

In partnership with the Trinity College School of Law, the BAI is publishing an essay on the topic of EU media regulation prepared by the top student taking the module EU Digital Single Market (Media regulation) as part of the postgraduate LL.M programme in Trinity College. This initiative is designed to promote public debate about media policy and practice. The 2021 winning essay focuses on the recent developments in media regulation in the European Union. It was written by Charlotte Petrasch and is edited by Dr Ewa Komorek, adjunct assistant professor, Trinity College.

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**EU MEDIA REGULATION IN FLUX. ANALYSIS OF THE EU'S
EFFORTS TO ADAPT LEGISLATION TO RECENT DEVELOPMENTS
-- A SISYPHEAN TASK IN LIGHT OF EVENTS SUCH AS BREXIT?**

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1. Introduction

In 2020, after having only been available for two years, the Chinese social media video platform “TikTok” ranked as the most downloaded app in Europe. With 100 million monthly users in Europe alone it has therefore not only become one of the most popular apps but also an integral part of the lives of many.¹ TikTok’s trends and content are becoming increasingly disseminated and visible, thereby bringing it to the attention of a large share of the European population, even those who are not signed up to it. At the same time, the platform has raised various concerns in regard to e. g. privacy rights and the protection of minors.²

20 years ago, such a trend would not have been possible. In fact, it was facilitated through rapid technological developments combined with platforms taking over the media industry that had once consisted of and been dominated by radio and television.³ Technological progress and digitization have had an enormous impact on the media landscape. Through the rise of the Internet and new (mobile) devices to access new platforms, a change in not only consumer habits but also business models which increasingly focus on the generation of content by fellow users was initiated.⁴ At the same time, providers started to disseminate their content online with it “no longer locked to a single medium”.⁵ For instance, audio-visual elements can nowadays be found in services such as the press that originally did not make use of these techniques. This media convergence has created a reality in which consumer behavior and business models continuously adapt to one another, in turn creating new trends and business strategies and “reshaping the structure of audiovisual markets”.⁶ Accordingly, unprecedented legal challenges continue to arise; and whilst the aforementioned phenomena

¹ Mansoor Iqbal, ‘TikTok Revenue and Usage Statistics (2021)’ (*Business of Apps*, 6 May 2021) <<https://www.businessofapps.com/data/tik-tok-statistics/>> accessed 12 May 2021.

² Ronen Bergman, Sheera Frenkel and Raymond Zhong, ‘Major TikTok Security Flaws Found’ (*NYT*, 8 January 2020) <<https://www.nytimes.com/2020/01/08/technology/tiktok-security-flaws.html>> accessed 12 May 2021.

³ Council of the European Union, ‘Council Conclusions on European Audiovisual Policy in the Digital Era’, (Brussels, 25 November 2014).

⁴ Ibid; Jenny Weinand, ‘The Revised Audiovisual Services Media Directive 2018 – Has the EU learnt the right lessons from the past?’ (2018) 1 UFITA 260, 270.

⁵ Connor Hogg, ‘Netflix and the Chilling Effect: European Regulation of Audiovisual Content in the Age of Streaming’

<https://www.bai.ie/en/media/sites/2/dlm_uploads/2019/08/BAI_EUMediaRegulation_Essay_ConnorHogg.pdf> accessed 8 May 2021.

⁶ Maria Trinidad García Leiva, Luis A. Albornoz, ‘VOD Service Providers and Regulation in the European Union: an Audiovisual Diversity Approach’ (2020) *Int J Cult Policy* 5.

of platformism and media convergence have been immensely impactful, they do not represent the only obstacles for the way the media are regulated today.⁷

On the basis of Art. 167, 173 TFEU, the EU has been regulating the field of media law in seeking to create and foster the single market since 1989.⁸ Until the ECJ began to pave the way to this in 1974, the EC's competency to regulate this area had been denied due to the media's important link to national sovereignty.⁹ In its landmark case *Giuseppe Sacchi*, the ECJ had established that television signals due to their economic nature were to be regarded as the provision of services, hence submitting them under the EC treaty.¹⁰ Six years later, this was reaffirmed in *Procureur du Roi v Marc J.V.C. Debauxe and others*. In dealing with the retransmission of signals originating from other Member States, the ECJ stipulated that transnational broadcasting could be restricted by Member States when adhering to the concept of non-discrimination.¹¹ Consequently, this ruling drew attention to the highly diverse media legislation across Member States. In order to promote retransmission within an increasingly liberal market, the EC was called upon to drive forward harmonization in order to facilitate compliance with media legislation across States.¹² This eventually led the EC to enacting the TWFD in 1989.¹³

Since then, media regulation has repeatedly been forced to adapt to new circumstances to maintain its applicability and significance.¹⁴ This is especially important in light of the media's dual character since broadcasting services are not only vital for the economy but also of immense socio-political and educational importance.¹⁵ Facing this challenge again due to

⁷ EU Agenda, 'Revision Of The Audiovisual Media Services Directive (AVMSD)' (7 November 2016) <<https://euagenda.eu/publications/revision-of-the-audiovisual-media-services-directive-avmsd>> accessed 8 May 2021.

⁸ Council Directive 89/552/EEC of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities [1989] OJ L 298 ("TWFD").

⁹ Jackie Harrison, Lorna Woods, 'European Broadcasting Law and Policy' (Cambridge University Press, 2007) 67.

¹⁰ Case 155/73 *Giuseppe Sacchi* [1974] EU:C:1974:40.

¹¹ Case 52/79 *Procureur du Roi v Marc J.V.C. Debauxe and others* [1980] EU:C:1980:83.

¹² Maria Michalis, 'Focal Points of European Media Policy from Inception till Present: *Plus ça change?*' in Karen Donders, Caroline Pauwels, Jan Loisen, *The Palgrave Handbook of European Media Law* (Palgrave Macmillan, 2014), 131.

¹³ TWFD (n 8).

¹⁴ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L 202 and Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L 332.

¹⁵ Recital 5 AVMSD; Leiva, Albornoz (n 6) 3.

further technological progress as outlined above, policymakers were and are confronted with the question of which measures to take. Therefore, and against the backdrop of the EU's Digital Single Market Strategy, a functioning media sector that strikes a balance between access to online content services, consumer protection and competitiveness was regarded one of the pillars to reach its objectives of *inter alia* creating a Europe fit for the digital age.¹⁶

A key challenge in this is providing a legal framework which is sufficiently flexible to adapt to changes without lagging behind. In this context, the EU decided to amend its core piece of media legislation Directive (EU) 2018/1808 (“AVMSD”) once more in 2018, giving Member States time to transpose this into national law until September 2020.¹⁷ What is more, several other initiatives continue to be discussed on EU level.

However, with Brexit taking place on 31 January 2020 and the Covid-19 pandemic, it is questionable how impactful and prevailing these changes will prove to be. Against this backdrop, the following essay will seek to analyze some of the most critical recent changes. Apart from requirements regarding content itself, the AVMSD *inter alia* introduced amendments dealing with the types of services falling into its scope. What is more, adaptations were made to jurisdictional questions in the context of Member States discretion. In this light, this essay will focus on AVMSD amendments in the context of the newly added video sharing platforms (“VSPs”). What is more, the country of origin (“CoO”) principle will be analyzed before regarding implications through Brexit on those two matters. Thereby, this essay will seek to evaluate whether media regulation is consistent with the objectives the EU attempted to achieve through the recent changes.

2. Challenges in today's regulation

2.1 Inclusion of VSPs: from two-tier to three-tier approach

As shown, media law needs to be fit to appropriately regulate the online platform environment which is also crucial to accelerate media innovation. In 2007, the AVMSD had been amended by extending its scope from TV broadcasters to include Video on Demand (“VoD”) services as a second tier. Whilst the Directive strives for a technology-neutral

¹⁶ Recital 1, 2 AVMSD; cf. <<https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>> accessed 8 May 2021.

¹⁷ Directive (EU) 2018/1808 of the European Parliament and of the Council 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 [2018] OJ L 303.

approach it did not accommodate VSPs as their responsibilities lie in the organization of programmes and not the content itself.¹⁸ Hence, the legislator decided to introduce similar obligations to VSPs which despite their particularities share similarities with the other two tiers: VSPs have become important audio-visual mediums, competing for the same audiences and relying on advertising revenues.¹⁹ What is more, they have assumed an influential role as they increasingly shape the way the world is seen by pre-choosing and removing the content displayed on the basis of algorithms. Thus, they can serve as enablers in times of the spread of disinformation and have a direct influence on democratic values such as freedom of expression.²⁰ This is even more prevalent as content is often directed at minors. Therefore, the creation of a common level playing field also extending to these actors should be deemed convincing.²¹ However, differences between VSPs and traditional media outlets need to be acknowledged by adjusting obligations accordingly.²²

Under Art. 28b AVMSD, VSPs which exercise organizational instead of editorial control are required to comply with similar rules as audio-visual media services by taking “appropriate measures”. More precisely, they are to prevent content which is illegal or incites violence or hatred. Furthermore, they are subject to “traditional” obligations in regard to commercial communications for advertising they “sell, market, or arrange themselves”. For other commercial advertising (such as influencer marketing) they shall again take appropriate measures whilst “taking into account the limited control exercised”.²³ In addition, they are to protect minors from harmful content for which the Directive provides an exemplary list of measures such as age verification, parental control or flagging mechanisms and the adjustment of their Terms and Conditions. Pursuant to Art. 28b(7) AVMSD, Member States shall establish out-of-court redress mechanisms for users’ disputes with those platforms. The Directive sets out various criteria to assess these measures’ appropriateness, ranging from the content in question to the rights and legitimate interests at stake and the concrete VSP concerned.²⁴ These measures shall not establish *ex-ante* control or upload-filtering with

¹⁸ Sally Broughton Micova, ‘The Audiovisual Media Services Directive: Balancing Liberalisation and Protection’ (Draft) in Ida Brogi, Pier Luigi Parcu (eds) *Handbook on EU Media Law and Policy* (Edward Elgar Publishing 2020).

¹⁹ Recital 4 AVMSD; Weinand (n 4) 271.

²⁰ Ibid; Kinga Sorban, ‘The Video-Sharing Platform Paradox: Applicability of the New European Rules in the Intersection of Globalisation and Distinct Member State Implementation’ (2020) 25 *Comms L* 89.

²¹ Recitals 4, 44 AVMSD.

²² Recital 48 AVMSD.

²³ Max van Drunen, ‘The Post-Editorial Control Era: How EU Media Law Matches Platforms’ Organisational Control with Cooperative Responsibility’ (2020) 12 *J Media Law* 166, 181.

²⁴ Art. 28b(3) AVMSD.

Member States to promote the use of co- and self-regulation through codes of conduct.²⁵ Therefore, VSPs are given flexibility as they are ultimately awarded discretion in regard to the concrete measures they choose whilst oversight in assessing the appropriateness is exercised by Member States.²⁶

Moreover, Member States may introduce stricter measures whilst respecting the rules laid down in Directive 2000/31/EC.²⁷ Thereby, “national specificities and cultural differences” can be taken into consideration.²⁸ As a result, the amendment’s effects will depend on national transposition and guidance given by National Regulation Authorities (“NRAs”). Despite the transposition period having ended last year, implementation has thus far not been concluded in most countries.²⁹ According to a study conducted by the Commission, VSPs have to date partly implemented similar policies e. g. in using AI tools to prevent terrorism. Yet, policies differ significantly for hate speech and the protection of minors.³⁰ Forms of co-regulation can already be observed with divergences in the level of control exercised by NRAs.³¹ In case of substantial differences, this may impede this “unified European approach” and pose a risk of fragmentation.³²

In this context, the VSP definition as stipulated in Art. 1(a)(aa) AVMSD raised further concerns of legal certainty.³³ *In concreto*, debates arose around the exact scope of the “essential functionality” criterion which is not fulfilled if the provision of audio-visual

²⁵ Art. 28b(3) AVMSD.

²⁶ Art. 28b(5) AVMSD.

²⁷ 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’) [2000] OJ L 178.

²⁸ Sorban (n 20).

²⁹ For a recent update on Ireland cf. Philip Andrews, Laura Treacy and Ciarán Donohue, ‘Update on Implementation of Audio-Visual Media Services Directive in Ireland’ (*Lexology*, 19 April 2021) <<https://www.lexology.com/library/detail.aspx?g=ab203028-7c42-4010-adcd-6c739067692f>> accessed 12 May 2021.

³⁰ EU Commission, ‘Executive Summary SMART 2018/0066 - Study on the Implementation of the New Provisions in the Revised Audiovisual Media Services Directive (AVMSD)’ Ares(2021) 307771 14 January 2021.

³¹ *Ibid.*

³² Sorban (n 20).

³³ A VSP service is defined as a service “where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing”.

content is “merely ancillary to, or a minor part of” the service’s activities, i. e. not “exclusively accessory to an underlying activity or functionality”.³⁴

Whether a platform constitutes a VSP is left to the Member States’ discretion, thus creating the risk of those assessing the same providers differently.³⁵ Especially if a Member State classifies a VSP as such without having jurisdiction over it, disagreements between States may eventually hinder users in proceeding with their claims.³⁶ Questions were especially posed in regard to social media platforms which host various forms of content. To increase clarity, the Commission issued Guidelines regarding the “essential functionality” criterion,³⁷ stating that social media platforms as such would not be excluded from this provision and establishing four categories to be taken into account in the assessment: the audio-visual content’s role in the economic activities of the service; quantity and quality of this content; monetization and revenue of it; and users’ exposure to such content through enhanced visibility or attractiveness of it. Whilst the Commission has strived to support the effectiveness of the AVMSD with this and contributed to increased certainty, national approaches will be decisive due to the non-binding nature of these guidelines. This will be assessed on a case-by-case basis, creating legal uncertainty especially in regard to e. g. niche platforms or live streaming.³⁸

All in all, the AVMSD acknowledges the need for regulation of VSPs as even by merely curating content it cannot be assumed that these platforms have less influence. At the same time, provisions were adjusted to VSPs’ particularities. By establishing minimum standards and including those that produce and share the content (e. g. through Terms and Conditions), “the AVMSD moves away from centralised responsibility, and towards cooperative responsibility”.³⁹ This form of regulation may be criticized on the grounds of it weakening Member States’ control over VSPs.⁴⁰ However, it should also be noted that even such a

³⁴ Recital 5 AVMSD; Commission, ‘Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive’ (COM) 2020/C 223/02 7 July 2020. In regard to the dissociable section guidance can be found in Case C-347/14 *New Media Online GmbH v Bundeskommunikationssenat* (21 October 2015) EU:C:2015:709.

³⁵ Sorban (n 20).

³⁶ Sorban (n 20).

³⁷ Commission (n 30).

³⁸ Platforms categorized as VSPs without further difficulties include YouTube, TikTok or Twitch. Less clear examples nonetheless likely to be categorized as VSPs are platforms such as Facebook, Twitter, Instagram or Reddit.

³⁹ van Drunen (n 23) 167.

⁴⁰ Joan Barata, ‘Regulating content moderation in Europe beyond the AVMSD’ (LSE, 25 February 2020) <<https://blogs.lse.ac.uk/medialse/2020/02/25/regulating-content-moderation-in-europe-beyond-the-avmsd/>> accessed 11 May 2021.

restrictive approach represents the first measure taken to regulate VSPs and therefore leads to an increase in authority over them. What is more, Member States nonetheless assert final control over the measures' appropriateness and are furthermore responsible for shaping users' out-of-court redress mechanisms. For the first time, these award users with a way to directly enforce their rights.⁴¹ In light of the growing difficulties of defending one's rights in the online environment, this can be seen a crucial step in which Member States should assume their responsibility by *inter alia* shaping those in the optimal way.

Furthermore, it can be asserted that this regime intends to strike a balance by preventing the over-blocking of content. In this context, platforms shall enable and incentivize users to make use of the tools provided to them such as flagging.⁴² Overall, this approach fits into the EU's broader aspirations in regard to existing and future platform regulation with e. g. the Digital Services Act. This proposal for a reform of the eCommerce Directive will address liability of online intermediaries in complimenting the AVMSD's sector-specific rules.⁴³ However, the latter will remain in force as *lex specialis*. All in all, this trend "that better matches platforms knowledge and control" should be welcomed in a world in which traditional (state) redress mechanisms have proven to be unable to appropriately regulate platforms.⁴⁴ Therefore, public oversight and transparency are important elements of the AVMSD which at the same time shifts responsibility to the implementation process, e. g. by calling for co-regulation.⁴⁵ In light of the aforementioned considerations, this can be deemed convincing whilst the concrete interpretations will in the end depend on each Member State and their NRAs.⁴⁶ Thus, concerns of legal uncertainty might be counterbalanced by sticking to the Commission guidelines and taking a common, pan-European approach.

2.2 Country of Origin principle: specifications

The CoO principle has been an integral part of EU media regulation since the TWFD.⁴⁷ It has been retained throughout amendments and can be considered the AVMSD's "governing

⁴¹ Ibid.

⁴² Ibid.

⁴³ Commission, 'Proposal for a Regulation Of The European Parliament And Of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' (COM) (2020) 823 final 15 December 2020, 3.

⁴⁴ van Drunen (n 23) 189, 190.

⁴⁵ Ibid.

⁴⁶ Art. 28a AVMSD.

⁴⁷ Art. 2ff AVMSD.

element”.⁴⁸ It serves to identify under whose Member State’s jurisdiction a media service provider will fall so they need only comply with the national laws of a single State before being allowed to retransmit their services across the EU.⁴⁹ Thereby, it avoids both multiplicity and absence of jurisdictions over providers and comprises an important mechanism to ensure a functioning internal market of free flowing information whilst promoting media pluralism and Member States’ “different national values, cultures and particularities”.⁵⁰

However, adjustments were made to this regulatory regime in 2018. Firstly, there are different criteria to determine the responsible Member State. The assessment of where a provider is deemed to be established is primarily based on the location of providers’ head office and where editorial decisions are made.⁵¹ The definition of the latter was modified by now requiring a link to “day-to-day operation[s]”.⁵² If these criteria are inconclusive focus is to be placed on the location of a “significant part of the workforce”. As specified, this workforce needs to be “involved in the pursuit of the programme-related audiovisual service activity”.⁵³ Whilst the AVMSD generally entails a detailed concept to determine jurisdiction these specifications were introduced to achieve further clarity. In addition, Member States are now obliged to publish up-to-date lists of those providers over which exercise control to create a pan-European database, further fostering transparency.⁵⁴ These changes should be welcomed after ERGA had ascertained that insufficient clarity would create barriers for providers and thus impede the Directive’s applicability in 2016.⁵⁵

Secondly, the AVMSD allows for derogation from the CoO principle in exceptional cases, thereby allowing for secondary control by receiving countries. Art. 3(2) AVMSD comprises a mechanism to enforce the Directive’s minimum standards. States may temporarily restrict foreign broadcasting if a provider “manifestly, seriously and gravely” infringes certain rules or principles in a specified timeframe. Through the amendment, risks to public security were added to these grounds.⁵⁶ Pursuant to Art. 4(2) AVMSD, Member States can reassert control

⁴⁸ Zsolt Kokoly, 'Exceptions to the Principle of Free Transmission and Retransmission of Audiovisual Media Content - Recent European Case-Law' (2020) 9 Acta Univ Sapientiae Legal Stud 83.

⁴⁹ Ibid, 85.

⁵⁰ Ibid; Recital 33, 43 AVMSD; Weinand (n 4) 268.

⁵¹ Art. 2(3) AVMSD.

⁵² Art. 1(1)(bb) AVMSD.

⁵³ Art. 2(3)(b) AVMSD; Greg Mason, 'The revised Audiovisual Services Directive 2018: To Implement Or Not To Implement?' (2019) 30 Ent L R 254.

⁵⁴ Art. 2(5)(b) AVMSD; Kokoly (n 48) 99.

⁵⁵ ERGA, 'Report on Territorial Jurisdiction in a Converged Environment' ERGA(2016)08 17 May 2016.

⁵⁶ Art. 3(3) AVMSD.

and enforce stricter national rules through a circumvention procedure if providers with a different CoO avoid compliance with this country's laws although their programmes are "wholly or mostly directed towards its territory".⁵⁷ This mechanism is comprised of a consultation phase which is followed by official proceedings.⁵⁸ *Inter alia*, the circumvention procedure was amended by strengthening cooperation between NRAs and exchange with the Commission. Moreover, procedures for linear and VoD services were aligned by subjecting them to the same rules. What is more, it was stipulated that evidence for circumvention is to be "reasonably established, without the need to prove the media service provider's intention".⁵⁹ Before, there had thus far been only one successfully concluded circumvention procedure.⁶⁰ Therefore, this mechanism had been considered a "seemingly impossible task" as it was not only complex and time-consuming but had also created uncertainty in regard to the standard of evidence.⁶¹ Therefore, best practices as established in previous case-law were incorporated and legislative gaps were filled.⁶² By abandoning disparities and adjusting procedures to previous learnings, the AVMSD aspired to increase efficiency and practicability.⁶³ Especially in times of growing political propaganda and disinformation this should be welcomed. However, equivalent provisions cannot be found in regard to VSPs, rendering it unclear how disagreements between Member States could be resolved in this context.⁶⁴

By simultaneously extending the list of reasons to derogate from the CoO principle under Art. 3(2) AVMSD this overall concept strikes a balance between "giving Member States a wider space to exert limitations based on public policy reasons" and enabling providers to express their views, thus respecting their right of defense which may also be beneficial to

⁵⁷ Art. 4(2)(b) AVMSD.

⁵⁸ Zsolt Kokoly, 'The Anti-Circumvention Procedure in the Audiovisual Media Services Directive' (2019) 8 *Acta Univ Sapientiae Legal Stud* 43, 59.

⁵⁹ Art. 4(3)(b) AVMSD.

⁶⁰ Commission, 'Decision of 31.01.2018 on the incompatibility of the measures notified by the Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services' COM (2018) 532 final (31 January 2018).

⁶¹ Kokoly (n 58) 53.

⁶² Kokoly (n 48) 99.

⁶³ Kokoly (n 58) 43.

⁶⁴ Lorna Woods, 'Revision of Audiovisual Media Services Directive – Video-sharing Platforms' (*EU Law Analysis*, 28 May 2018) <<http://eulawanalysis.blogspot.com/2018/05/revision-of-audiovisual-media-services.html>> accessed 13 May 2021. Regarding the responsible jurisdiction, Art. 28a AVMSD applies which focuses on establishment as well as VSPs' parent and subsidiary undertakings.

counter e. g. hate speech more efficiently.⁶⁵ Hence, these efficiency and transparency improvements were appropriate and all the more important in today's rapidly changing media landscape.⁶⁶ The thus increased legal certainty will lead to lower compliance costs for providers and broader options for consumers. Nonetheless, this clear commitment to the CoO principle will only function if it is easily and efficiently applicable without discouraging providers and Member States from making use of it and its mechanisms. It seems that the EU was aware of this in amending the CoO principle accordingly.

2.3. Brexit: an impediment to the regulatory changes?

The AVMSD's rules on the CoO principle only extend to transmissions from other Member States without applying to third countries.⁶⁷ Yet, the UK became such a third country with its exit from the EU on the basis of Art. 50 TEU as audio-visual services were excluded from the EU-UK Trade and Cooperation Agreement, posing the question how its audio-visual media sector and cross-border services will be regulated henceforth. This is even more important in light of its important role as a CoO.⁶⁸ According to the European Audiovisual Observatory, the UK is the leading country of establishment for linear and on-demand services with 40 % of TV channels targeting audiences across the EU, deeming it a media hub due to an overall light regulatory regime and strong programme creation infrastructure.⁶⁹

Therefore, the applicability of the CoO principle or a regulatory regime comparable to it is of high significance for the future relationship between the UK and the EU. Without its mechanisms, EU Member States as well as the UK would be free to regulate and take measures in regard to broadcasts transmitted to their territories reaching from national

⁶⁵ Kokoly (n 48) 100; Lucas Volman, 'Is the Cornerstone Loose? Critical analysis of the functioning of the 'country of origin' principle in the Audiovisual Media Services Directive, taking into account the rapid changes in the audiovisual industry and the recent challenges brought by Brexit' 15 <<https://www.bai.ie/media/sites/2/2018/09/BAI-Media-Content-Regulation-Essay-Lucas-Volman.pdf>> accessed 13 May 2021.

⁶⁶ ERGA (n 55).

⁶⁷ Cf. Art. 3(1) AVMSD.

⁶⁸ Ofcom, 'Frequently Asked Questions on Linear Television Services and Video on Demand Services After Brexit' 6 January 2021 <https://www.ofcom.org.uk/_data/assets/pdf_file/0019/190342/faq-television-on-demand-services-after-brex-it.pdf> accessed 13 May 2021.

⁶⁹ Latham&Watkins, 'How the Updated AVMS Directive Will Impact European Media Services' (*LW*, 19 February 2019) <<https://www.lw.com/thoughtLeadership/lw-how-the-updated-ams-directive-will-impact-european-media-services>> accessed 13 May 2021.

authorization processes (esp. licensing) to content requirements. Providers would therefore face a complex web of regimes having to tailor their services accordingly.

There are no exceptions for the AVMSD to extend to third countries in general and the UK in particular. However, the Council of Europe adopted the Convention on Transfrontier Television (“ECTT”) in 1989.⁷⁰ As this body represents an international organization of European countries and is separate from the EU, Brexit will leave the UK’s membership and thus the ECTT’s applicability unaffected. Apart from national legislation, this Convention now represents the only legislative measure of impact to the relationship between the UK and EU countries in the realm of media regulation.

Conceptually similar to the AVMSD, the ECTT stipulates the right to freedom of reception and retransmission which are put to practice through a CoO principle.⁷¹ Again, establishment of providers depends on multiple factors such as the head office as well as the location of decision-making and significant parts of the workforce. Nonetheless, the two legislative measures differ significantly. Furthermore, this applies to services which can be accessed through an Electronic Programming Guide regulated by one of the signatory states.⁷²

Under the ECTT, a broadcast which falls under the jurisdiction of a signatory country will again require a license from its CoO to be allowed to retransmit its services to other States’ audiences on their territories. However, it is most importantly the limited scope of the ECTT which poses the main challenges.

Although the ECTT stipulates rules on programmes such as a prohibition of hatred inciting content and regulates advertising and tele-shopping, it provides for less grounds in regard content regulation. Furthermore, it does not establish any enforcement mechanisms. Especially in comparison to the AVMSD, its regime thereby sets up only very limited minimum standards.⁷³

Moreover, the ECTT extends to linear broadcasting only, rendering it impossible for VoD broadcasters and VSPs to rely on it. Therefore, national laws will govern the prerequisites under which these services would be authorized to transmit their services henceforth. Against

⁷⁰ Council of Europe, European Convention on Transfrontier Television Strasbourg, 5 May 1989 ETS 132.

⁷¹ Art. 3, 4 ECTT.

⁷² Osborne Clarke, ‘TV services head towards complex post-Brexit regulatory world’ (*Lexology*, 16 November 2020) <<https://www.lexology.com/library/detail.aspx?g=2a972c21-db64-4ea7-998a-f6a6a42f3b88>> accessed 13 May 2021; for the UK cf. Sec 310(8) Communications Act 2003.

⁷³ Art. 5, Chapter III ECTT; Explanatory Memorandum to the Audiovisual Media Services (Amendment) (EU Exit) Regulations 2020 No. 1536.

this backdrop, the UK government has drafted legislation to “[fix] jurisdiction issues” in regard to VSPs for the post-Brexit stage.⁷⁴ Under this, VSPs will be subject to UK law if there is a “required connection”. This shall primarily be the case if “the service [uses] a fixed establishment in the UK for an indefinite period and effectively pursues an economic activity in doing so”.⁷⁵ Otherwise, a VSP’s “centre of activity” or the establishment of a “group undertaking” are decisive unless another EEA state has a closer link to the service. Through these rules that regard EEA countries and establish a similar regime to the AVMSD, the UK acknowledged only regulating those that provide services to their country would be necessary avoid a “regulatory loophole” and becoming a “safe haven for online harms from content providers”.⁷⁶ However, especially in regard to content regulation concrete legislation will continue to be awaited.⁷⁷

In aspiring to contribute to clarity, the UK’s regulatory broadcasting and communications authority Ofcom has issued additional guidance.⁷⁸ In this, it noted that VoD services currently accessible for UK audiences would remain to be available as Ofcom would refrain from imposing further authorization requirements on these.⁷⁹ However, this relies on Ofcom’s goodwill and may change at any time especially once the UK may decide to address VoD services through further legislation.⁸⁰ Furthermore, this will entail the UK’s cooperation with the responsible regulator if issues concerning these services arise.⁸¹

In addition, not all EU countries have ratified the ECTT. Hence, providers originating from the UK would have to apply for a license in all these countries.⁸² This “may in practice require operational changes to ensure the broadcaster qualifies for jurisdiction in the relevant member state”.⁸³ As could be observed in the case of BBC Worldwide, complex situations of dual-licensing with multiple NRAs assuming their competency may arise when broadcaster

⁷⁴ The Audiovisual Media Services (Amendment) (EU Exit) Regulations 2020 No. 1536.

⁷⁵ Ibid.

⁷⁶ Explanatory Memorandum (n 73).

⁷⁷ House of Lords Draft Statutory Instrument, Audiovisual Media Services (Amendment) Regulations 2021.

⁷⁸ Ofcom (n 68).

⁷⁹ E. g. Netflix .

⁸⁰ Clarke (n 72).

⁸¹ Ibid.

⁸² These seven countries are Belgium, Denmark, Greece, Ireland, Luxembourg, The Netherlands and Sweden.

⁸³ Clarke (n 72).

decide to establish themselves in such a country.⁸⁴ As satellite signals often cross borders, evading these countries actively may in practice be hard to achieve.⁸⁵

As a result, providers are required to ascertain whether and which additional licenses they need to acquire and what this will entail exactly.⁸⁶ In general, UK services under the ECTT will not require a license in ECTT countries. However, all other services outside its scope wishing to transmit to the UK or from the UK to a non-ECTT signatory will depend on regulation by Ofcom or the respective NRA.⁸⁷ Whilst the concrete and long-term effects of this new regulatory situation remain to be seen, a trend of services, e. g. BBC Worldwide, relocating to EU countries can already be observed.⁸⁸ As another example, Sky Ireland has decided to pull channels from the Irish EPG.⁸⁹ Hence, it seems to transpire that provider are unwilling to lose the benefits going along with the applicability of the AVMSD and the EU internal market.

Lastly, Brexit with the UK's withdrawal from the digital single market has also ended the cross-border portability of online content.⁹⁰ Therefore, online content service providers may only offer their services abroad "on a voluntary basis".⁹¹ And for this, equivalent legislation is non-existent. With nothing to replace this, this will go to the detriment of users who will have to rely on providers' goodwill once more.

All in all, Brexit has turned the regulatory landscape into a significantly different playing field than before.⁹² The challenges examined above reveal that the ECTT is far from a

⁸⁴ Olaf Trojan, Paul Waszink, 'Media Regulatory. Brexit from a Dutch perspective' (*Twobirds Blog*, February 2021) <<https://www.twobirds.com/en/news/articles/2021/nethenether/media-regulatory-brexit-from-a-dutch-perspective>> accessed 11 May 2021.

⁸⁵ Ofcom (n 68).

⁸⁶ Clarke (n 72).

⁸⁷ Stephen Edwards, Jessica V. Parry, 'Brexit – Regulatory and Copyright Issues for Broadcasters and Video on Demand Service Providers' (*ReedSmith*, 18 June 2020) <<https://www.reedsmith.com/en/perspectives/2020/06/brexit--regulatory-and-copyright-issues-for-broadcasters-and-video-on>> accessed 13 May 2021.

⁸⁸ Robert Briel, 'Brexit: Rules Change for UK Based Broadcasters' (*Broadband TV News*, 27 December 2020) <<https://www.broadbandtvnews.com/2020/12/27/brexit-rules-change-for-uk-based-broadcasters/>> accessed 13 May 2021.

⁸⁹ Robert Briel, 'Brexit: Irish Sky Viewers Lose TV Channels and Radio Stations' (*Broadband TV News*, 26 December 2020) <<https://www.broadbandtvnews.com/2020/12/26/brexit-irish-sky-viewers-lose-tv-channels-and-radio-stations/>> accessed 13 My 2021.

⁹⁰ Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on Cross-Border Portability of Online Content Services in the Internal Market [2017] OJ L 168/1.

⁹¹ Or Goren, 'UK TV Streaming Services After Brexit: Major Changes Are Coming' (*Cordbusters*, 30 December 2020) <<https://www.cordbusters.co.uk/uk-streaming-services-after-brexit-changes/>> accessed 11 May 2021.

⁹² Dolf Segaar, Rogier de Vrey, 'Revised EU Audiovisual Directive Changes Playing Field for Third-Country Media Service Providers' (*Lexology*, 16 April 2021)

replacement of the AVMSD but could, if applied as broadly as possible and complimented by additional legislation, become partial but within its scope convincing solution.⁹³ In light of the economic impact for all countries involved, this should be done in a legally certain way that expects providers to comply with reasonable and transparent standards. This would also allow them to assume their cultural role which will in turn be beneficial to consumers. Brexit may have been the realization of the people's will. However, it should not lead to limitations on economic and cultural growth with limited options for consumers to choose from as it is safe to assume that this did not extend to developments endangering the future of the media landscape.

3. CONCLUSION

“The story of the AVMSD has always been one of combining liberalization and protectionism and of balancing liberal market approaches with concerns about the cultural and social function of media”.⁹⁴ As demonstrated, successfully striking such a balance was and continues to be the underlying challenge in light of the latest developments discussed. The most recent amendments of the AVMSD impacted the media landscape significantly by incorporating VSPs, giving them adequate flexibility and laying out jurisdictional questions in more detail. Thereby, the EU legislator aspired to consider the positions of all stakeholders involved.⁹⁵ Thus extending and at the same time clarifying EU media legislation in regard to the CoO principle conceptually aimed at rendering it more efficiently applicable.

Certainly, the AVMSD managed to respond to a considerable number of recent challenges. Since then, however, the situation has again changed drastically, posing the question whether recent events such as Brexit in combination with the “speed of developments in audiovisual services and technology” render the AVMSD as in place today outdated already.⁹⁶ So how future-proof is the current regulatory regime really?

As shown, for example, by the nuanced CoO provisions, EU media regulation has come a long way since its beginnings. Especially after its latest revision, it enables the EU to deal with individual cases appropriately. However, the thus achieved legal certainty should be

< <https://www.lexology.com/library/detail.aspx?g=ba0e5fdd-f11d-404f-968f-29d8c7af268d>> accessed 12 May 2021.

⁹³ Latham&Watkins (n 69).

⁹⁴ Broughton (n 18) 17.

⁹⁵ Ibid.

⁹⁶ Ibid.

treated cautiously as it may have a detrimental effect on all stakeholders if turned into excessive complexity. The recent developments in attempting to “catch up” with the technological reality can be considered a first “step in the right direction”.⁹⁷ The AVMSD regime as in force today represents a “solid framework” which can function as the “backbone of media regulation”.⁹⁸ With the occurrence of Brexit, its effect was, however, impeded. Although the Covid-19 crisis has given a boost to media consumption, a high number of providers find themselves in an uncertain situation once more.

How up-to-date and flexible the AVMSD actually is, will only be seen over time. Its success will largely depend on its implementation and application by Member States which will require a “a lot of dialogue and reflection” for it to prevail.⁹⁹ Considering the delays in transposition this should progress rather today than tomorrow as the current regulatory regime despite events such as Brexit does lay down a convincing framework with high potential.

⁹⁷ Weinand (n 4) 292.

⁹⁸ Ibid.

⁹⁹ Barata (n 40).

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