

Audiovisual Media Services Directive (AVMSD)

Recommendations for the upcoming Commission's evaluation

16 May 2024

Introduction

Following the revision of the Audiovisual Media Services Directive (AVMSD)¹ adopted in 2018, the European Commission is preparing by 19 December 2026 an *ex-post* evaluation of the Directive. This evaluation will be accompanied by potential recommendations for review and adjustments. The Computer & Communications Industry Association (CCIA Europe) closely followed the negotiations of the AVMSD, its impact on Video-on-Demand Services (VoDs) and Video-Sharing Platforms (VSPs) and the implementation of the Directive in EU Member States.

The VOD market in the EU is highly competitive, with new players entering and services launching in multiple EU countries. While VoD revenues and subscriptions are growing, the share of VoD in the overall EU audiovisual market remains small compared to traditional actors (18% in 2023). The market shift towards more on-demand business models in direct-to-consumer distribution is progressing, with many opportunities available for local and international providers, as attested by the growth of new advertising-financed VOD backed by linear services.²

In light of the above, CCIA Europe suggests the following recommendations to the European Commission when evaluating the AVMSD. The aim of these recommendations is to support the growth of the audiovisual market in Europe thanks to a robust digital single market. This will only be achieved if the differences between the digital environment and traditional actors are acknowledged and the distinct role of each actor in the content ecosystem remains balanced.

1. Preserve the key principles of the single market and remove unnecessary barriers
2. Provide more clarity on the implementation of prominence rules
3. Avoid counterproductive local financial contribution rules

¹ Directive (EU) 2018/1808 of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities, available [here](#).

² European Audiovisual Observatory, European VOD revenues increased 30-fold over the last ten years, 9 February 2021, available [here](#); Top players in the European AV industry Ownership and concentration 2023 Edition, April 2024, available [here](#); Statista, Video-on-Demand - Europe, consulted on 30 April, available [here](#).

I. Preserve the key principles of the single market and remove unnecessary barriers

1. Uphold the country-of-origin principle

The country-of-origin principle is, and should remain a cornerstone of the EU single market. Its application has facilitated substantial cross-border broadcasting (and content production) in the EU. This principle allows service providers to abide only by the legislation of their Member State of establishment when operating across the EU and remains a key principle of the AVMSD. Any proposals that would not uphold the country-of-origin principle would bring legal uncertainty and fragmentation, and directly contradict and undermine all legislation adopted by the EU institutions to support the EU digital single market, including the Digital Services Act.

2. Choose harmonisation over fragmented national rules

Since the adoption of the AVMSD, we have seen significant diverging implementations that put at risk the aims and ambitions of the EU digital single market. In particular, Article 7a on prominence obligations for the content of general interest, Article 13 on local financial contributions, and Article 28 a-b on obligations of VSPs have been interpreted very differently. While variations in the transposition of a directive in Member States are to be expected to some extent, certain transpositions appear to contradict AVMSD requirements and other EU legislation. Further harmonisation at the EU level would be welcomed to remove these discrepancies, which are hurting the cross-border provision of services and the ability of players to enter markets and compete.

Among the most worrying diverging implementations, the extension of the obligation of local financial contributions to VSPs in Flanders is symptomatic of the need to resolve the tension with the country-of-origin principle. This local financial contribution already lacks economic ground for VoDs. In the case of VSPs, it additionally contradicts all applicable EU law, including the freedom to provide services across borders.³ It also fails to give the rationale behind the extension of this obligation's scope, whether its purpose, legal ground, or the applicability of such measure to user-generated content services. These new barriers and seemingly unconnected obligations risk creating more impediments to the single market and making companies reconsider entering certain markets.

In France, a soon-to-be-adopted draft law bases itself on the VSP provisions of the AVMSD and the Digital Services Act (DSA)⁴ to impose provisions aimed at protecting minors. The protection of minors is currently being tackled at the European level (through the creation of an EU Task Force and the imminent issuance of Guidelines under Article 28 of the DSA). Adopting diverse national laws in this field before there is a European-wide standard would not only introduce barriers in the single market, but moreover result in varying levels of minors' protection across the EU.⁵ This can already be reflected in the differences with the

³ CCIA Europe, TRIS notification, Contribution on the Flemish Government Draft Decree as regards financial contributions to the production of audiovisual works, 30 May 2023, available [here](#).

⁴ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), available [here](#).

⁵ CCIA Europe, TRIS notification, French Law to Secure and Regulate the Digital Space, 16 January 2024, available [here](#).

German Interstate Treaty on the Protection of Minors (JMStV). Specific discussions about VSPs, which are now also subject to the DSA, would be needed to ensure AVMSD implementation in Member States does not become a loophole to avoid harmonised EU rules. A removal of VSPs from the AVMSD's scope could ultimately resolve discrepancies.

II. Provide more clarity on the implementation of prominence rules

3. Harmonise clear prominence rules

Article 7a of the AVMSD empowers Member States to “take measures to ensure the appropriate prominence of audiovisual media services of general interest”, with very broad conditions in Recital 25. This late unsubstantiated addition to the AVMSD raised concerns given the legal uncertainty regarding the country-of-origin principle, even more so in light of the various results of the implementation of this article in Member States.⁶

The answer to the prominence obligation cannot be simplistic. The full application of the country-of-origin principle would lead to absurd situations where a viewer in Lithuania would have to be presented with French audiovisual media services of general interest. The reverse situation would be technically burdensome and not in line with the goals of the EU digital single market, as it would mean that service providers would have to progressively develop 27 different versions of their offer to technically adapt to local rules, effectively constituting obstacles to the cross-border provision of services. This could create enormous costs for companies, in particular harming smaller markets.

The uncoupling of the prominence obligation from both the technical possibility for services to give prominence to certain content, and the decision of what is “content of general interest”, would help to reach greater harmonisation. This would build on other EU legislation that harmonises processes and leaves room to manoeuvre for Member States (e.g. the DSA does not harmonise the definition of illegal content, but lists obligations for online intermediaries to moderate them). Even more than illegal content, general interest means something very different from country to country. The guidelines on prominence obligations foreseen by Article 16 of the European Media Freedom Act (EMFA)⁷ could be a step in the right direction to harmonise the way the relevant AVMSD and EMFA obligations work in practice.

4. Allow for national decisions on content of general interest

Member States should be able to make decisions on what is considered content of general interest. These national decisions should be based on general criteria defined by the European Commission in collaboration with the European Board for Media Services (EBMS) to harmonise the procedure as much as possible. These criteria would ensure that national particularities are accounted for, while preserving the purpose of prominence

⁶ European Audiovisual Observatory, Prominence of European works and of services of general interest, Iris Special, 4 April 2023, available [here](#).

⁷ Regulation (EU) 2024/1083 of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), available [here](#).

obligations, following the guidance note of the Council of Europe.⁸ In particular, there is a need to limit the number of services of general interest, as an assumption that all national broadcasters qualify would defeat the entire purpose of prioritisation.

Furthermore, clarifications on the criteria to determine what constitutes content of general interest would also help better delineate the relationship between prominence obligations under the AVMSD and the right to customisation under Article 20 of the EMFA. This would address the gap identified between the Council of Europe's guidance, which includes the ability of users to opt out of prominence and EU law.⁹

III. Avoid counterproductive local financial contribution rules

5. Diminish the friction between investment obligations and the country-of-origin principle

Article 13(1) of the AVMSD sets an obligation for VoD services to have a 30% share of European works in their catalogues, as well as ensure their prominence. Article 13(2) of the AVMSD opens the possibility for an EU Member State to impose non-discriminatory and proportionate financial contribution obligations on providers established in another EU Member State and targeting audiences in its territory. Article 13(6) of the AVMSD safeguards services with low turnover or low audience from these obligations.

However, the current landscape of local financial contribution obligations poses significant challenges for pan-EU audiovisual media services due to fragmented EU regulations and implementation. These obligations go against the very essence of the country-of-origin principle, and their justification lacks clarity, as there is no market failure to necessitate intervention. As part of the AVMSD review, an economic study of Article 13(2) is essential to substantiate regulatory action and identify any market failures.

As long as Article 13 of the AVMSD continues to operate on a country-of-destination, some interventions would be welcome to reduce the friction with the country-of-origin principle. The fragmentation in the interpretations of Article 13 across EU Member States could also be reduced through harmonisation of certain elements, in particular:

- **Scope and Definition of European Works:** Standardising the definition of "European works" is crucial to ensure clarity and consistency across Member States, beyond the current guidelines.¹⁰ This could involve:
 - Implementing a mandatory obligation for content producers to label their works as "European" to reduce ambiguity;

⁸ Council of Europe, Guidance Note on the Prioritisation of Public Interest Content Online adopted by the Steering Committee for Media and Information Society (CDMSI) at its 20th plenary meeting, 1-3 December 2021, available [here](#).

⁹ Ledger Michèle, Towards Coherent Rules on the Prominence of Media Content on Online Platforms and Digital Devices, CERRE, 13 December 2023, available [here](#).

¹⁰ Communication from the Commission Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover 2020/C 223/03, available [here](#).

- Establishing a comprehensive definition of "European works" that includes UK works and takes into account how content is now made;
- Setting limits on the ability of national governments to unilaterally alter or limit the definition of "European works" to avoid distortions in the market.
- **Amounts of Contributions:** Establishing clear limits on the amount and duration of local financial contributions would provide certainty and predictability for pan-EU media service providers. This might entail:
 - Defining at EU level a maximum percentage of revenue that providers must contribute to local content investment to prevent excessive financial burdens.
 - Setting specific timeframes for investment settlement to ensure timely and efficient allocation of funds.
 - Implementing restrictions on national sub-quotas and gold-plating to prevent overregulation and encourage cross-border collaboration.
- **Consistent Regulatory Approach:** As recognised in the ERGA memorandum of understanding, harmonising data requirements and reporting practices among regulators is essential to streamline compliance efforts for pan-EU media service providers. This could be done through:
 - Standardising the types of data and information required to confirm compliance with local financial contribution obligations.
 - Implementing a one-stop shop approach, whereby media service providers submit an annual declaration to their home regulator, broken down per country.
 - Facilitating cooperation and information sharing among regulators to ensure consistent oversight and enforcement of compliance measures.
 - Encouraging collaboration between media service providers and content producers to collect and share necessary data, thereby reducing duplication of effort and improving data accuracy.
- **Method of Calculating Turnover:** Ensuring that financial contributions are proportionate and based only on revenues earned in targeted Member States is essential to prevent discriminatory practices and promote fair competition, in line with Article 13(3) of the AVMSD.
- **Scope of Local Financial Contribution Obligations:** Preventing the gold-plating of local financial contribution obligations to VSPs as it is not the original intent of the AVMSD.

6. Promote variety in contractual models for local direct investments

In implementing the AVMSD, Member States are considering directing contributions from audiovisual media services located outside their territory towards independently produced content to prevent theoretical industry concentration. However, using the concept of "independent production" to enforce specific contractual models and limit contractual freedom seems unprecedented.

Various contractual models are utilised by VoD services in dealings with producers, such as executive production, co-financing and co-production, fostering creativity and adaptability which are crucial for cinematographic and audiovisual creation across Europe. Imposing a singular contractual framework would restrict production possibilities, hindering smaller producers from handling ambitious projects and potentially reducing the diversity of works. It would also ultimately lead to in-market consolidation and concentration into the hands of

a select few large “independent producers” in given markets, leading to less choice and competition.

For instance, requiring delegated producers could limit opportunities for smaller entities, favouring larger, financially backed producers. Conversely, employing an executive production model could empower smaller, more creative production companies. Similarly, restricting rights' duration could diminish remuneration for producers and impede the global dissemination of creations, possibly leading to their production abroad. It would curtail many of the financing models currently used successfully in Europe.

The definition of independent producers should focus on financial and corporate law independence rather than intellectual property rights. Regarding mandatory rights reversion, VoD platforms advocate for flexibility in contractual negotiations tailored to producers' needs and project specifics. While open to different models, VoD platforms assert that assuming all production risks necessitates full rights ownership, thus rejecting mandatory rights reversion proposals that compromise this arrangement.

The direct investment model also anticipates that media service providers invest directly in productions, through commissioning or otherwise licensing individual titles. This doesn't take account of a variety of business models, including those in the transactional VOD markets, such as revenue shares. In the case of a revenue share model, the financial investment regime does not take account of the fact that media service providers may have no control over what titles will be rented/purchased by consumers, and therefore the proportion of its turnover which will be “invested” in local content, via revenue share.

Conclusion

In light of the forthcoming *ex-post* evaluation of the Audiovisual Media Services Directive (AVMSD) by the European Commission, it is imperative to recognise the evolving landscape of the audiovisual market in the EU and the role of digital players within it. The AVMSD revision in 2018 marked a significant step towards regulating Video-on-Demand Services (VoDs) and Video-Sharing Platforms (VSPs) in the EU, reflecting the growing importance of digital distribution channels in the audiovisual sector.

CCIA Europe recommends several key considerations for the evaluation of the AVMSD to ensure the continued growth and vitality of the European audiovisual market within the digital single market framework. Preserving the key principles of the single market remains crucial to fostering competition, innovation, and consumer choice. Pushing back against over-regulation can help to remove many barriers that were unintentionally created with divergent AVMSD implementation approaches. Avoiding the gold-plating of AVMSD provisions, in particular towards VSPs, is a priority. Additionally, efforts should be made to ensure that prominence rules effectively promote diverse content offerings without unduly creating separate markets in each Member State. Avoiding counterproductive local financial contribution rules that could hinder cross-border collaboration and investment in European audiovisual content is crucial moving forward.

In doing so, it will remain important to understand the different types of services, their roles in the market, and the need to have different rules for different business models, rather than extending one set of rules to services that are significantly different.

About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

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