SUBGROUP 1

2022

CONSISTENT IMPLEMENTATION AND ENFORCEMENT OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE FRAMEWORK

DELIVERABLE 1

THE IMPLEMENTATION(S) OF ARTICLE 28B AVMSD: NATIONAL TRANSPOSITION APPROACHES AND MEASURES BY VIDEO-SHARING PLATFORMS

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1. Introduction and context

1.1. AVMS Directive 2018/1808/EU and the video-sharing platforms

The AVMS Directive 2018/1808/EU[1] ("the Directive" or "the AVMSD" below) was adopted on 14 November 2018 and published in the EU Official Journal on 28 November 2018. Member States had 21 months, ending on 19 September 2020, to transpose it into their national legislation.

Before investigating how national regulatory authorities (insofar, NRAs) are dealing with the revised framework and the competences they gained on video-sharing platforms (from now on "VSPs") it is worth spending a few words on the scope and extent of the provisions of Article 28b.

Article 28b, para 3, obliges all Member States to ensure that VSP providers under their jurisdiction apply appropriate measures to protect minors and the general public from certain types of harmful and illegal content. These measures shall consist of, as appropriate:

> *"a) including and applying in the terms and conditions of the video-sharing platform services the requirements referred to in paragraph 1;*
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> *b) including and applying in the terms and conditions of the video-sharing platform services the requirements set out in Article 9(1) for audiovisual commercial communications that are not marketed, sold or arranged by the video-sharing platform providers;*
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> *c) having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know;*
>
> *d) establishing and operating transparent and user-friendly mechanisms for users of a video-sharing platform to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 provided on its platform;*
>
> *e) establishing and operating systems through which video-sharing platform providers explain to users of video- sharing platforms what effect has been given to the reporting and flagging referred to in point (d);*

[1] 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 (the Audiovisual Media Services Directive).

f) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;

g) establishing and operating easy-to-use systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;

h) providing for parental control systems that are under the control of the end-user with respect to content which may impair the physical, mental or moral development of minors;

i) establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the video-sharing platform provider in relation to the implementation of the measures referred to in points (d) to (h);

j) providing for effective media literacy measures and tools and raising users' awareness of those measures and tools."

Rules about how the measures should be implemented are contained in the first part of the provision:

"For the purposes of paragraphs 1 and 2, the appropriate measures shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest.

Member States shall ensure that all video-sharing platform providers under their jurisdiction apply such measures. Those measures shall be practicable and proportionate, taking into account the size of the video-sharing platform service and the nature of the service that is provided. Those measures shall not lead to any ex-ante control measures or upload-filtering of content which do not comply with Article 15 of Directive 2000/31/EC. For the purposes of the protection of minors, provided for in point (a) of paragraph 1 of this Article, the most harmful content shall be subject to the strictest access control measures."

The first aspect to bear in mind when approaching Article 28b is that it introduces an obligation resting with Member States, rather than VSPs providers: the Directive does not impose automatic obligations for the VSPs to adopt any measure (nor could it, being a non-self-executive Directive and not a Regulation) but, instead, it requires Member States to create a legal environment fulfilling the purposes of Article 28b, by ensuring that VSPs under their jurisdiction take appropriate measures and, by extension, that NRAs assess the appropriateness of such measures. VSPs are therefore responsible for complying with Article 28b only after it has been transposed into the national legislation of their country of origin, and not with the AVMSD provisions directly.

Moreover, while every Member State must ensure that the objectives of Article 28b are met in their approach to transposition, it is worth noting that the first two parts of Article 28b, para 3, create a "framework" for determining the minimum standard of protection that must be expected from VSPs. A range of factors need to be considered in determining whether these minimum standards are being met by VSPs, including "*the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest*" and also whether it is practical and proportionate for the VSP provider to take these measures.

Furthermore, the content of Article 28b, para 6, gives Member States a general power to require VSPs to adopt stricter or more detailed measures than those reported in para 3. These stricter or more detailed measures, however, must fall within the scope of the Directive while, obviously, being also compliant with the rest of the European Union legal framework as well as national laws, and consistent with the prohibition on filtering and ex-ante monitoring.

1.2. A glance back: the 2021 report

Ensuring a smooth and coherent implementation of the revised AVMSD has been a key topic in ERGA's work program since its adoption in 2018, constituting one of its core commitments, as clearly expressed in the Statement of purpose[2]. The 2021 Subgroup 1, which laid the groundwork for the 2022 Work Programme, was established with the aim of strengthening cooperation and supporting regulators in their new roles and tasks deriving from the revised AVMSD framework, with particular regard to its newer or most complex aspects, including the provisions on VSPs.

The 2021 Report[3] produced by the Subgroup 1 explored critical issues relating to the interpretation of Article 28b and to provide guidance on best practice in the implementation and enforcement of Article 28b. It explored how to interpret Article 28b and the Article 28b.3 measures at a high level, how regulators might assess the appropriateness of measures adopted by VSPs and how this is likely to be impacted by the approach to transposition taken within a jurisdiction. It also explored the different approaches to providing users of VSPs with out-of-court redress systems that are evolving at EU level and focused on four different possible approaches to the transposition of Article 28b from a regulator's perspective, how regulation is

[2] https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-02_Statement-of-Purpose-adopted.pdf "ERGA promotes common regulatory approaches and effective cooperation between its members as well as with stakeholders. It also facilitates the development of an integrated 'regulatory culture', where knowledge, best practices and experiences are judiciously disseminated to inspire NRAs in the achievement of their duties at national level".

[3] https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Article-28b-1.pdf
« Guidance and recommendations concerning implementation of Article 28b »

likely to be enforced against VSPs in these approaches as well as how they can respond to the complexities associated with regulating platforms.

A consistent topic emerging from the 2021 Report was that the regulation of platforms under Article 28b was not going to be straightforward: while, at a surface level, the text of Article 28b is quite straightforward, a deeper analysis raised a range of practical issues that regulators have to consider when regulating VSPs - particularly when assessing the appropriateness of the measures they adopt. Unsurprisingly, this year's report confirms this, as it will be shown in the next pages.

Another theme that has emerged from this report is the benefit of cooperation amongst NRAs in regulating VSPs. This is likely to help at both the conceptual level (e.g., in the development of processes to regulate VSPs) as well as at the practical level (e.g., assessing how VSPs with pan-European audiences are complying with national rules transposing the Article 28b measures).

A further matter that has emerged from the 2021 report is that the roles that regulators play can vary within different jurisdictions, due to the differences between countries with civil law tradition, where the regulator can be expected to play a strong enforcement role, and countries with common law tradition, where traditionally the regulators tend to focus on minimizing the likelihood of non-compliance by services in the first instance.

1.3 Looking forward: the 2022 report

As mentioned in the previous paragraph, the ERGA 2021 Subgroup laid the foundation for this year's new efforts and in-depth focus on the most complex aspects of the revised Directive.

Accordingly, ERGA's Work Programme for 2022 states that: "*Building on the work and the guidance documents produced within Subgroup 1 in 2021, notably as regards new obligations for audiovisual media service providers and video-sharing platforms […] ERGA will provide analysis and develop recommendations, in particular on the following topics: monitoring compliance by video-sharing platforms with the measures to be adopted under Article 28b AVMSD and assessment of the effectiveness of such measures; […]*".

The task of "*Monitoring compliance by video-sharing platforms with the measures to be adopted under Article 28b AVMSD and assessment of the effectiveness of such measures*" will apply the guidance produced by the Subgroup in 2021. As noted in the Terms of Reference[4] for this year's work, the implementation of Article 28b may prove to be complex because "*not only may each EU Member State have transposed the obligations in a different manner, but also because video-sharing platforms (VSPs) may decide to implement these obligations differently. There will therefore likely be more than "one right answer" to determining*

[4] https://erga-online.eu/wp-content/uploads/2022/03/SG1_ToR-2022-_-adopted.pdf

whether a measure taken by a VSP according to Article 28b is appropriate. Consequently, NRAs may require a certain margin of discretion in this matter, for example based on the nature of the VSP and its past conduct. Measures adopted by one platform may be more effective than measures adopted by another platform and differences between the technical features made available by platforms may require different approaches". For these reasons, the Subgroup decided to include in the VSPs-related workstream, also the key differences in national approaches to implement the VSP provisions (Chapter 2), the efforts related to fostering self/co-regulation (Chapter 4.1) and the role of cooperation between NRAs (Chapter 4.2).

The Subgroup 1 carried out the VSPs workstream activities by:

- Three Subgroup's meeting and many drafters' meetings;
- A survey carried out during Spring 2022;
- A panel of the workshop of 4 October, a summary of which is reported under Chapter 4.

While every attempt was made to ensure the data and information gathered for the present report are timely and accurate, most of the present work relies upon the information given from SG1's Members and is consequently updated to late Summer 2022.

The survey submitted to SG1 Members aimed to highlight the state of play of national provisions adopted in the transposition of Article 28b of the AVMSD or, in case national transposition has not occurred yet, any draft proposals currently under consideration. The following report is based on the answers provided by the responding national regulatory authorities.

31 NRAs submitted their answers: Austria (RTR-/Kommaustria), Belgium - French-speaking Community (CSA), Belgium - Flemish Community (VRM), Belgium – German-speaking Community (Medienrat), Bulgaria (CEM), Croatia (AEM), Cyprus (CRTA), Estonia (TTJA), Finland (TRAFICOM), France (ARCOM), Germany (DLM), Greece (NCRTV), Hungary (NMHH), Ireland (BAI)[5], Iceland (FJOLMIDLANEFND), Italy (AGCOM), Latvia (NEPLP), Lithuania (RTK), Luxembourg (ALIA), Republic of North Macedonia (AVMU), Malta (BA), Norway (MEDIETILSYNET), Netherlands (CvdM), Poland (KRRIT), Portugal (ERC), Romania (NAC), Slovakia (CMS), Slovenia (AKOS), Spain (CNMC), Sweden (SPBA), Switzerland (UFCOM).

The purpose of the questionnaire was to understand the main issues faced by Member States and the relevant national regulatory authorities in charge of overseeing the VSPs, and to map the current practices and cooperation efforts relating to their regulation. It reflects the state of play as in September 2022, with the still ongoing transposition process of the AVMSD in a few countries.

Switzerland reported that it is not subject to the obligation to implement Article 28b of the AVMSD. In fact, VSPs are not regulated in Switzerland, although the subject is currently being discussed at the political level. Norway answered that the national transposition of the revised AVMSD has not occurred yet, due to the

[5] Please note that the answers from BAI – IE, since Ireland has not implemented yet the AVMSD, are based on the draft Online Safety and Media Regulation (OSMR) Bill, currently under discussion.

fact that the Directive is not implemented in the EEA Agreement yet. However, a consultation paper was published by the Ministry of Culture and Equality on 16 September 2022, with a deadline for responses by 16 December 2022[6].

The questions submitted to the SG1 Members were the following:

1. *Please indicate the national provisions adopted in transposition of Article 28b of the AVMSD. If your State has not implemented it yet, please describe any draft proposals currently under consideration in your Member State concerning the appropriateness of measures under Art. 28 b.*

2. *Did your NRA adopt (or is it about to adopt) any Regulation pursuant to your national law transposing Article 28b?*

3. *In case your national law transposing Article 28b does not exactly reproduce the text of the Directive, could you please highlight the most significant differences?*

4. *Have you identified any VSP under your jurisdiction? Please specify the name(s) of the VSP service or services and of the relevant provider established in your country that you have identified accordingly.*

5. *What kind of measures have the VSPs under your jurisdiction adopted pursuant to your national law transposing Article 28b? In particular:*

    - *Which measures to protect minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development?*

    - *Which measures to protect the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter and/or the dissemination of which constitutes an activity which is a criminal offence under Union law?*

    - *Which measures to comply with the requirements set out in Article 9(1) with respect to audiovisual commercial communications that are not marketed, sold or arranged by those video-sharing platform providers?*

    Please elaborate.

6. *What kind of tools have the VSPs under your jurisdiction adopted so as to clearly inform users where programmes and user-generated videos contain audiovisual commercial communications?*

[6] https://www.regjeringen.no/no/dokumenter/horing-gjennomforing-av-endringsdirektivet-til-amt-direktivet-mv/id2927696/?expand=horingsnotater

7. *Have you already conducted an assessment /evaluation of such measures? If yes, could you please explain such a procedure and its outcomes? Have you identified any critical aspects you would like to shed light on?*

8. *In your experience so far, did you to have to cooperate with another Members State regarding a VSP? Please share any useful detail.*

9. *Have the VSP(s) under your jurisdiction been involved in co-/self-regulatory initiatives in regard to any matters related to Article 28b? If yes, please share any useful detail.*

2. VSPs across Member States

2.1 Article 28b and its national transpositions

Out of the 31 respondents, 25 answered that Article 28b was duly transposed into their national legislations.

Most of the Member States which have transposed the Directive reported that the adopted texts were mostly consistent with the Directive wording. In particular, respondents declared that their national legislation generally replicates the provisions of article 28b, except Estonia that did not transpose provisions regarding media literacy related measures.

In four cases (DE, EE, LT, PL) NRAs have also adopted further regulations on this topic, while nine NRAs (CSA, CRTA, ARCOM, NCRTV, AGCOM, NEPLP, ERC, NAC, AKOS) declared that they plan to do a supplementary VSPs regulation settlement by means of secondary rules.

In only one case (NL) transposition has been realized through the introduction of an obligation for VSP providers to adopt a code of conduct that prescribes measures as referred to in article 28b, paragraph 3, without replicating the Directive's wording in national legislation.

Among responding NRAs, only two non-EU respondents (AVMU, UFCOM) declared that the alignment with the AVMSD has not been initiated yet, while in four countries (ISL, RO, IE, NO) a draft proposal is currently under consideration.

In particular, Iceland and Romania are going to transpose the Directive mainly in accordance with the wording of the Directive, while Norway, according to the draft proposal currently on public consultation, should introduce specifications related to commercial communications to VSPs, reflecting the higher degree of protection for minors already applying to other Norwegian AVMS providers, as well as specific provisions about gambling and alcoholic beverages (a total ban).

Ireland, according to the draft Decree, will extend to online media, and not just VSPs, the national legislation transposing the Directive's provisions and address wider harms as they relate to the framework, setting out categories of harmful online content, a definition of inappropriate content and a definition of audiovisual commercial communications. The NRA, accordingly, should be drafting binding codes that set out how VSPs must take measures to address these kinds of content. National legislation will also give the NRA powers to implement Article 28b and apply discretion to decide the most appropriate way to accomplish this.

2.2 Highlighting the most significant differences among national implementations and Article 28b

With regard to paragraph 1 of article 28b, some Member States adopted stricter rules for providers, according to their national legislation, and two of them (IT, SE) set an age for minor classification as <12 years. Moreover, some legislations extend the general provisions concerning protection of the general public mentioning violations of human rights such as discrimination about thinking, belief, gender, and threats for democracy (AT, SE, BE, ES) and insert cross law references to national criminal law and human rights protection provisions. In particular, French speaking Belgian community protection is extended to a significant wide range of violations as highlighted by CSA.[7]In Germany, the Interstate Media Treaty and the Interstate Treaty on the Protection of Minors do not contain anything in addition or less than Art. 28b AVMSD. However, Art. 24a of the Federal Law on the Protection of Minors foresees some additional measures ensuring better information of minors about counselling facilities as well as more detailed requirements as regards default settings.

Transposition of paragraph 2 of article 28b in respondent Member States is adequately consistent with the provisions of the Directive; depending on the national approach, some Member States gave preference to cooperation in the form of self-regulatory acts based on the experience gained at national level (PL, NL),

- [7] Measures must not only be taken against contents containing incitement to violence or hatred but also against contents containing *incitement to discrimination* (for very various reasons) and against contents *undermining the respect of equality between men and women*.
- Measures must not only be taken against contents that consist in provocation to commit a terrorist infraction, in child pornography, or in racism and xenophobia, but also against contents that are contrary to the laws, decrees, regulations or to the general interest, that are violating human dignity, that are promoting a way of thinking, a belief or an opinion consistent of a threat for democracy, fundamental rights and freedoms guaranteed by the Constitution or the European Convention on Human Rights, or aiming to abuse the credulity of the public, or that are aiming at the denial, minimisation, justification or approval of the genocide committed by the German Nazi regime during World War II or of any other form of genocide.

while other respondents adopted stricter or more detailed provisions in regard to commercial communications (SE, ES) which reflects the higher degree of protection for minors already established by national legislator, as well as specific provisions about gambling and alcoholic beverages.

In Bulgaria, the NRA has the power to modify pre-formulated standard terms published on the Internet site of the video-sharing platform service provider, ensuring easy, direct and quick access thereto.

Another aspect emerging from the survey is the adoption of data collecting by national authorities regarding complaints, alternative dispute resolution, content flagged by users, parental control and age verification by providers. In particular, some Member States (GR, CY, IE) have set in their legislation detailed control procedures on this issue.

With regard to jurisdiction, in Italy certain provisions of Article 28b, paragraph 3, apply also in cases where an Italian company is controlled by or is part of the same group of a VSPs' provider that operates in another Member State.

The establishment of a VSP providers register is mostly left to regulation although some Member States detailed the procedures in the transposition act (HU, SE).

3. Monitoring and impact

3.1. VSPs established/identified

A list of the VSPs registered or at least identified can be found under Annex 1 to the present report.

Among the respondents, eleven NRAs (AT, BG, CY, DE, ES, FR, HU, LU, PL, PT, SE) claimed they have either registered or identified VSPs services provided by providers that are established in their countries. In some cases, the number of services is limited to one or two: Amateurseite (Commatis GmbH) and Sexmagazin (Online Magazin GmbH) in Austria, Vbox7 (Netinfo/Nova Broadcasting Group) in Bulgaria, Dailymotion in France, SwebbTube (Svensk Webbtelevision AB) in Sweden, Meo Kanal and Sapo Videos (MEO – Serviços de Comunicação e Multimédia, S.A.) in Portugal. The identification of VSPs is ongoing therefore the number of VSPs identified and registered in the different Member States could be evolving in the future.

In other Member States, a higher number of services is highlighted, though such services are most of the times operated by the same provider. In Poland, eight providers, providing a total of thirteen services, already submitted applications to be registered as VSPs by KRRiT.

In Luxembourg, ALIA, together with the Department of Media, Connectivity and Digital Policy (SMC), has identified eleven VSPs under its jurisdiction, all of which are operated by the JWS Americals S.à r.l - JWS International S.à r.l.; in Hungary the NMHH registered six services and in Germany the DLM reported three

services, all operated by as many different providers. In Cyprus, Stripchat (Technius Ltd), xHamster (Hammy Media Ltd) and Fabhouse (Tecom Ltd) have officially submitted to CRTA the required Notification form. It should be noted though that in their Notification form, Virtual Taboo, questions that it constitutes a VSP. All Notification forms are being examined by CRTA. Moreover, other services have already been identified. YouPorn, PornHub and many other services, not explicitly mentioned in the answer to the survey, are reported to be operated by Mindgeek Group - MG Freesites Ltd. The latter notified CRTA of their specific services within the jurisdiction of the Republic before the enactment of the national Law, with a confidential letter. CRTA has repeatedly requested verbally and in writing MG Freesites Ltd to submit the Notification form and to submit their proposals regarding the measures they intend to take, in order to comply with the national Law.

It is worth noting that answers are influenced by the different status of the AVMS Directive transposition into national legislations, and/or by the lack of official assessments. Two NRAs (IE, IS) pointed out that despite more or less straightforward evidence, it was not possible to report on any VSP service or provider. BAI underlines that services such as Youtube and Tiktok would appear to be classic cases of VSPs established in Ireland, satisfying the definition wholly on the principal purpose ground. Services like Facebook, Instagram and Twitter that make available large quantities of publicly available user-generated audiovisual content mixed with other kinds of non-audiovisual content would appear to satisfy the definition on essential functionality grounds.A final determination will be made after transposing legislation is passed and operationalization by the new Media Commission (which, according to the draft law, should replace BAI).

CNCM (Spain) has received two different requests of information from KRRIT (Poland) and ARCOM (France) regarding two different entities, that could, meet the criteria for being a video-sharing platform provider and are offering pornographic content, without the appropriate measures to avoid that minors could access to such content. In both cases, CNMC opened an investigation that finalised by CNMC Board Decision[8]. In those cases, CNMC using the criteria set in the AVMSD 2018 declared that both companies could be defined of being a VSP. However, CNMC could not analysed in depth the appropriate of the measures adopted by those entities because, at that time, was not empowered to conduct any official procedure against VSP providers. Thus, CNMC referred its Decision and both requests of collaboration (KRRIT and ARCOM) to the Ministry in charge of monitoring the E-commerce legislation to adopt the measures that may consider adequate.

In Iceland the IMC has identified one possible VSP called Uppkast which is provided by the company Uppkast ehf, but confirmed identification depends on the implementation of the AVMSD into national law.

[8] Could be consulted in Spanish here: https://www.cnmc.es/expedientes/ifpadtsa14722 and https://www.cnmc.es/expedientes/ifpadtsa26622

Interestingly, the CVDM (the Netherlands) observed that one specific provider showed many characteristics of a VSP provider, but on closer inspection it turned out to be an on-demand media service provider. This is in view of the editorial responsibility it takes in filtering and allowing uploaded videos to its platform.

3.2. Measures taken by VSPs

3.2.1. Measures taken to protect minors and the general public from inappropriate content

As concerns the measures adopted by VSPs to comply with the relevant national legislation, within the eleven countries reporting identified or registered services, the picture arising from the survey appears to be still rather fluid. While some respondents emphasized that VSPs' providers already implement certain technical tools, others pointed out that talks between NRAs and providers, aiming at establishing measures for VSP services, are still in progress.

In some cases, a general reference was made to measures enshrined in the Terms and Conditions adopted by VSPs. According to CEM (Bulgaria) Vbox7 has elaborated on their terms and making them comply with the revised AVMSD. In Cyprus, Stripchat submitted to CRTA the document titled "Content Moderation and Account Opening Procedure" which sets out the steps that Stripchat takes to mitigate the risks as well as to monitor the content uploaded on its site. This document will be examined by CRTA.

The main initiatives taken by providers focus on the protection of minors. Age verification systems, through the implementation of banners or dedicated pages, asking users to confirm that they are at least 18 years old, have been mentioned by some NRAs (CY, LU, HU). In addition, in Hungary some service providers do not recommend at website for those under the age of 14. If an inappropriately classified content is uploaded on the website, and the service provider is notified, it might delete the content or provide a warning that the content is only suitable for adults.

More technical tools to restrict or impede the access of minors to harmful content have also been reported. In Cyprus, Mindgeek informed CRTA that they included a tag of RTA (Restricted To Adults) in its pages at the bottom of the screen informing users that the content is inappropriate for children and minors and thus can be blocked by parents, while Hammy Media Ltd informed CRTA that they are considering several options, such as face recognition through age estimation, authorization via bank card/credit card, creation of a digital ID. It is emphasized that during the meetings, all Cypriot VSP providers raised their high concerns regarding the competition from similar VSPs that are not regulated under EU laws, especially VSPs in the USA which are not regulated at all, and their concerns about the high cost of taking age assurance measures. In Hungary, contents which address users over 18 years old get a metatag with the help of which filtering programmes can identify the video.

Another kind of restriction consists of verifications on the uploader side. In Cyprus, since December 2020, Mindgeek verifies the age for those seeking to upload content and moderators check the uploaded content and since October 2021, within Xhamster (provided by Hammy Media Ltd), users who upload content need to show their identity. In Hungary, a registration is required to upload videos, and there are service providers who require contracting. Moreover, prior to the uploading, the user has to declare in which category the content belongs to, including whether the content is aimed at adults (the age of 18 years), and if it contains commercial communications.

Among other means introduced to protect minors, educational initiatives to educate parents (i.e., Trust and Safety) were mentioned by Cypriot Mindgeek especially as regards the PornHub service. More in general, in Luxemburg providers claim to comply with several industry child protection standards (Internet Content Rating Association and Association of Sites Advocating Child Protection)

As far as measures to protect the general public from harmful content are concerned, respondents pointed out that in some cases VSPs feature reporting system that allow users to highlight the presence of inappropriate content (FR, HU, PT). In France, on Dailymotion, there is a video reporting system (user-generated content or programs) allowing users (logged in or not) to report, among other reasons, sexually explicit content, child abuse, terrorism, violent, shocking, or dangerous content, and hateful content. In Hungary, service providers prohibit the uploading of such contents, or upon notification they remove them. Beyond that, service providers may delete the contents of those who repeatedly upload illegal contents. Their registration can also be revoked or suspended.

In Portugal, MEO Kanal users (subscribing MEO ADSL or Fiber services) can report whenever they consider that contents violate any legal provision or the Terms of use. MEO undertakes to make the best efforts to resolve the reported situation as quickly as possible. It also has the right to remove from the service, without prior notice to the user, any content that proves to be offensive to good customs, illegal, malicious, pornographic, violent, discriminatory, offensive, which may violate the privacy of third parties or any content for which the user does not prove that he/she is the owner of the respective copyright and related rights. MEO has also the right to suspend or to cancel, immediately and without prior notice, the users' access to the service's website, as well as the viewing of such contents through the MEO Kanal application if obligations contained in the terms of use are not respected. MEO may also remove, without any prior notice to the user, content made available through the service whose illegality is manifest or whenever requested by a competent entity under legal terms.

As regards measures to comply with requirements in respect to audiovisual commercial communications, no particular initiatives have been mentioned. In some cases, though, respondents reported some obligations and requirements set out in the terms and conditions of the services. In Hungary, within the General Contractual Conditions, the obligations pertaining to commercial communications should be defined, and service providers should also provide information on their application. Prior to the uploading of a video, users have to declare whether the given video contains commercial communication, and it

should be categorized accordingly. Apart from this, service providers may set out content, which cannot be uploaded on the site, and may also prohibit the uploading of illegal contents.

In Portugal, in the case of prior and express agreement by MEO, for the advertising exploitation of SAPO Videos, users undertake to respect the applicable legislation on audiovisual commercial communications (they do not use subliminal techniques, they do not encourage behaviors that are harmful to health or safety, do not concern cigarettes and other tobacco products, etc.).

3.2.2. Tools adopted to clearly inform users about audiovisual commercial communications

No particular tools to clearly inform users whether programmes and user-generated videos contain audiovisual commercial communications, have been adopted so far. In France, ARCOM reported some initiatives undertaken by Dailymotion to identify commercial communications, in particular: content produced by Dailymotion in partnership with advertisers show the advertising nature derived from the partnered content and advertisements (e.g. in pre-roll videos) are identified by the mention "PUB" (“AD”). Moreover, it is not possible for a Dailymotion user to pay to increase the visibility of a video (sponsored content).

3.3. Assessment /evaluation of the measures (question #7)

Given the ongoing process of control and verification of the VSP services, no assessments or evaluations of the measures adopted have been conducted so far, or they are in an embryonic state. In Bulgaria, CEM declared that it works in constant collaboration with the VSP, improving on the standards of the content of the platform and their Terms and Conditions, showing excellent effectiveness with co-regulation. In Hungary, NMHH underlines that in 2021, it received a complaint about a VSP service registered at NMHH for the unlimited access to pornographic content. Yet, NMHH did not launch a procedure, as the service provider removed the contested content as soon as he it became aware of it.

4. Cooperation(s) with VSPs or with other Member States

Question no. 8 of the questionnaire was handed out in order to collect information about existing collaboration experiences or cooperative arrangements among NRAs of different Member States regarding VSPs and related matters under the revised AVSMD. The NRAs were asked to provide detail of cooperation requests to and from other relevant national regulatory authorities regarding specific cases of concern in which video-sharing platform providers under a Member State’s jurisdiction offer content and services in

another Member State's territory, reflecting the mainly cross-border nature of the services offered by the VSPs themselves.

Question no. 9 focused on the development of self- or co-regulatory mechanisms, codes, schemes on the VSP providers' side, relied upon to a much larger extent in the 2018 Directive (as stipulated by Article 4a (3) and Article 28b), and on the role of NRAs in facilitating and contributing to their establishment, and in assessing whether such voluntary measures are sufficiently effective.

4.1 Initiatives on self/co-regulation

Of the 31 NRAs that responded to the survey, 23 (AT, BE– CSA, BE- VRM, BG, CNMC, EE, EL, ES, FI, HR, IS, IT, LT, LV, MK, MT, NL, PL, PT, RO, SE, SI, SK) replied to question 9 stating that they have no information of ongoing co-regulatory initiatives on any matters related to Article 28b. In most cases, the reason is that either there are no VSP providers under the NRA's national jurisdiction (BE- CSA, BE- VRM, EE, EL, ES, FI, LT, MT, NL, SI, SK) or there has not yet been an official assessment of VSPs under their national jurisdiction (IS, IT, LV, MK, RO). In three cases (PL, PT, SE), the NRAs have identified VSPs under their national regulations; however, the VSP providers have not put in place any self- or co-regulatory mechanisms yet.

On three occasions, (FR, IE, LU), however, some VSP providers appear to have subscribed to already existing self- and co- regulatory bodies.

In Ireland, Google joined the Advertising Standards Authority of Ireland (ASAI) in 2020. In Luxembourg, a few video-sharing platform providers are members of the Association of Sites Advocating Child Protection (ASACP), active in the field of the protection of minors.

In France, the only VSP under the French jurisdiction identified so far, Dailymotion, operated by Dailymotion SA, is a member of the online hate observatory, chaired by ARCOM, which brings together operators of online platforms, associations, administrations, and researchers. Dailymotion is also one of the potential future signatories of the "Studer Charter", which aims to regulate through voluntary commitments the commercial exploitation of minors' images on online platforms. Furthermore, Dailymotion participates in cooperation mechanisms in the field of e-advertising as a member of the Syndicat des Régies Internet (Federation of Internet Advertising Agencies) and of the IAB. It has been granted the Digital Ad Trust certification since 2017, and the Trustworthy Accountability Group (TAG) certification since 2020.

In some cases, an AVMD-specific co-regulatory scheme is foreseen (CY, HU). In Cyprus CRTA has discussed in detail with the identified VSPs the co-/self-regulatory initiatives that they are required to put in place concerning matters related to Article 28b, especially the protection of minors. Meanwhile, at the beginning of June 2022, the following additional Notification forms were electronically submitted to CRTA: xHamster (Hammy Media Ltd), Fabhouse (Tecom Ltd) and Virtual Taboo (Camon Trading Ltd). All Notification forms are currently being examined by CRTA. In Hungary, there are 6 VSP services under the national jurisdiction,

as reflected by the NRA's Register, NMHH, that has consulted the providers regarding the provisions pertaining to their services. As a result of the consultation with the VSPs, NMHH Work Program 2022 envisages that the NRA will be involved in supporting the establishment of a VSP self-regulation mechanism within a dedicated co-regulatory framework.

In conclusion, in most Member States reliance on self-regulatory codes of conduct in this regard is not clearly identified at this stage.

4.2 Cases of cooperation among NRAs

One of the aspects on which the 2021 Report focused on, was the importance of cooperation among Member States, considering the cooperation amongst NRAs "a benefit" when regulating VSPs, stressing its relevance to help "*at both the conceptual level (e.g., in the development of processes to regulate VSPs) as well as at the practical level (e.g., assessing how VSPs with pan-European audiences are complying with national rules transposing Article 28b measures)".* This prediction was confirmed a year later by the answers given to the survey, from which emerged the substantial relevance of such cooperation in many cases.

Germany reported having had some cases of cooperation, in particular with Cyprus, since the biggest adult platforms are located there. DLM used the ERGA Memorandum of Understanding and consequently the procedures from Art. 3 of the E-Commerce-Directive as foreseen by Art. 28a, para 5. On that basis, Germany issued decision against some platforms that have been appealed before Courts and have in the meantime been confirmed in two instances, by the Administrative Court of Düsseldorf and the Higher Administrative Court of Düsseldorf.

Hungary reported to have handled the complaints addressed to the Hotline operated by its Authority NMHH by getting directly in touch with the representatives of the service providers (e.g., YouTube). If the violations related to video-sharing platforms content are serious, the NRA notifies the national law-enforcement competent authority (e.g., the police) that is in charge of investigation, detection and prosecution of criminal offences.

In one case (PT), there have been cooperation initiatives only in terms of exchanging best practices with other NRAs.

Six NRAs (BG, CY, ES, IE, LT, LU) have cooperated with other Member States, in most cases submitting or answering enquiries related to information asymmetry over providers of video-sharing platforms and, in general, the difficulty in accessing VSPs' data and monitoring their activity as the main challenges. AT reported some informal interlocution with DE.

In Ireland BAI - pending the appointment of a formal regulator for VSPs in Ireland - has received a few queries from NRAs regarding VSPs, including: (i) pornography available on Twitter, where BAI discussed the

topic informally with Twitter, and the matter was then progressed by the other regulator following up with their national branch directly; (ii) the service "Redtube", for which the jurisdiction is elsewhere (Cyprus); (iii) a MoU query about TikTok's compliance with consumer law and the AVMSD: the matter was referred to the Irish local consumer authority who has responsibility over this topic.

Cyprus has also received and responded to several requests through the MoU of ERGA concerning the VSPs under its jurisdiction. CRTA performed electronic searches in the Cyprus Register of Companies on behalf of other NRAs and provided them with the search results to handle their cases.

The Latvian NRA NEPLP has sent a letter to the Irish media regulator regarding "YouTube" and "Meta" and the possibility of cooperation to block access to online tv programmes that are restricted in Latvia. However, the revised AVMSD will be transposed in Ireland through the Online Safety and Media Regulation (OSMR) Bill that will establish a Media Commission to replace the BAI as part of this process. Therefore, the Broadcasting authority of Ireland, BAI, has no competences to assist NEPLP.

In 2021 the Spanish NRA CNMC detected several potential cross-border infringements of the Spanish law involving different pornographic video-sharing platforms presumably located in Luxembourg and Cyprus. At that time, those services provided pornographic content without adopting effective measures to prevent minors from accessing such content. CNMC, following the procedure set out in the MoU, requested information from each NRA of every Member State through their respective SPOC (single point of contact). In both cases, because the AVMSD 2018 had not been transposed in none of the two Member States, both NRAs were unable to collect and adopt any measure regarding the VSPs providers.

In 2022, CNMC received two different requests of information from KRRIT (Poland) and ARCOM (France) regarding two different entities that offer online pornographic content without applying the appropriate measures to avoid that minors have access to them. In both cases CNMC opened an investigation that led to two CNMC Board Decisions[9] where, using the criteria set in the 2018 AVMSD, it was established that

[9] Cf. CNMC Board Decision of 16 June 2022 (only in Spanish): IFPA/DTSA/147/22 - SOLICITUD DE POLONIA SOBRE IDENTIFICACIÓN DE WEB PORNOGRÁFICA COMO VSP | CNMC

The Board Decision states that:

i) The service provided by TECHPUMP through the website https://www.porn300.com could meet the criteria to be defined a VSP according to the 2018 AVMSD

ii) The VSP had not implemented any mechanism to prevent minors from being exposed to its pornographic content.

iii) Considering that such content could seriously harm minors, CNMC referred its Decision and KRRIT request of collaboration to the Ministry in charge of monitoring the E-commerce legislation, in order to adopt adequate measures.

Cf. CNM Board Decision of 15 September 2022 (only in Spanish): IFPA/DTSA/266/22 - SOLICITUD DE FRANCIA SOBRE WEB PORNOGRAFICA COMO VSP | CNMC

both companies meet the criteria for being defined video-sharing platform providers. However, CNMC could not analysed in depth the appropriateness of the measures adopted by the VSPs because, at that time, it was not empowered to conduct any official procedure against VSP providers.

Luxembourg has been requested for collaboration by another Member State regarding some VSPs established in Luxembourg and its NRA, ALIA, has since exchanged information and experiences on possible measures to further strengthen the protection of minors. ALIA has contacted other Member States regarding the jurisdiction over Twitch and the VSPs that are operated by MindGeek (e.g., Pornhub.com, Youporn.com). The latter operates under Cyprus jurisdiction. The former is under Germany jurisdiction.

Bulgaria has attempted to cooperate with other MS on the topic of removing video showing suicidal content on YouTube.

In 2022 the Belgian CSA has been in contact with BAI, via the ERGA MoU, for a video accessible on Youtube that violated human dignity, based on a recent decision of the Collège d'autorisation et de contrôle of CSA (Décision Radio Contact: Dignité Humaine, du 30 juin 2022[10]). The video in question was originally posted on Facebook and Instagram. Following the CSA decision that it constituted an attack on human dignity specifically (the underage girl portraited in the video) and in general, the video was removed from FB and Instagram. However, despite CSA flagging the concerned video to Youtube, the same was still accessible on the video-sharing platform until the beginning of October 2022, when CSA reached out to BAI for mutual assistance. The cooperation between the two NRAs was successful, in that Youtube finally removed the video based on a request addressed by CSA to Youtube taking down illegal content under the French Community of Belgium law.

Fifteen NRAs (BE- VRM, EE, EL, FI, FR, HU, IS, IT, LT, MK, MT, NL, RO, SE, SI) reported that they had not cooperated with other Member States regarding matters related to video-sharing platforms.

The Board Decision declared that:

i) The service provided by DETCHEM through the website https://www.jacquieetmichel.net could meet the criteria for being defined a VSP in terms of the 2018 AVMSD.

ii) Since the ARCOM request, DETCHEMA has introduced an additional age-verification system in order to prevent that minors have access to its pornographic content. CNMC did not analysed the appropriateness of this mechanism due to the *vacatio legis* of the VSPs obligations.

ii) Considering the importance of the matter related to the protection of minors, CNMC referred its Decision and ARCOM request of collaboration to the Ministry in charge of monitoring the E-commerce legislation in order to adopt the appropriate measures.

[10] https://www.csa.be/document/decision-radio-contact-dignite-humaine/

In conclusion, the need for enhanced cooperation between media regulatory bodies appears to be central to address challenges in regulating VSPs, reflecting the cross-border nature of VSPs, and the experience of the NRAs using the ERGA MoU was very positive.

5. Workshop and conclusions

5.1 Workshop

The last part of the work conducted during 2022 by the Subgroup was the organization of an online workshop, which took place on 4 October on the Webex platform.

The workshop was divided into three panels, one per each workstream, and saw the participation of stakeholders to gather useful elements and food for thought to be included in the SG1 deliverables.

As for the VSPs- dedicated session, the panelists were Ania Helseth from Meta, Andrea Stazi from Google and Prof. Dr. Giovanni Maria Riccio, full Professor of Comparative Law.

We heard from Meta and Google, two of the most prominent stakeholders, how the two platforms firmly commit to removing content that violates their policies. Meta highlighted to consider media literacy a priority and was echoed by Google who mentioned also their digital skills programs.

Both consider the application of the Country-of-origin principle as a cornerstone to ensure legal certainty within the Single digital market and warned the Subgroup about the crucial necessity of a consistent implementation among Member States and an interplay with the Digital Services Act (DSA) and European media freedom Act (EMFA) to avoid different approaches in transpositions, leading to different results in evaluating the same content.

The fruitful discussion touched upon many aspects such as the regulation of content, the regulation of providers, responsibility and liability by fault regimes, age verification systems also in the light of data protection issues, as well as the VSPs and the definition of media service provider given by EMFA.

Consistency and legal certainty were the keywords also in the final remarks of Prof. Riccio, in order to ensure a well-defined regulatory perimeter for players to move in, as he remarked that the concrete outcomes of the provisions should be coordinated with the reality of the market and possibly with an enhanced cooperation between providers and NRAs, stressing also the relevance of the central role of ERGA.

Many of the issues raised by the panelists are not that immediate and easy to solve: some examples are the topic of regulating metadata, the need of ensuring uniformity in the obligations and the behaviors of

the operators (especially online), the compatibility between the principle of the country-of-origin and the global reach of the digital platforms.

5.2 Conclusions

Basing on this year of work and trying to wrap it up, one main conclusion to highlight is that less than a half of respondents reported information over the presence of VSPs providers established in their countries. Eleven claimed that they have either registered or identified VSPs services, two other countries mentioned services that are apparently under their jurisdiction, even though no official scrutiny has been conducted so far. In some cases, the number of services is limited to one or two, while in others a higher number of services has been reported, even though such services are most of the times operated by the same provider.

The different status of the AVMS Directive transposition into national legislations, or of the adoption of regulatory provision to provide concrete implementation to the law, as well as the possible lack of official assessments on VSP are further elements to take into consideration.

For the time being, measures to protect minors and the general public from inappropriate content have been taken in number of cases, as in some others their elaboration is still underway. Age verification systems, recommendations by means of banners or warnings have been put in place by some providers as possible means to protect minors. Age verification may occur also on the uploader side, asking users who upload content to show their identity, requiring a registration to upload videos Other, less widespread, though more effective technical tools include the use of metatags, face recognition through age estimation, authorization via bank card/credit card, creation of a digital ID. Finally, educational initiatives to educate parents have also been cited.

The adoption of measures to protect the general public seem less evident. Mostly, respondents highlighted that VPSs feature reporting system that allow users to highlight the presence of inappropriate content, while as concerns measures to comply with requirements in respect to audiovisual commercial communications, no particular initiatives have been mentioned.

There is no doubt that the AVMS Directive has the well-recognized merit of levelling the playing field between the traditional broadcasters and the video-on-demand players and that, for the first time, it extended the scope of regulation to the VSPs. But the evolution of the media sector goes too fast and requires a continuous - and sometimes strenuous - effort from the regulators to keep up with the pace.

Not only this is blurring the edges between the audiovisual and the electronic communications sectors; but it also seems to have an impact also on the geographical borders, since several services and audiovisual contents available are offered by operators not established in the country (or even in the continent) where they are consumed.

To answer this need, the European institutions have been working hard to set up an unprecedented review of the regulatory framework for the Digital Single Market. The AVMS Directive is and will probably keep on being the pillar of the European media regulation. However, as it was mentioned also several times during the online workshop, the revised AVMS Directive, alone, was only the initial and essential step and it needs further complementary interventions to regulate the new market dynamics and to ensure a fair and sustainable competition between the traditional media and the new digital players.

The Digital Service Act and the Digital Markets Act, as well as the next steps that will be taken for the European Media Freedom Act and the implementation of the Strengthened Code of Practice on disinformation, are expected to introduce new topics and areas in which the cooperation among NRAs will be needed.

Many of the questions raised during the workshop may be answered only by the very recent legislative initiatives carried out by the European Union: the Digital Services Act (DSA) is going to shape the role of regulation of the digital platforms and of the non-audiovisual content, and the EMFA will likely touch upon the topic of the freedom of media also in the digital environment.

On many occasions ERGA has always stressed the importance of securing an efficient interplay between the AVMSD and the other legal initiatives. A consistent, multi-level framework not only will make the regulators more efficient when it comes to regulating online content, giving also better enforcement tools, but also it will result in a clearer, more efficient, and consistent scenario for stakeholders to provide their services.

While we look with a lot of interest and high expectations at the next steps toward the mentioned initiatives, in the meantime, ERGA will continue, as usual, its work to achieve a consistent and effective implementation of the Directive.

Annex 1 – Table 1. List of registered or identified VSPs (Oct. 2022)

Country	Provider	VSP
AT	Commatis GmbH	amateurseite.com
AT	Online Magazin GmbH	sexmagazin.at
BE	IconV PGmbH	itemfix
BG	Netinfo (Nova Broadcasting Group)	Vbox7
CY*	Mindgeek group - MG Freesites Ltd	YouPorn
CY*	Mindgeek group - MG Freesites Ltd	PornHub
CY	Hammy Media Ltd	Xhamster
CY	Technius Ltd	Stripchat
CY	Tecom Ltd	Fabhouse
CY	Camon Trading Ltd	Virtual Taboo
DE	Seven.One Sports GmbH	Yousport
DE	Hartplatzhelden GmbH	hartplatzhelden.de
DE	Alugha GmbH	alugha.com
ES**	Techpump solutions, SL	www.porn300.es
ES**	Detchema S.L	www.jacquieetmichel.net
FR	Dailymotion SA	Dailymotion
HU	OJT Kft.	Jegy.hu online események
HU	PORT.hu Kft.	Indavideó
HU	New Wave Media Group Kft.	Videa
HU	New Wave Media Group Kft.	Videakid
HU	Országos Adatbank Kft.	Autósvideók
HU	PORT Kft.	videok.hu
LU	JWS Americals S.à r.l / JWS International S.à r.l	Livejasmin.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Cameraboys.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Livesexasian.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Mytrannycams.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Maturescam.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Liveprivates.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Lsawards.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Mycams.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Joyourself.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Pornhdlive.Com
LU	JWS Americals S.à r.l / JWS International S.à r.l	Porndoelive.Lsl.Com
PL	Niezależne Polskie Media Sp. z o.o.	Banbye
PL	CDA.PL	Cda S.A.
PL	MSI Mariusz Składanowski	Demotywatory
PL	MSI Mariusz Składanowski	Mklr
PL	MSI Mariusz Składanowski	Joemonster
PL	Cube Investments Sp. z o.o.	Kwejk
PL	Cube Investments Sp. z o.o.	Jbzd
PL	Cube Investments Sp. z o.o.	Sadistic
PL	PBR Sp. z o.o.	Vider
PL	PBR Sp. z o.o.	Zaq2
PL	SPECLAB Szymon Kłos	Wgrane
PL	of.pl Sp. z o.o.	Wiocha.Pl
PL	NOONATAQ Joanna Nogieć	Hrabi.Tv
PT	MEO – Serviços de Comunicação e Multimédia, S.A.	Meo Kanal
PT	MEO – Serviços de Comunicação e Multimédia, S.A.	Sapo Videos
SE	Svensk Webbtelevision AB	SwebbTube

Note: Youtube, Tiktok, Facebook, Instagram and Twitter have been mentioned as potential cases of VSPs established in Ireland satisfying the definition either wholly on the principal purpose, or on essential functionality grounds. In the lack of a final determination, as the passing of legislation in Ireland and its operationalisation by the Media Commission is pending, such services

are not reported in the table; (*) the list of services in Cyprus is not exhaustive. MG Freesites Ltd has not officially submitted the notification form to the CRTA yet, despite, the authority has already repeatedly requested both verbally and in writing to proceed. For this reason, services operated by MG Freesites Ltd are equated to the aim of this table, to the registered services. (**) The identification of these VSP providers were before the transposition of the AVMSD 2018 into the Spanish legislation and considering just the AVMSD 2018 regulation.