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 2022 winning essay focuses on the AVMS Directive in the age of VSPs and online content creation.It was written by Daniel Mooney and is edited by Dr Ewa Komorek assistant professor, Trinity College.

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**Media Regulation in Flux:**

**The AVMSD in the Age of VSPs and Online Content Creation**

**Edited by: Dr. Ewa Komorek, assistant professor, Trinity College Dublin**

In the age of media convergence, the traditional conception of audiovisual media services has increasingly fused with online and digital content thereby changing the way media is understood. In particular, platforms that allow for the uploading and sharing of user-generated content have revolutionised the media landscape, leading to an abundance of digital audiovisual media content. So-called video-sharing platforms (herein, ‘VSPs’) have exploded in popularity with the likes of YouTube, DailyMotion and Twitch raking in millions of views[[1]](#footnote-1) and hosting almost immeasurable amounts of audiovisual content.[[2]](#footnote-2) In Europe in 2018, the numbers showed that 93% of Western Europeans view at least one video a month while in Eastern Europe 91.3% of people were using some kind of video-sharing platform.[[3]](#footnote-3) Combined with the Covid-19 pandemic’s effect on raising media consumption across the platform ecosystem,[[4]](#footnote-4) it is clear that online audiovisual content now represents one of the largest and most important forms of media for Europeans and, indeed, people throughout the world.

Media regulation in Europe has borne witness to these great changes throughout the years, expanding in complexity and scope over time. Beginning with the Television Without Frontiers Directive,[[5]](#footnote-5) the European Union (EU) has increasingly intervened in the audiovisual media sector seeking to regulate effectively as media consumption evolves along with technology. The Commission’s Digital Single Market strategy represents the next step in European policymaking in the field of technology and digital society,[[6]](#footnote-6) including the increasingly digitised audiovisual media sector. The 2018 revision to the Audiovisual Media Services Directive[[7]](#footnote-7) (herein, ‘**the AVMSD’**) was a core part of this strategy, and it expanded the scope of audiovisual media regulation to include VSPs, in response to their ever-increasing importance to the media consumption landscape. The advent of the AVMSD ushers in a new era of audiovisual media regulation, bringing with it a revamped legal framework for some of the largest players in the media landscape.

This essay aims to analyse the revised AVMSD in respect of its application to VSPs, focusing on critically assessing whether the new provisions are adequate in regulating platforms and their content creators. Part I will begin by setting out and examining the pre-2018 regulatory structure, providing an overview of the issues that faced the audiovisual media sector in respect of VSP regulation. It will provide context for the analysis and discussion of the Directives changes in the subsequent sections. Part II will then examine the scope and definitions for VSPs, including guidance that lays out how such services are to be identified. Part III will discuss the general obligations, moving onto the content restrictions specifically in relation to harmful and illegal online content, which brings VSP regulation into line with the standards for other forms of media services. It will then move to outline the commercial communication obligations and their practical impact on VSPs, alongside some of the other new regulatory requirements. Part IV will then briefly consider the implications of the AVMSD for influencers and vloggers, who are now newly subject to the Directive’s regime. Finally, the essay will conclude by analysing the Directive in the context of the broader regulatory shift that is ongoing in Europe’s digital policy sphere, arguing that the Directive plays a key role in safeguarding audiences and effectively regulating media in the EU.

**Part I: Background to the 2018 Revision – VSPs in a Regulatory Vacuum**

Prior to the enactment of the current AVMSD, VSPs were, for the purposes of media regulation, essentially unregulated in the EU. Indeed, examining the previous iterations of the AVMSD show that the inclusion of internet-based services has been an incremental and, arguably, slow process.[[8]](#footnote-8) While the scope of the Directive was expanded to include on-demand services under the 2010 regime, the AVMSD specifically did not include VSPs, who were considered to fall under the category of ‘information society services’[[9]](#footnote-9) and thus were regulated under the e-Commerce Directive.[[10]](#footnote-10) Although VSPs as services were not formally controlled under media regulation, they were still subject to a host of varying rules at Member State level, including the likes of Germany’s NetzDG[[11]](#footnote-11) and other tax laws that aimed to promote European content.[[12]](#footnote-12)

In more general terms, there was very little in the way of content controls aside from the very general provisions across the various platforms’ self-regulatory initiatives.[[13]](#footnote-13) For instance, YouTube was a participant in a number of self-regulatory protocols as well as having its own internal programmes, like YouTube Kids etc.[[14]](#footnote-14) There were also no regulations that prohibited or restricted the advertising of alcohol or unhealthy foods/drinks, with the emphasis instead on self-regulation, which given the platform’s incentives to maximise profits, was often lacklustre.[[15]](#footnote-15) All in all, what emerges is a piecemeal or patchwork legal framework for VSPs, where a heavy emphasis is on self-regulation and legal immunity under the E-Commerce Directive.

While regulation struggled to keep up with the pace of technological development, digital media became widespread and it quickly overtook traditional broadcasting and audiovisual media forms as a source of news content.[[16]](#footnote-16) In response to the growing power of VSPs and online content in the media landscape, the Commission announced plans to reform the media regulation framework to bring these platforms into the regulatory fold.[[17]](#footnote-17) Thus, in 2018 the text of the revised Directive was approved and Member States were given until September 2020 to transpose. As of the time of writing in 2022, several states are yet to implement the AVMSD.[[18]](#footnote-18)

Highlighting the background to the AVMSD helps to put the amendments into sharp relief while also exposing the balancing act at the heart of the Directive. The key balance that the Directive has tried to strike is between maintaining the traditional liability exemptions afforded under the E-Commerce Directive while also trying to improve safeguards for users. In doing so, the Directive eschews ex-ante moderation in favour of ex-post reporting functions that avoid proactive filtering of user-generated content.[[19]](#footnote-19) In a sense, the AVMSD represents a qualification to safe harbour principles for VSPs, reflecting similar trends across other pieces of EU legislation in the area.[[20]](#footnote-20) Furthermore, the previous regime under the 2010 Directive can arguably be described as piecemeal and disparate, with VSPs subject to multiple varying obligations across a number of directives and regulatory instruments. Alongside this situation, the threat of market divergence was very real, with Member States increasingly seeking to regulate VSPs on their own terms. Overall, it is submitted that in this context, the AVMS revision was clearly needed and very much welcomed, both from a platform and user perspective. Moving now to examine the scope and substantive provisions of the revised Directive, the differences between the old and new regimes becomes clear.

**Part II: Setting Boundaries – The Scope of the AVMSD**

One of the core reasons that VSPs were left unregulated under the previous AVMS regime was the difficulty in defining what kind of online services and platforms would fall under the definition of audiovisual media services.[[21]](#footnote-21) Indeed, this is still a problem for large online platforms who may host a whole range of content, creating uncertainty as to which kinds of services fall within the scope of the Directive. Thus, it is worth engaging in a textual analysis of the definition in order to ground later discussions with a practical understanding of what kinds of services will be caught under the definition of VSP.

Under Article 1(aa), the AVMSD defines VSPs as follows:

*a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, 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.[[22]](#footnote-22)*

As can be observed, the legislative scope of the AVMSD is nuanced. The definition makes clear that services must be remunerated[[23]](#footnote-23) and the requirement to entertain, inform or educate excludes purely commercial content, in line with established jurisprudence.[[24]](#footnote-24) The definition introduces two key tests. Firstly, is the principal purpose test, which essentially evaluates what role audiovisual content plays on the service, is not especially clear requiring a nuanced view.[[25]](#footnote-25) A 2019 UK report examined that test in a 2019 report which illustrated the differing ways in which services could be captured.[[26]](#footnote-26) For instance, it suggests that TikTok’s principal purpose is video-sharing; Vimeo’s dissociable section of its service is video sharing; while Snapchat has video-sharing as an essential functionality but not its principal purpose nor as a dissociable section of its service. This points to the expansive and nuanced approach that the Directive takes toward identifying which services are likely to constitute VSPs. Practically, it will be for regulators to follow ERGA and Commission guidelines[[27]](#footnote-27) for assessing these services and how audiovisual content is used in their platforms. The second test relates to the level of editorial control that is exercised by the service. Unlike an on-demand service or a traditional broadcaster, which exercises control over content via its schedules etc., a VSP instead ‘organises’ its content with no editorial control.[[28]](#footnote-28)

Sogan notes that the definition’s complexity increases the risk for divergent cross-border regulatory approaches and further criticises the lack of precision in relation to mixed-function platforms.[[29]](#footnote-29) However, the Commission has released guidance as to how the concept of VSP is to be applied and what kinds of services will be caught by it which aims to clarify the scope of the definition.[[30]](#footnote-30) Furthermore, national regulators have also indicated their approach to assessing whether a service can be considered a VSP. The Broadcasting Authority of Ireland for example has produced a document outlining what approach it plans to take, identifying basic elements (i.e., providing access to audiovisual content uploaded by users) that will cause a service to automatically be considered a VSP.[[31]](#footnote-31)

One other criticism of this definition is that it does not match with the other definitions of similar or indeed identical services in other key regulatory instruments, for instance the 2019 Copyright Directive.[[32]](#footnote-32) In the Copyright Directive, services which are considered VSPs under the AVMSD are called ‘Online Content-Sharing Service Providers.’ While the argument could be made that definitional precision is preferable over the harmony of definitions, it is submitted that creating more overlap between definitions would have been helpful from a practical perspective, allowing for greater clarity and understanding.

It is also worth considering at this juncture how a VSP might come under the jurisdiction of a Member State once its status is established. A key provision is Article 28a, which sets out the rules governing a VSP’s jurisdiction. VSPs are considered to be established in a Member State in the same manner as under the E-Commerce Directive,[[33]](#footnote-33) with parent under-takings and groups also being included,[[34]](#footnote-34) something it is argued constitutes a broad scope. Member States are required to maintain a list of VSPs under their jurisdiction and communicate it to the Commission.[[35]](#footnote-35)

It can be observed that the definition of a VSP is nuanced and broad. It is argued that the definition is targeted enough to capture key platforms while excluding ancillary services. Overall, this approach is reflective of the Directive’s ambitious aim at ending the regulatory void that surrounded VSPs prior to 2018. It also acts as a key *lex specialis* to the E-Commerce Directive, thereby serving its purpose as a key pillar in the overall digital single market framework. With the scope and definition now set out, naturally the question arises; what kind of regulation is applied to VSPs? This essay now moves to consider these provisions.

**PART III: Minimum Standards – Light-Touch Regulation for VSPs**

A core part of the 2018 revision was bringing VSPs into the regulatory framework, as well as introducing minimum standards across all forms of audiovisual media services. In this sense, the AVMSD acts as a qualification to the safe harbour principles, requiring action while also maintaining the core liability exemption. The content obligations require VSPs to take appropriate measures to protect minors from content that may impair their development[[36]](#footnote-36) as well as the general public from incitement to hatred[[37]](#footnote-37) and criminal content such as child sexual abuse material or public provocation to commit a terrorist offence.[[38]](#footnote-38) The usage of the term ‘appropriate measures’ suggests a range of actions and, indeed, the Directive provides a number of examples as to what kind of actions are appropriate ranging from implementations of the requirements within the platform’s terms of service[[39]](#footnote-39) to flagging,[[40]](#footnote-40) parental controls[[41]](#footnote-41) and media literacy measures.[[42]](#footnote-42) As can be observed, all of these measures aim to implement ex-post regulation of content while avoiding general monitoring.

Commercial communications naturally play an important part of the audiovisual media environment and the digital world is no different. Indeed, advertising and sponsorship is arguably the driver of most VSPs, especially ‘free’ services like YouTube where users’ data is utilised to sell advertising. The Directive creates an important distinction in relation to commercial communications.[[43]](#footnote-43) It delineates between commercial communications that are carried out by the platform itself and those that are made by the platform’s users. The nature of the obligations and their impact on users is discussed in detail in Part IV below. For the VSP itself, its commercial communications must be consistent with the rules set out under Article 9 of the Directive. This means, in essence, that those commercial communications must include transparency rules for advertising, consumer protection rules around the advertising of alcohol, tobacco, medicines etc.[[44]](#footnote-44) Another key provision is that VSPs will also have to take appropriate measures to help ensure that advertising contained within content uploaded by users complies with the same rules, for instance a notification option. These requirements bring VSPs into alignment with other media providers. Again, the above mentioned ‘appropriate measures’ are required to ensure compliance. Generally, the measures taken need to be compatible with the E-Commerce Directive, including flagging systems, age-verification, content rating systems etc.[[45]](#footnote-45) There are also requirements for Member States to foster self-regulatory measures to control the advertising of the junk foods on VSPs.[[46]](#footnote-46)

One concern that arises in relation to content restrictions is the potential for Member States to further regulate above and beyond the minimum requirements. For instance, scholars have pointed to the risk of fragmentation and warned of the potential for differing interpretations to cause issues for providers.[[47]](#footnote-47) It remains to be seen how this will work in practice however, it is argued that, with co-operation under the guise of ERGA, major divergence can be avoided. Overall, it is submitted that these content requirements are proportionate, striking a key balance that respects the safe harbour principles while also building a comprehensive framework to protect audiences from harmful content. In a similar vein to other recent regulations at an EU level, the Directive uses VSPs as a co-regulatory partner, requiring them to utilise their own systems to tackle the harms that they or their uses can cause.

**PART IV: In Vlogs We Trust – Obligations on Online Content Creators, Vloggers and Influencers**

Prior to the advent of the current AVMSD, the regulatory landscape for social media influencers, vloggers and digital content creators was a vacuum, with the 2010 iteration of the AVMSD specifically excluding VSPs and other online digital media. This is in spite of the Commission’s stated intention in 2010 to create a “consistent internal market framework for information society services by modernising the legal framework for audiovisual services.”[[48]](#footnote-48) In this regulatory void, influencer marketing has emerged as a massive industry allowing advertisers to utilise user-generated content and the creators behind it to target audiences in a precise and intimate way.[[49]](#footnote-49) Indeed, some have estimated that influencer marketing has a value of nearly $15 billion in 2022, clearly indicating the critical nature of such advertising in the online space.[[50]](#footnote-50) With influencers and online content creators playing such an important role in the audiovisual media ecosystem in particular their role as the main draw to VSPs, it is worth examining what the updated regulations will mean for these users.

Prior to the 2018 revision, influencers, like the VSPs they operate on, were very much excluded from the legal framework with self- or certain co-regulatory measures being the only type of regulations applicable to them. One such example of these self-regulatory initiatives, is the often-praised Dutch Social Media Advertising Code.[[51]](#footnote-51) The Code, which was drafted in 2014, provided a mandatory framework for advertising within the social media environment. Aside from these kinds of initiatives at national level or indeed, self-regulatory measures undertaken by advertising bodies, the regulatory space was in essence undefined, with influencers operating in a legal grey area.

As noted in Part IV above, the provisions of the AVMSD apply to VSPs in a variety of ways, in particular in terms of content obligations and requirements pertaining to the transparency of commercial communications. With these provisions, influencers are, in a sense, subject to dual regulation. Under the provisions of the AVMSD, influencers with large enough followings could now be subject to a much more direct form of regulation. Reflecting the shift of the AVMS to broaden its reach and impact, the Directive now explicitly captures larger influencer channels who exercise editorial control over their content, classifying them as potential on-demand providers with all of the obligations that entails.[[52]](#footnote-52) As ERGA notes, there are a number of criteria that national regulators will need to consider when making the assessment as to whether an individual vlogger falls within the definition of an on-demand service, including editorial control, mass media appeal etc.[[53]](#footnote-53) The recommendation is that regulators should use a collaborative, soft-law approach to help ensure compliance. The author concurs with this approach and argues that in practice, all but the largest of channels could escape being classified as on-demand providers. As always however, caution about divergent approaches among regulators must be exercised.

While larger channels can be regulated directly as on-demand services, as De Cock Bruning points out, the requirements on VSPs also indirectly impact social media influencers of any size.[[54]](#footnote-54) For example, the prohibitions of hate speech and terrorist content apply indirectly. This is alongside other content moderation obligations on removing illegal content, which apply through the VSP, meaning that influencers or online content creators who make available infringing content could see it removed via flagging processes etc. Similarly, the commercial communications obligations apply indirectly. VSPs are required to, via self-regulatory means, comply not only with commercial communications obligations for their own content but also to ensure compliance by their users too.[[55]](#footnote-55) In this sense, while influencers and content creators are themselves liable for the commercial communications such as sponsorship deals within their own content, their platform is required to provide the tools and functionalities to enable them to comply.[[56]](#footnote-56) Under the 2018 Directive, Member States and their respective media regulators will be required to ensure that VSPs have at least the following provisions within their terms of service: all of the requirements set out under Article 9(1) of the AVMSD; a functionality for users who upload user-generated content to allow them to declare whether their videos contain any commercial communication to the best of their knowledge and; to establish an operational age-verification system for users on the platform in respect of content that may impair the physical, moral or mental development of minors.[[57]](#footnote-57)

Overall, both individual influencers and their management will need to be more aware of their role as audiovisual media service providers. ERGA has recommended that online content creators engage with national regulatory authorities, who in turn can adopt a more collaborative approach to ensuring compliance with their new obligations.[[58]](#footnote-58) As regards the enforcement of all of these requirements, the Directive entrusts the monitoring and assessment of these measures to the national regulatory authorities of the Member States.[[59]](#footnote-59)

While influencers will be subject to these restrictions under the regulatory auspices of their VSPs relevant national authorities, they will also come under the control of their respective platform's terms and conditions/services. As has been noted above, VSPs will be required to incorporate many of the Directive’s obligations into their terms of service. This, it is submitted, creates an odd situation where users will be subject to legal obligations via a private system of enforcement i.e., the platform’s internal policies. It has been noted by some that, given the large volume of user-generated content that is uploaded every day, VSPs will likely need to make use of AI systems in order to comply more effectively with the AVMS.[[60]](#footnote-60) While this solves the issue of problematic content, it raises a variety of other issues that arise from the generally lacklustre nature of AI moderation.[[61]](#footnote-61) There are also concerns about the over-policing of content by AI systems and research has consistently pointed to the issues that come from this, in particular in relation to free expression.[[62]](#footnote-62) Furthermore, such AI moderation can actually remove content that is useful or informative, for example with regards to breast cancer information videos which were categorised as harmful for children by automated moderation systems.[[63]](#footnote-63) De Cock Buning has pointed to the dangers of AI and the potential for a chilling effect on influencers.[[64]](#footnote-64) With platforms and their moderation tools becoming the *de facto* enforcers, this places influencers at the risk of having their livelihoods adjudicated upon by automated systems that are subject only to the platform’s terms of service with little in the way of oversight nor recourse to alternative dispute mechanisms. Thus, it is absolutely vital that Member States and their regulatory authorities provide for robust systems and processes to settle disputes between online content creators and their platforms. In this regard, policy-makers could potentially look to the provisions in the 2019 Copyright Directive[[65]](#footnote-65) or the proposals in the Digital Services Act[[66]](#footnote-66) (DSA) to create a comprehensive system of dispute settlement mechanisms covering all manner of disputes between platforms and their users.

It is clear that the regulatory landscape for influencers, vloggers and other online content creators has changed drastically as a result of the AVMSD which now has the potential to doubly regulate creators. The new obligations on VSPs provide indirect regulatory control over platform users in respect of the content they create, while at the same time, those larger creators who fall within the conception of on-demand services could be subject to a host of new requirements ranging from identification of providers to promotion of European works provisions.[[67]](#footnote-67) Overall, it is submitted that for content creators, these new obligations will mostly be provided via their platforms although larger channels may find themselves as the implementers of the new requirements. The author posits that these new regulations are appropriate given the power these new media providers have over their followers and reflects the AVMSD’s ambitious attempt to define a new approach for media regulation in the digital age.

**Part V: Critical Analysis and Conclusion**

This article has aimed to set out and analyse the background to the AVMSD’s regulation of VSPs, the scope and substantive obligations that it places on them as well as the impact that the Directive will have on the creators who make their livelihoods on said platforms. What emerges from this analysis is that the AVMSD represents a sea change in the regulation of audiovisual media services, in particular in relation to VSPs. The Directive is a key pillar in the digital single market strategy and provides a robust regulatory framework for digital media content. Without doubt, given the previous uncertainty, the revised AVMSD is a welcome change to the media regulation of VSPs, firmly and concretely bringing them within the legal framework. The material requirements are also, arguably, to be welcomed. They help to safeguard users while balancing the goal of maintaining safe harbour principles in a way that is proportionate and that compliments the other key pieces of legislation that make up the digital single market strategy. For creators, the more coherent framework helps to bring legal certainty although issues remain in relation to AI moderation. Not all assessments of the Directive have been positive. Indeed, scholars have repeatedly voiced concerns about the potential for significant divergence between states in the practical implementation of certain measures.[[68]](#footnote-68) This is, it is submitted, the greatest issue that could arise as the effects of the Directive play out. The AVMSD has also been criticised as incoherent and having the potential to damage the audiovisual media industry by over-regulating, particularly on smaller platforms.[[69]](#footnote-69)

On balance, the author is of the view that the Directive does achieve its goals of safeguarding audiences with a tailored framework for VSPs. While issues do exist, these mostly come down to policy choices by Member States which can be corrected and aligned. Furthermore, by setting a baseline for content standards, the AVMSD contributes to efforts to create a safer and rights-respecting online ecosystem where both users and creators are protected.

Much will depend on the practical implementation of the AVMSD, which is still yet to be fully transposed by all Member States. In particular, the Irish transposition and practical enforcement will be of great interest due to the presence of a large number of VSPs, including YouTube, Facebook, TikTok and others.[[70]](#footnote-70) Concerns are present in this regard, in particular as to whether Ireland has the regulatory capacity to handle such large and powerful platforms given the small size of the newly proposed regulator,[[71]](#footnote-71) An Coimisiún na Meán (Media Commission). From a European perspective, it would be desirable to avoid a situation similar to that in the field of data protection, where the Irish Data Protection Commission has been repeatedly criticised for its lacklustre regulation of some of the world’s largest tech companies.[[72]](#footnote-72) Perhaps, it is submitted, the Commission should be given a greater role in the regulatory framework in order to prevent the Irish regulator from becoming overwhelmed. A potential model for such a scenario could be found in the (soon to be adopted) DSA proposal.[[73]](#footnote-73) Under that proposal, the Commission would have responsibility for regulating very-large online platforms, in co-operation with the relevant Member State.[[74]](#footnote-74) This, it is argued, may represent a more robust policy option for VSP regulation, as it strengthens the regulatory enforcement capacity in order to ensure the most effective practical implementation of the AVMSD’s safeguards.

In conclusion, the AVMSD marks a clear turning point in the regulation of audiovisual media service in the EU. By bringing VSPs within the regulatory framework, the Directive makes great strides in achieving its goal of a robust and comprehensive regulatory regime for audiovisual media services in Europe. Through the introduction of content obligations and safeguards for users, the Directive now ensures that VSPs have legal clarity and can become regulated players in the market on par with other providers. In a time of regulatory flux, the AVMSD acts as the best way to protect and promote European media in the digital age.

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