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Subject: Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of **audiovisual media services** in view of changing market realities
- Progress report

I. INTRODUCTION

1. Background

On 20 May 2016, the Commission adopted a proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities¹.

¹ doc. 9479/16 + ADD 1-4

The current Audiovisual Media Services (AVMS) directive was adopted in 2007 and codified in 2010. It is based on the country of origin principle which allows for a free circulation of audiovisual media services within the EU. At the same time, it pursues a number of general public interests such as cultural diversity, protection of minors, consumer protection and media freedom. Both linear (TV) and on-demand services are regulated by the directive, albeit to a different degree.

2. Commission proposal and impact assessment

On 8 and 20 June 2016, the Commission presented to the Audiovisual Working Party the amending proposal together with the impact assessment².

The aim of the Commission proposal is to update and modernise the current audiovisual regulatory framework as set out in the 2010 AVMS directive to make it better fit to the digital age, which is characterised by rapid technological developments, emergence of new business models and changing viewing and consumption patterns. In short, the Commission proposal³ seeks to:

- ensure protection of minors and consumer protection also on video-sharing platforms services,
- simplify the rules governing the country of origin principle,
- increase competitiveness of TV services by further aligning rules for linear and on-demand services,
- address the media convergence by updating the rules for audiovisual commercial communications,
- ensure a proper implementation of the directive by reinforcing the independence of national regulatory authorities and by formalising the existing European body of national regulators.

² doc. 9479/16 ADD 1

³ For more details on the content of the Commission proposal, see the outcome of proceedings from the meetings of the Audiovisual Working Party in doc. 10745/16

When examining the impact assessment, the Audiovisual Working Party took into account the indicative checklist provided for in the guidance for handling the impact assessment in the Council⁴. Delegations did not raise any major issues in relation to the Commission's impact assessment. On the other hand, there were a number of issues that delegations felt were not (fully) addressed by the impact assessment. They are mentioned in doc. 10745/16, section III.

3. Other institutions/bodies

The leading European Parliament's committee on this file is Committee on Culture and Education. On 9 June 2016, the Committee appointed as co-rapporteurs Sabine Verheyen (DE-EPP) and Petra Kammerevert (DE-S&D). The vote in the committee is foreseen to take place at the end of January 2017.

The European Economic and Social Committee issued an opinion on 19 October 2016.

II. STATE OF PLAY IN THE COUNCIL

During the Slovak Presidency, the Audiovisual Working Party examined the Commission's proposal at a number of meetings held between July and October 2016.

On 4 and 15 July, delegations expressed their general comments to the Commission proposal, followed by the chapter-by-chapter examination⁵.

At the meetings on 1, 12 and 26 September as well as on 3 and 28 October 2016, the Audiovisual Working Party proceeded with a detailed examination of the Commission text, analysing each amended provision separately⁶.

A number of delegations maintain general and specific scrutiny reservations on the Commission proposal.

⁴ doc. 9790/16 + COR 1

⁵ Detailed account of the discussions held during these meetings can be found in doc. 11361/16.

⁶ The detailed comments of delegations can be found in doc. 13934/16.

III. DELEGATIONS' MAIN REACTIONS

Delegations' reactions can be grouped around the following main issues:

1. Extension of the scope

a) Video-sharing platform services - Article 1(1)(aa), Article 28a

In order to respond to the rise of harmful content and hate speech on the internet, the Commission proposes to extend the scope of the AVMS directive to include video-sharing platform (VSP) services. It does so by creating a separate category of services with a separate set of rules. VSPs to be included are the ones whose principal purpose is to provide programmes and user-generated videos, that store a large amount of such content, and have no editorial responsibility for the stored content but at the same time they determine its organisation. For this reason, the Commission is proposing an obligation for Member States to ensure that VSPs take certain appropriate measures to protect minors from harmful content and all citizens from incitement to violence or hatred.

The reaction of Member States was mixed. Firstly because they lacked clarity on which services are exactly covered by the **definition** of VSP services (Article 1). In this regard, some Member States found some parts of the definition of the VSPs, e.g. the principal purpose and dissociable section⁷, too restrictive as it might not allow to cover video content on social media services. The Commission confirmed that social media services as known today, i.e. not addressed to the public and whose principal purpose is not to provide audiovisual content, are not covered unless they provide a service that complies with the definition of a video-sharing platform service⁸. Secondly, there was a concern about the compatibility of obligations imposed on VSP providers in the AVMS directive (new Article 28a) and the limitations of liability for these providers in the e-commerce directive⁹. The Commission ensured delegations about the full compatibility of both instruments since the proposal for amending the AVMS directive does not establish any ex-ante control of content, but only regulates the way it is organised and for a specific purpose of protecting minors from harmful content and all citizens from hate speech.

⁷ See point b) below for „dissociable section“.

⁸ See also recital 3 of the Commission proposal.

⁹ Directive 2000/31/EC (Directive on electronic commerce).

Regarding the **measures** that Member States can impose on VSPs (Article 28a), some delegations found them too prescriptive. They proposed instead to achieve the objectives of protecting minors and citizens through media literacy. Certain other delegations suggested to complement the list with measures that would prevent the uploading of content previously removed and ensure a quick processing of reports of harmful content. The Commission underlined that Member States can choose from the list those measures that they consider appropriate in given circumstances. However, they cannot adopt stricter measures unless they are compatible with the e-Commerce Directive, since the Commission is proposing maximum harmonisation for these specific services. This was opposed by some delegations. In addition, some other delegations questioned the usefulness of co-regulation for the implementation of these measures if Member States cannot go beyond of what is proposed. The Commission clarified that co-regulation is not mandatory and can be useful to specify in more detail the content of the measures.

b) Dissociable section of service and short videos (Article 1(1))

In the light of the judgement of the European Court of Justice (Case C-347/14), the Commission is proposing to:

- extend the definition of a service also to a (audiovisual) section which in content and form is **dissociable** from the non-audiovisual main activity¹⁰ (Article 1(1)(a)(i) and Article 1(1)(aa)(iii)). Some delegations perceived this definition as restrictive since it might exclude videos posted on social media from the scope of the AVMS directive. Several delegations also asked for a more precise clarification of what a "dissociable section" actually means,
- include "**videos of short duration**" in the definition of a programme (Article 1(1)(b)). Given the lack of clarity of what is a short duration, certain delegations proposed to delete the reference to the duration, while several other delegations asked for further guidance on how to interpret this term.

¹⁰ E.g. a stand-alone video section of an on-line newspaper.

2. Levelling of the playing field between linear and on-demand services

Commission proposal aims at creating a more level playing field between linear and on-demand services and at the same time ensuring a consistent level of protection across these services. This is notably the case of the promotion of European works, consumer protection, protection of minors and protection against hate speech (where the rules are extended also to VSPs), and the derogation procedure from the country of origin principle. However, several delegations were not satisfied with the Commission approach that maintains graduated regulation for linear and on-demand services, and instead wished for the rules to be aligned further. In addition, several delegations wanted a more level-playing field to be also ensured in relation to VSPs in certain areas such as commercial communications.

a) Promotion of European works (Article 13)

The Commission proposes to strengthen the obligations of on-demand audiovisual media service providers in relation to the promotion of European works in two ways:

- i. Member States must ensure that on-demand service providers in their jurisdiction secure a minimum 20% quota of European works in their catalogue and ensure prominence (visibility) of these works. Regarding **quotas**, the views of Member States differed substantially: one group was against the introduction of an obligatory 20 % share while another group was in favour, with some delegations proposing even a higher share. Certain Member States wanted to be able to impose quotas also on providers outside of their jurisdiction. Regarding **prominence**, certain delegations asked for clarification of what is meant by this term and how to implement it,

- ii. Member State can require a **financial contribution** (levy) from on-demand audiovisual media service providers established in its territory, but also in another Member State if they are targeting their audiences¹¹. One group of Member States was against this proposal on the grounds that it undermines the country of origin principle, while another group of Member States saw it favourably. Furthermore, many delegations would like to extend this possibility to linear service providers. The Commission does not interpret this provision as an exemption from the country of origin, but rather as a clarification that financial contributions are similar to taxes and should therefore be left to Member States to determine, provided that they are compatible with EU law, in particular State aid rules¹².

b) Commercial communications (Articles 9, 10, 11, 20, 23)

The Commission proposes increased flexibility for the quantitative rules on TV advertising and more flexible rules on sponsorship and product placement that would apply to linear and on-demand services. The aim is to strengthen broadcasters' capacity to invest in the production of original content and thus make them more competitive in the light of advertising revenues migrating to the on-line environment.

- i. Delegations had very different views on the Commission proposal to change the quantitative rules (i.e. limit and frequency) concerning **television advertising**. Commission proposal to reduce the **frequency** of advertising breaks from 30 to 20 minutes was favourably welcome by one group of delegations, while opposed by another group (Article 20(2)). Regarding the proposal to change the calculation of a 20% advertising **limit** from an hour to a day (between 7:00 and 23:00), one group of delegations supported this change, while another group was against, pointing at the negative effect on viewer in particular during prime time and having doubts about the mid- and long-term positive effect on the revenues of broadcasters (Article 23).

¹¹ Recital 23 of the Commission proposal specifies what indicators Member States can use to determine whether an on-demand service targets their territory.

¹² This follows from the Commission decision of 1.9.2016 on the state aid scheme (C(2016) 5551 final).

In addition, some Member States pointed to the fact that the relaxation of TV advertising rules should be seen in connection with the softening of the rules regarding product placement and sponsorship, with sponsorship messages not being calculated in the advertising limit, which in total might result in a significant increase of the amount of commercial communications that viewers will be exposed to.

In response to these concerns, Commission underlined that given a wide range of media services available, some of them without any advertising at all, and strong competition on the audiovisual market, the market will auto-regulate the amount of advertising on the TV services.

- ii. Regarding provisions on **sponsorship** (Article 10) and **product placement** (Article 11) many delegations were against the Commission proposal to allow "special promotional references" in sponsorship messages and product placement and "undue prominence" in product placement. These delegations argued that the proposed changes firstly blur the boundaries between these types of commercial communications and TV advertising, and secondly that they could have a negative impact on the responsibility and editorial independence of the media service provider. Certain delegations were against the change of the approach to product placement from forbidding it to making it admissible.

The Commission justified its flexible approach to sponsorship and product placement by the need to respond to today's reality and encourage the take-up of these forms of commercial communications in order to deliver their full potential.

iii. Many delegations wanted the **qualitative** standards¹³ (Article 9) to be extended to cover also VSPs. Some delegations wanted to see a more level playing field between linear and on-demand services on alcohol advertising. In this regard, they proposed to extend the currently stand-alone, more stringent rules for TV (Article 22) also to on-demand services. The Commission underlined that its proposal strengthens protection of minors from inappropriate commercial communications for alcohol and HFSS¹⁴ food and beverages by encouraging the development of national codes of conducts as well as, if appropriate, of EU codes of conduct.

c) Protection of minors (Article 12)

Delegations in principle welcomed Commission proposal to fully align the rules aimed at protecting minors in linear and on-demand services, but some delegations wanted to extend those rules also to video-sharing platforms. In addition, many delegations suggested it was important to underline the role of media literacy in protecting minors.

3. Improving the functioning of the country of origin principle and jurisdiction

The country of origin principle is the cornerstone of the AVMS directive as a media service provider is subject only to one set of rules, which are the rules of the Member State where it is established. Consequently, the provider can provide services freely within the EU as other Member States must ensure freedom of reception and may not restrict retransmission of services on their territory except in specific situations. Commission proposes to maintain the country of origin principle, while applying it also to video-sharing platforms (albeit with specific jurisdiction setting mechanism), and reinforce it mainly by making it easier to determine the Member State of jurisdiction and improving cooperation mechanisms. Member States in general supported the country of origin principle, although some Member States were rather reserved.

¹³ Qualitative rules are e.g. that commercial communications must be recognisable, may not use subliminal techniques, have to respect human dignity, may not feature cigarette and medicinal products and protect minors regarding alcohol and HFSS food.

¹⁴ High in fat, salt and sugar.

a) Stricter measures and circumvention procedure (Article 4)

Several delegations pointed at the shortcomings of the country of origin principle in particular when a Member State has decided to apply **stricter measures** than the ones set out in the directive - which is based on minimum harmonisation – and if a media service provider decides to establish itself in another Member State which has a lighter regulation, but targets its programming at the first Member State. In this regard, several Member States pointed to the difficulty to make such providers respect stricter rules that they have for instance in the area of protection of minors or commercial communications. As a potential solution, some of these delegations suggested to follow the "deviation" from the country of origin principle that the Commission proposes for the promotion of European works (see point 2(a) above).

The directive provides for a procedure that allows a Member State to act in situations when a broadcaster establishes itself in another Member State only to avoid the stricter rules of the first Member State. However, some delegations underlined that the procedure in question, **circumvention procedure**, is not currently effective due to its complexity, and that the Commission proposal does not make its application easier. The Commission stated that the circumvention procedure restricts freedom of establishment which justifies strict and restrictive application of this procedure. At the same time the Commission admitted that the procedure has so far not been used. Since the circumvention procedure can only be applied to TV broadcasting, some delegations asked for it to be extended to on-demand services.

b) Derogation procedure (Article 3)

Delegations in general supported the simplification of the procedure that allows Member States to temporarily derogate from freedom of reception or restrict retransmission of audiovisual media services in certain specific circumstances. They welcomed in particular the creation of a single derogation procedure for both linear and on-demand services, new grounds for derogation and a possibility to use an emergency procedure regardless the type of service.

Certain delegations, however, pointed to the difference between the conditions that must be fulfilled for linear and on-demand services. In the case of TV broadcasting, and unlike for on-demand services, infringement must be repeated (reiterative). The Commission explained that the reason for keeping this difference is the fact that it is more difficult in on-line environment to establish when an infringement has occurred.

Some delegations were not in favour of extending the deadlines for Commission's decision. The Commission justified longer time limits by the need to accommodate the complexity linked to the decisions limiting freedom of providing services within internal Commission mandatory deadlines.

c) Jurisdiction criteria (Article 2(3))

Several delegations found that the proposed change to determining which Member State has a jurisdiction over a media service provider was only cosmetic. Some of them felt that alternative criteria should have been explored to address issues such as targeting broadcasting.

Several delegations were against the proposed change of criterion linked to the workforce from "significant" to "majority". They either found such criterion lacking stability since staff levels tend to fluctuate, or they wanted more clarification as to what type of employees would be counted in the majority of workforce. The Commission explained that its intention was to simplify this rather complex criterion and was open to discuss it further with Member States.

d) Common lists of services (Article 2(5a) and Article 28b(2))

In order to ensure transparency and thus facilitate the implementation of the AVMS directive, the Commission proposes the establishment of common lists (database) of the audiovisual media services (TV and on-demand) and video-sharing platform services. The list would indicate a Member State of jurisdiction for each service together with the criteria on which the jurisdiction was decided. Delegations in general welcomed such a list, but several of them were concerned with the administrative burden and financial costs that putting such a list together and keeping it up-to-date could have.

e) Jurisdiction for video-sharing platforms (Article 28(b)(1))

The Commission proposes to apply country of origin rule also to VSPs. Since some of these platforms are established outside the EU, but nevertheless in most cases have a point of attachment (i.e. subsidiary or a parent company) with the EU, the Commission proposed to take such a point of attachment as a factual establishment for the purpose of the AVMS directive. Some delegations queried the application of the country of origin in the case of platforms, some others underlined a possible "forum shopping" that the proposed approach might create. Certain delegations proposed to cover also services provided by video-sharing platforms established outside the EU. There was in general a demand for more clarification of how the assignment of jurisdiction would work in practice. The Commission explained that it choose to apply country of origin principle to VSPs in order to ensure that the VSP provider is covered by the rules of one Member State of the EU and at the same time avoid double jurisdiction.

4. Supervisory and monitoring mechanisms

a) Co- and self-regulation and EU codes of conduct (mainly Article 4(7))

While a possibility to use **co- and self-regulation** was already provided in the 2010 AVMS directive, the Commission encourages a wider use of this type of regulation in different areas covered by the directive, in particular with regard to the content descriptors for harmful content (Article 6a), protection of minors and fight against hate speech on video-sharing platforms (Article 28a), and commercial communications to reduce minors' exposure to the advertising of HFSS food and beverages and of alcohol (Article 9(2) and (3)). This type of regulation is exercised through code of conducts that are agreed voluntarily by the industry, NGOs and other stakeholders, and in the framework set up by national legislator in the case of co-regulation.

Many questions were raised in connection with these measures since national practices regarding the implementation of the AVMS directive differ across Member States. Many Member States found the wording unclear as to whether the use of co-/self-regulation is obligatory or not. The Commission confirmed that this type of regulation is not obligatory and should be seen as complementary to legislative measures. The question has also been raised how a Member State can make codes of conduct agreed at a national level respected by media service providers established in other Member States, but targeting its territory. In addition, several delegations proposed to merge all the provisions dealing with co-/self-regulation in one article to avoid repetition and provide more clarity.

EU codes of conduct are a self-regulatory instrument already used at EU level but now introduced in the AVMS directive. There were many delegations asking for more detail about how such EU codes will be prepared and how they will operate, and how the compliance with these codes will be ensured and enforced. Also in the light of these uncertainties, delegations in general were rather reserved to the idea of EU codes and in some cases also against it. The Commission explained that EU codes are self-regulatory and therefore, unlike national legislative or co-regulatory measures, not mandatory. They should be therefore rather seen as an exceptional measure and in any case complementary to the national codes.

b) Independence of national regulators (Article 30)

Member States in general welcomed the idea of reinforcing of the independence of national regulators. However, many delegations found the requirements to be too detailed and would instead prefer only basic principles to be set out in the text. The Commission defended its proposal by explaining that independent regulators are necessary to ensure a proper implementation of the directive and that, in order to guarantee that all the regulators in the EU are independent, it is necessary to set the detailed requirements of independence.

c) ERGA (mainly Article 30a)

The Commission is proposing to formalise the European group of national regulators for audiovisual media services (ERGA) which is currently functioning as a Commission expert group¹⁵. Since the AVMS directive is based on minimum harmonisation (with the exception of the proposed regulation of VSPs) and given the increased focus on co-/self-regulation, the Commission is seeking a higher degree of harmonisation in the implementation of the directive across the EU.

Several Member States supported the Commission proposal, but many Member States had a rather reserved position towards ERGA and some were against it. They were mainly concerned with the fact that ERGA's tasks and competences overlap with the ones of the Contact Committee (Article 29), which gathers the representatives of Member States and assists the Commission in implementation of the directive. In this regard, many delegations asked for a clear distinction to be made between the Contact Committee and ERGA, with ERGA's role to be limited to providing technical advice and platform for exchanging best practices. Several delegations pointed out that there are excessive references to ERGA throughout the text and proposed to reduce and/or rebalance them in favour of the Contact Committee.

5. Other issues

As a general issue, delegations asked for clarification of many terms and concepts used in the Commission proposal such as, in particular: "large amount" of content stored on VSP (Article 1(aa) (i)), "editorial decisions" (Article 2(3)(b)), "public security" (Article 3(2)(b)), "rights of defence" (e.g. Article 3(3)(e)), "low turnover" and "low audience" providers (Article 13(5)), "parent company" and "subsidiary" (Article 28b), etc.

¹⁵ Commission decision of 3 February 2014 on establishing ERGA.

In addition to the main issues described under points 1 to 4, delegations also raised the following issues:

- **Accessibility requirements (Article 7)**

The Commission had proposed to remove accessibility requirements from the AVMS directive in the light of its proposal to regulate accessibility in the horizontal European Accessibility Act¹⁶. A big majority of delegations, however, wanted to maintain accessibility requirements for the audiovisual services in the AVMS directive. At the same time, some of these delegations were in favour of having more ambitious requirements than those in the current text, which the Commission supported.

- **Significant children's audience (Articles 9 and 11)**

Many delegations had concerns regarding the change from "children's programmes" to "programmes with a significant children's audience": they found the term vague and imprecise which would make its implementation difficult. The Commission explained that the aim of this change was to extend current protection of minors beyond programmes specifically aimed at children in view of their changing viewing habits.

- **Incitement to violence and hatred (Articles 6 and 28a mainly)**

Several delegations pointed at the inconsistency between different parts of the text that mention the grounds on the basis of which content is considered to incite to violence or hatred. Certain delegations wished to add among the grounds also glorification of terrorism and violation of human dignity, while some other delegations would prefer not to specify any grounds. The Commission confirmed that the same wording, aligned to the appropriate extent with the definitions set out in the 2008 Council Framework Decision¹⁷, should be used throughout the text.

¹⁶ doc. 14799/15

¹⁷ Council Framework Decision 2008/913/JHA of 28 November 2008 on combatting certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008, p. 55).

- **Content descriptors (Article 6a)**

This proposal complements protection of minors provisions with a new obligation to provide sufficient information to viewers about the harmful nature of content by using "a system of descriptors" (e.g. pictograms). Many delegations asked for clarification of this term. Certain delegations objected to the use of content descriptors since national practices differ in this area and pictograms are not used in all Member States. Certain other delegations had doubts about using EU codes of conduct, with one of them being against the harmonisation at EU level. The Commission pointed out that an EU code could address the concern raised by certain delegations that services targeting their territory, but established outside, do not use the same way of describing content which has a negative effect on their viewers.
