linear and VOD services, as established by the AVMSD, is still correct and should be maintained and the distinction between broadcasting and on-demand content provision is still relevant, effective and fair.

The vast majority of content available on the user generated content platforms is created by private, individual users for sharing with other individual users. This is content, which falls outside the scope of the AVMS Directive, which is intended to cover traditional television broadcasting and the developing on-demand alternatives to traditional television broadcasting, such as what is commonly known as "video on demand" (where the provider of the service is also the provider of, or at least procures, professionally produced content accessed through that service).

Broadcasters have full control on what content is available to consumer on their channels, and the AVMSD captures this situation. Content which might seriously impair minors must not be included in any programme for linear services, and only be made available in such a way that ensures that minors will not normally hear or see such on-demand audiovisual media services, for non-linear services. Creators retain editorial control over their TV-like content on user-generated websites. They select what content to make available and organise it for inclusion in their feeds of channels. They also decide when to take that content down from the platforms.

User-content-generated websites are taking the protection of minors very seriously and enforce bans on any content that might seriously impair minors. For example online platforms developed Community Guidelines⁷ that describe the type of content that is and is not allowed on the site.

³ DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), ABI L 149/22.

⁴ DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011, on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, ABI L 304/64.

⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095 , 21/04/93 P. 0029 - 0034

⁶ Directive [2006/114/EC](#) of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ L 376 of 27.12.2006.

⁷ E.g. Amazon Community Guidelines, <http://www.amazon.com/gp/help/customer/display.html?nodeId=14279631>, (23.09.2015), Facebook Community Standards, <https://en-gb.facebook.com/communitystandards/>, (23.09.2015), Youtube Community Guidelines, <http://www.youtube.com/yt/policyandsafety/de/communityguidelines.html> (23.09.2015).

Community flagging is used to help identify and hide inappropriate content. It is also designed to hide objectionable comments. These tools also empower users to fulfil their responsibilities regarding the content they make available. A wide system of governance has developed on the Internet, backed by the E-commerce Directive, which is a strong and flexible legal framework. These approaches have proven successful to ensuring a stable, well-regulated market. The Austrian report centre against child pornography and National Socialism on the Internet - Stopline⁸ – which was established by the providers is an excellent example of the dedication of the Internet platforms to take actions against illegal content.

4. The protection of European heritage does not justify distribution practices fragmenting the availability of content throughout the EU

Have you come across or are you aware of issues caused by the AVMSD's rules related to the promotion of EU works?

While ISPA believes that the promotion of EU works is a commendable objective, we are concerned when such principle is used in an instrumental way to justify distribution practices fragmenting the availability of content throughout the EU. Such practices are very frequent in both broadcasting and Internet sector. Remarkably, they are enforced also with respect to non-EU content, thus making clear that this is a matter of commercial convenience rather than protection of European heritage.

ISPA would like to reiterate that it is very thankful for this opportunity to contribute. For further information or any questions please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Maximilian Schubert
General Secretary

About ISPA: ISPA is the Austrian association of Internet Service Providers, representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework to support optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.

⁸ Stopline, <https://www.stopline.at/en/ueberuns/>, (23.09.2015).