



TECHNOLOGY

Revised Audiovisual Media Services Directive – what does it mean for the audiovisual media industry?

by Aileen Burke, Peter Bolger

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The new Audiovisual Media Services Directive (AVMSD) was adopted by the Council of Europe on 6 November 2018, and comes into force 20 days after its publication in the Official Journal of the EU. Member States will then have 21 months to transpose the AVMSD into national legislation.

The new AVMSD introduces a number of key changes to the original 2010 version of the AVMSD which is currently in force. Since 2010, the audiovisual media landscape has changed significantly and the new AVMSD seeks to take account of this. The changes introduced by AVMSD will have a significant impact on the audiovisual media industries. In this article, we discuss some of these key changes, and their potential effect on the industry in Ireland.

VIDEO SHARING PLATFORMS

The new AVMSD now regulates 'video-sharing platform services' (VSPS) for the first time. A VSPS is a platform or part of a platform whose principal purpose is providing programmes, user-generated videos or both to the general public, for which the platform does not have editorial responsibility, in order to 'inform, entertain or educate, by means of electronic communications network.' This includes not just YouTube but also other types of media platforms such as online newspapers which post video content to their sites.

Under the new AVMSD, VSPS are subject to a number of different restrictions and obligations, including relating to sponsorship and product placements. In addition, Member States are required to ensure that VSPS under their jurisdiction take 'appropriate measures' to protect minors from harmful content, and to protect the general public from content containing incitement to violence or hatred, as well as content involving public provocation to commit a terrorist offence. This is a significant development towards the regulation of VSPS, platforms which have thus far fallen outside of the remit of the AVMSD.

COUNTRY OF ORIGIN

The AVMSD retains the 'country of origin' principle which, briefly, provides that once a TV or on-demand service provider has obtained a broadcasting licence from one Member State, and complies with the regulatory rules of that Member State, it can broadcast its service into all other Member States across the EU without having to meet any further regulatory hurdles. The new AVMSD introduces some changes to the criteria by which a service can establish itself in a Member State.

As before, under Article 2(3)(a), a provider has a head office and makes editorial decisions in a Member State, it will be established in that Member State. 'Editorial decisions' is now defined in the new AVMSD, and means a decision which is taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of the audiovisual media service.

Article 2(3)(b) now provides that if a provider has a head office in one Member State and editorial decisions are taken in another Member State, it is established in the place in which a significant part of its workforce involved in "programme related activities" [previously "the activities of the audiovisual media service"]. If a significant part of the workforce involved in the pursuit of programme-related activities in each of those Member States then it is established in the Member State in which it has its head office. If a significant part of its workforce involved in the pursuit of programme-related activities operates in neither Member State then it is established in the Member State in which it first began its activity in accordance with the laws of that Member State, once it maintains a stable and effective link with the economy of that Member State.

The criteria for establishment under Article 2(3)(c) remains unchanged; a broadcaster can establish itself in a Member State and, consequently, avail of the country of origin principle, if (a) its head office is in a Member State and (b) decisions on the audiovisual media service are taken in a non-Member State or vice versa, then the provider will be established in the Member State once a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State.

The inclusion of a reference to programme-related activities in Article 2(3)(b) but not 2(3)(c) is noteworthy, and may mean that broadcasters can establish themselves in another Member State under Article 2(3)(c) (the criteria under which most UK-based services would be likely to seek to establish themselves in a Member State after Brexit) by having a significant part of its workforce involved in any type of activity (as opposed to programme-related activities only) located in that Member State. Whether or not this will mean that in practice, a larger proportion of the overall workforce would need to be located in the Member State remains to be seen.

Member States are also now required to establish and maintain a list of media service providers established under their jurisdiction and to indicate under which criteria they are established under the AVMSD; these lists will then be made available by the Commission in a centralised database. The Commission is also given the power to adjudicate in instances where Member States do not agree on which Member State has jurisdiction.

DEROGATIONS FROM COUNTRY OF ORIGIN PRINCIPLE

The derogations from the country of origin principle under the AVMSD are more streamlined and now extend to all media services, not just television broadcasters, where a service manifestly, seriously and gravely infringes the prohibition on content involving incitement to violence or hatred, or public provocation to commit a terrorist offence or which prejudices or presents a serious or grave risk of prejudice to public health or public security. These derogations are subject to certain conditions, which now include a requirement that the Member State has respected the right of defence of the service provider and given it an opportunity to express its views on the alleged infringement.

CO-REGULATION AND SELF-REGULATION

The new AVMSD requires Member States to encourage the use of co-regulation and fostering of self-regulation through national codes of conduct, as well as through Union codes of conduct, which may be drawn up by media service providers, video sharing platform providers or organisations representing them. The AVMSD recognises that Member States are free to require media service providers under their jurisdiction to comply with more detailed or stricter rules.

CONTENT FUNDING LEVY

The revised AVMSD paves the way for imposing a long sought-after levy on overseas broadcasters that target Irish audiences. Currently, channels such as Sky and Channel 4 stream services here known as opt-outs, with ads targeting Irish audiences. These generate significant revenues here.

The revised AVMSD provides that where Member States require media service providers under their

jurisdiction to contribute financially to the production of European Works, including via direct investment in content and contribution to national funds (such as by way of levies, for example), the Member State may also require media service providers targeting audiences in their territories, but established in another Member State, to also make financial contributions, which shall be proportionate and non-discriminatory.

The amount of the financial contribution which can be charged must be based only on the revenues earned by the service in the targeted Member States. If the Member State where the provider is established imposes such a financial contribution, it shall take into account any financial contributions imposed by targeted Member States. There is an exception under the AVMSD for services with a low turnover or low audience, and Member States may also waive these requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services.

The provisions are a significant departure from the country of origin principle. Importantly, Member States have the right, but not the obligation, to require financial contributions from overseas media service providers; as such, it will be up to the Government whether or not to impose these levies of media service providers. Significantly, the provisions do not apply to non-EU service providers, nor do they apply to video platform providers.

EUROPEAN WORKS

The existing AVMSD which applies to TV broadcast, on-demand and now video sharing platforms requires that broadcasters reserve over 50% of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, to European works.

Under the new AVMSD, on-demand services are required to secure at least a 30 % share of European works in their catalogues and ensure prominence of those works. This could represent a significant opportunity for Irish producers, as Irish productions, as well as certain Irish co-productions, would satisfy the 'European Works' quotas under the AVMSD. The AVMSD provides for the Commission to issue guidance in relation to the calculation of the share of European works.

The AVMSD allows for Member States to define 'European Works' in more detail when transposing the AVMSD to national legislation.

CONCLUSION

Overall, the AVMSD imposes many significant additional obligations on audiovisual media services, and clarifies certain areas which were previously somewhat unclear. The Government will have just under two years to transpose the AVMSD into Irish law, with new legislation expected to be in place by no later than September 2020.

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