

1.

Audiovisual Media Services Directive¹

(AVMSD)

Purpose of AVMSD

- (1) to ensure optimal conditions of competitiveness and legal certainty for Europe's information technologies and its media industries and services, as well as respect for cultural and linguistic diversity.
- (2) free movement of audiovisual media services;
- (3) Article 151(4) of the Treaty requires the Community to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures.
- (4) enhance compliance with fundamental rights

To sum up:

- free movement of services
- competition
- legal certainty

Specific (sectoral) regulation is justified by the cultural element.

What does AVMSD cover?

How does it differentiate between various types of internet content?

(16) For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are **mass media**, that is, which are intended for reception by, and which could have a clear impact on, a **significant proportion of the general public**. Its scope should be limited to services as defined by the Treaty and therefore should cover any form of economic activity, including that of public service enterprises, but **should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites** and services consisting of the provision

¹ 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

or distribution of audiovisual content **generated by private users for the purposes of sharing and exchange within communities of interest.**

(17) It is characteristic of on-demand audiovisual media services that they are **'television-like'**, i.e. that they **compete for the same audience** as television broadcasts, **and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection** within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the notion of 'programme' should be interpreted in a dynamic way taking into account developments in television broadcasting.

(18)... **exclude all services** whose principal purpose is not the provision of programmes, i.e. where any **audiovisual content is merely incidental to the service** and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service

(22) ... the term 'audiovisual' should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services.

(28) In order to **promote a strong, competitive and integrated European audiovisual industry** and **enhance media pluralism** throughout the European Union, only one Member State should have **jurisdiction** over an audiovisual media service provider and **pluralism of information should be a fundamental principle of the European Union.**

The areas of regulation set out in AVMSD:

- applying to both linear and on-demand services:
 - o accessible to people with disabilities
 - o cinematographic works only within period licenced.
 - o advertising rules basic
 - o sponsoring rules
- only to on-demand services:
 - o European works
- only to linear services:
 - o exclusive rights; short news. (events of major importance)
 - o European works
 - o television advertising and teleshopping - length and interruption
 - o protection of minors
 - o right of reply

2.

E-Commerce Directive¹

Purpose of the Directive:

1. Free movement of information society services

The development of information society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.

2. The development of electronic commerce; offers significant employment opportunities in the Community; can also enhance the competitiveness of European industry.

3. Its scope is purposefully limited: to respect the principle of subsidiarity; it deals only with certain specific matters which give rise to problems for the internal market.

a. to ensure legal certainty and consumer confidence

b. to lay down a clear and general legal framework to cover certain legal aspects of electronic commerce in the internal market, and to ensure the free movement of information society services.

4. This (free movement of information society services) can be a reflection of freedom of expression. (9).

5. therefore, the Directive must ensure that this activity can be done freely, subject to the restrictions only in Article 10 (2) and 46(1) of the Treaty; this D does not intend to affect any fundamental rule.

Topics covered by the Directive

- free flow of information society services;
- no prior authorisation of such services;
- general information to be provided (customer protection);
- advertising and spamming;
- advertising by regulated professions;
- contracts shall be allowed to be concluded electronically (exceptions allowed);
- ecommercial minimum information to be provided before concluding e-contracts (consumer protection);
- placing of the order (the process of concluding a contract), (consumer protection);

¹ 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

- liability exemptions.

3.

E-Commerce Directive Liability

Information society services: this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service;

Section 4: Liability of intermediary service providers

Article 12

"Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, **Member States shall ensure** that the service provider **is not liable** for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place **for the sole purpose of carrying out the transmission in the communication network**, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13

"Caching"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, **Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service**, on condition that:

(a) the provider **does not have actual knowledge of illegal activity or information** and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, **upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access** to the information.¹

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15

No general obligation to monitor

1. **Member States shall not impose a general obligation on providers**, when providing the services covered by Articles 12, 13 and 14, **to monitor the information which they transmit or store**, nor a general obligation **actively to seek facts or circumstances indicating illegal activity**.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

¹ (44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities. (Cited from the Preamble here by Judit Bayer)

4.

Areas covered by the E-Commerce Directive and others that are not covered:

<p>Examples to Information Society Services:</p> <ul style="list-style-type: none">- selling goods on-line;- services giving rise to on-line contracting, but not only that:- offering on-line information or commercial communications,- providing tools allowing for search, access and retrieval of data;- the transmission of information via a communication network,- providing access to a communication network- hosting information provided by a recipient of the service;- services which are transmitted point to point,- such as video-on-demand or- the provision of commercial communications by electronic mail	<p>These are No Information Society Services:</p> <ul style="list-style-type: none">- delivery of goods as such- provision of services off-line- television broadcasting- the use of electronic mail or equivalent individual communications by natural persons acting outside their trade, business or profession- their use for the conclusion of contracts between such persons- the contractual relationship between an employee and his employer- activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or- medical advice requiring the physical examination of a patient.
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5.

Texts of EU relevance on freedom of expression

Treaty on European Union

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Article 7

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament,

may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Article 11

Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

European Convention on Human Rights

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.