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Audiovisual Media Services

Impact Assessment (SWD(2016) 168, SWD(2016) 169 (summary)) of a Commission proposal for Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016) 287)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [Impact Assessment](#) (IA) accompanying the above [proposal](#), adopted on 25 May 2016 and referred to the Parliament's Committee on Culture and Education.

This proposal forms a part of the [Digital Single Market \(DSM\) strategy](#) adopted on 6 May 2016, in which the Commission calls for a modernisation of the [Audiovisual Media Services Directive](#) (AVMSD)¹ to adapt to the recent market, consumption and technological changes in the audiovisual field. In the communication on the DSM strategy the Commission undertakes to focus on the scope of the AVMSD 'and on the nature of the rules applicable to all market players, in particular measures for the promotion of European works, and the rules on protection of minors and advertising rules' (DSM strategy, p. 11). The need for the modernisation of the AVMSD is one of the conclusions of the [REFIT evaluation](#) that was carried out as part of the Commission's 2015 work programme². For example, one of the major changes in the sector is the recently growing number of consumers of video on-demand, with revenues soaring by 272% between 2010 and 2014, reaching €2.5 billion in 2014 (IA, p. 7).

The main changes claimed to be brought by the proposal³ are the enhanced protection of minors from harmful content on video-sharing platforms, more flexibility on advertising rules (TV broadcasters would have a 20% daily limitation), and a 20% share for European works applied to on-demand video services, in addition to TV broadcasters. The IA gives an insight into the overall size of the European audiovisual sector, which represented around €105.8 million in 2014. 'The EU audiovisual sector mainly comprises large companies which account for an absolute majority (more than half) of the workforce in 10 of these.' More than 80 % of the value added generated in Spain, Poland, Italy, France, Romania and the UK was attributed to large enterprises (IA, Annex 4, pp. 89-90).

¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

² For more details on ex-post REFIT evaluation of the AVMSD, see Roxana Osiac, European Parliamentary Research Service [implementation appraisal](#), June 2016.

³ For more details on the context of the AVMSD proposal, see Ivana Katsarova, [The Audiovisual Media Services Directive](#), Legislative Briefing, June 2016.

Problem definition

The IA identifies the following three problems in need of action at EU level, stemming from the conclusions of the REFIT evaluation:

- 1) Insufficient protection of minors and consumers on video-sharing platforms
- 2) Lack of a level playing field and internal market weaknesses
- 3) Rules on commercial communications no longer fit for purpose (IA, pp. 5-13)

Problem 1: The insufficient **protection of minors on video-sharing platforms** is a problem that results from easy and unrestricted access by children to violent, gory or pornographic content. The IA claims that hate-speech is also increasingly accessible via video-sharing platforms, and that consumers should be protected. AVMSD does not apply to user-generated content (UGC) on these platforms, as the platforms do not control the selection of the content. The platforms are subject to the [e-Commerce Directive](#) (ECD),⁴ which does not require the content on video-sharing platforms to be monitored, but requires illegal content to be removed (and does not deal with harmful content). The main video-sharing platforms do apply their own standards to the protection of minors and consumers, however, these may differ from those set out in the AVMSD (IA, p. 5). The lack of transparency in advertising is covered by the [Unfair Commercial Practices Directive](#) (UCPD),⁵ and the Commission explains that therefore there is no need to address this issue in the impact assessment (IA, p. 7).

Problem 2: Regarding the **promotion of European works and the protection of minors**, AVMSD rules are stricter for TV broadcasters than for on-demand audiovisual media services, and these lighter rules undermine the protection of minors and cultural diversity, and **distort competition** (IA, pp. 7-8). For example, TV broadcasters invested around 24 % of their revenue in the production and promotion of EU works in 2013, whereas on-demand providers invested less than 1% of their total revenue. Some Member States, namely France and Germany, intend to apply levies on on-demand services established in other Member States and targeting their audiences. According to the IA, this results in the need for a coordinated approach in this directive. The AVMSD is based on the principle of country of origin (COO),⁶ which was supported by the majority of the Member States, regulators and industry at the 2015 public consultation. However, the problems related to the COO include excessively **complex rules** that are difficult to apply, for example, in order to determine the jurisdiction, as well as imprecise and uncertain procedures enabling Member States to derogate from the COO. The AVMSD does not set requirements for ensuring the **independence of regulatory authorities** in the Member States, however, 'regulatory independence both from political bodies and commercial interests is essential to ensure effective market supervision, proper application of the rules of the Directive and to guarantee media freedom and pluralism' (IA, p. 10).

Problem 3: The IA claims that **rigid rules on advertising** for the TV broadcasters⁷ prevent them from maximising their profits at times when the viewers have the possibility to switch to other viewing habits, for example, video-on demand platforms (IA, pp. 11-12). Regarding avoiding exposure of minors to advertising of alcohol and foods high in fat, salt and sugar (HFSS), the majority of the Member States already apply self- or co-regulatory rules to regulate alcohol advertising, and good progress has been achieved by stakeholders through initiatives regarding the HFSS advertising. The IA concludes however that there is still scope for improvement (IA, pp. 12-13).

Objectives of the legislative proposal

The objectives of the Commission proposal address the three issues identified in the problem definition (IA, p. 14).

⁴ 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.

⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

⁶ Audiovisual media service must only be regulated by the Member State where its provider is established (IA, p. 354).

⁷ Maximum 12 minutes of advertising per hour on TV (20% per hour), how often films, works and programmes can be interrupted, and minimum duration of teleshopping windows (IA, p. 11).

Table 1: General and specific objectives (IA, p. 14)

General objectives	Specific objectives
Enhance protection of consumers and minors	<ul style="list-style-type: none"> Enhance protection of consumers and minors on video sharing platforms
Ensure a level playing field, preserve the integrity of the internal market and enhance legal certainty	<ul style="list-style-type: none"> Establish more effective and fair rules on promotion of European works Ensure more effective and fair rules on the protection of minors in on-demand services Simplify and clarify the procedures to apply the COO rules Ensure regulatory impartiality across the EU
Simplify the legislative framework	<ul style="list-style-type: none"> Make the rules on commercial communications clearer and more flexible

The IA does not provide any operational objectives whereas the [Better Regulation Guidelines](#) stipulate that operational objectives – which are defined there in terms of the deliverables of policy actions – ought to be defined for the preferred option.

Range of options considered

In addition to the status quo scenario, the IA presents eight mutually complementary and not distinct options to solve the defined problems, which are arranged in three groups according to the problem they aim to solve.

Table 2: Problems and options proposed

Problem	Options
Group 1: insufficient protection for minors and consumers on video-sharing platforms	
Insufficient protection for minors and consumers on video-sharing platforms	<p>Option A introduces self-regulation for video-sharing platforms to protect minors and consumers, covering all audiovisual content under the editorial responsibility of a provider; removes the 'TV like'⁸ requirement; codifies the interpretation of the 'principal purpose' criterion in the European Court of Justice (ECJ) ruling on the <i>New Media Online GmbH</i> case, thus covering also other types of content, namely stand-alone video sections on newspaper websites (IA, pp. 17-18).</p> <p>Option B introduces a co-regulation requirement for video-sharing platforms, leaving for the industry to choose the mechanisms for protection of minors from harmful content and consumers from hate speech, such as age-verification systems, content description, age rating systems. The 'TV like' requirement and 'principal purpose' criterion remain the same as under Option A. Under this option, Member States 'should not impose on providers any general obligation to monitor content ex ante'. In cases of non-compliance, a complaint mechanism should be foreseen (IA, pp. 19-20).</p>
Group 2: lack of a level playing field and internal market weaknesses	
I. Promotion of European works	<p>Option A obliges TV broadcasters to invest at least 50% of their programming budget in European works, or reserve the majority of the broadcasting time for European works (or both), whereas on-demand service providers would be obliged to choose to promote European works either through a share of them, their prominence in the catalogues, or through a financial contribution.</p> <p>Option B maintains the status quo for TV broadcasters, but reinforces the rules for on-demand service providers by requiring them to provide at least a 20% share of</p>

⁸ As a result of the ECJ judgment in the *New Media Online GmbH* case, short videos can qualify as 'TV like' (IA, p. 17).

	European works in their catalogue, as well as giving prominence to such works, and reporting to the Commission on their compliance. Member States would be allowed to require a contribution (for the production of European works) from on-demand service providers established in another Member State, but targeting consumers in its territory.
II. Protection of minors using on-demand services	Option A increases the level of protection by restricting access to any kind of 'harmful content' both for on-demand services and TV broadcasters, simplifies the notion of harmful content and encourages EU co-regulation on content descriptors.
III. Country of origin principle	Option A simplifies and improves the jurisdiction rules and the cooperation procedures.
IV. Independence of Regulators	Option A requires Member States to have an independent regulatory authority and set a number of requirements to support its independence and effectiveness; and reinforces and embeds in the AVMSD the co-ordination and advisory role of the European Regulators Group for Audiovisual Media Services (ERGA).
Group 3: rules on commercial communications no longer fit for purpose	
Rules on commercial communications no longer fit for purpose	Option A makes the audiovisual commercial communication (AVCC) rules more flexible, by changing the 20% advertising per hour rule to a daily rule.

The preferred package of options is the following: Option B from the first group and second group subgroup I, and all other single A options, as shown in bold in table 2. The preferred options seem to be described in more detail than the others, and no genuine alternative set of options is provided to compare to the preferred set of options. For example, no other mechanism than the complaint-based one is offered among the options or as a possible sub-option to protect minors and consumers on video-sharing platforms. Besides, the IA does not give any description on what the complaint mechanisms would be based on, if they already exist and have proved effective, or how consumers would be informed about how to use them. Another example concerns Option A related to the promotion of European works, for which the IA says it is 'questionable whether a flexible requirement for on-demand services would be effective'. (IA, p. 26). It is quite striking that an alternative option to the preferred one does not apparently attempt to respond to the problems of the level playing field for the industry: it seems that not enough attention was paid in the IA to the claimed need to create a level playing field for TV broadcasters and on-demand service providers. For example, Option A for promotion of European works appears to give more flexibility to on-demand service providers compared with TV broadcasters.

Scope of the Impact Assessment

The IA provides a rather superficial assessment of the economic and social impacts. Economic impacts are further subdivided into compliance costs, administrative costs, impacts on internal market, impacts on competitiveness and impacts on SMEs (see relevant sections below). The description of impacts is at times incoherent, and mainly explains existing problems rather than giving details of the expected impacts.

As regards **costs**, the IA summary indicates that 'The main costs of the preferred option would be borne by on-demand services and video-sharing platforms'. Table 3 below, based on the information found in the option comparison tables of the IA and in the text of the IA, attempts to summarise the cost impacts for service providers.

Table 3: Compliance and administrative costs for service providers

Issue	Impact of options on compliance costs
Protection of minors on video-sharing platforms	Option A: not quantified (self-regulation) Option B: will depend on the size of the company and on the mechanisms chosen (between €100 000 and €320 000, maybe more for more developed content moderation systems)
Promotion of European works	Option A: cost of reporting would be €200 000 for all EU TV broadcasting services and €110 000 for all EU on-demand services Option B: between €5.8 and 8.2 million per year for one major EU provider (contributions extra territorially); between €4.7 and 11.7 million per year for all EU providers (levies only)
Protection of minors in on-demand services	Option A: limited for most on-demand services (some Member States require some form of protection)

Concerning the impacts on the **internal market**, the IA indicates that the preferred options would generally prevent or reduce fragmentation and contribute to harmonising the internal market, without giving many details.

The **social impacts** are considered positive except as regards commercial communication rules and promotion of European works. Concerning the commercial communication issue, the option proposed implies that viewers could be exposed to more advertising during peak times and that breaks could be more frequent, which would affect the integrity of cinematographic works. As regards the promotion of European works, the preferred option would have a positive impact on the creation of European audio-visual content and on small independent producers (no details given in the IA), but a negative impact on small providers not able to recoup the financial contributions.

Subsidiarity / proportionality

Subsidiarity and proportionality are addressed in the proposal's Explanatory Memorandum (pp. 4-5). As regards **subsidiarity**, EU intervention is justified by the increasing cross-border dimension of the audiovisual market: TV channels are becoming more international and on-line services keep growing. Subsidiarity is analysed in more detail in the option comparison tables of the IA, where compliance of the preferred option with the subsidiarity principle is justified. **Proportionality** is justified by the fact that the proposal preserves the minimum harmonisation approach, which allows Member States to adopt stricter rules according to national circumstances. The Explanatory Memorandum indicates that the rules could be adapted in particular as regards the definition of an on-demand audiovisual media service, the setting-up of national regulatory authorities, the promotion of European works, the protection of minors and commercial communications.

Several national parliaments have scrutinised the proposal, but none has adopted a reasoned opinion with subsidiarity or proportionality objections. The deadline for submissions was 27 July 2016.

Budgetary or public finance implications

The IA summary indicates that the 'main impacts on national budgets and administration would derive from the implementation of co-regulation for the protection of minors on video-sharing platforms and from the introduction of legal requirement of independence of national regulatory authorities and a minimum set of features that regulators need to meet.' Table 4 below strives to summarise the costs, based on the information found in the tables comparing the options. As regards promotion of European works, it seems there is an inconsistency between the comparison table and Annex 16: the table indicates that the €220 000 represent a yearly cost, whereas Annex 16 indicates in a footnote that the €220 000 would incur once every two years (p. 317). Besides, as the Explanatory Memorandum indicates that 'the proposal has no implications for the EU budget' (page 11), the costs 'for the EU' presented in the tables comparing the options can be confusing.

Table 4: Public finance implications (compliance costs and administrative costs)

Issue	Impact of options on the EU, on EU regulators and on MS budgets
Protection of minors on video-sharing platforms	Option A: between €100 000 and €3.1 million per year for the EU Option B: €600 000 per year for EU regulators (complaint-based mechanism); between €100 000 and €3.1 million per year for the EU (user generated rating system or moderation system in a large platform); between €250 000 and €1 million per year per Member State (cost for co-regulatory structure)
Promotion of European works	Option A: €220 000 per year for all EU regulators (monitoring TV broadcasters); status quo for on-demand services Option B: €220 000 per year for all EU regulators (monitoring TV broadcasters); €2 000 per year (monitoring on-demand services in France)
Protection of minors in on-demand services	Option A: €2 million per year for the EU (cost of self-regulatory schemes for content information)
Country of origin	Option A: cost for ERGA opinions (not specified); €51 630 to run the MAVISE database for the EU
Independence of regulators	Option A: 200-250 full time equivalent (maximum staff increase for understaffed regulators)

SME test / Competitiveness

SMEs and microenterprises are provided with a mandatory exception from the rules regarding 20% of European works in on-demand video services (IA, pp. 27 and 339). The explanation in the IA of why the Commission decided on the 20% rule on European works is based on the interests of SMEs, which may have fewer European works in their catalogues than the big EU video on demand (VoD) catalogues and subscription video on demand (SVoD) catalogues⁹ (IA, p. 27). It is therefore unclear why the share of European works was set at 20% to take into account that it may be challenging for the SMEs to provide any higher share of European works, if SMEs are actually exempted from this rule.

The IA briefly addresses the impacts of options on SMEs, and indicates that the options related to the protection of minors could generate additional costs, which are not quantified.

As regards **competitiveness**, the IA indicates that the preferred options would generally make the playing field more level. The flexibility brought in the AVCC rules would have a positive impact on TV broadcasters but a possible negative impact on printed press industry (IA, p. 51).

Simplification and other regulatory implications

The IA explains that in drafting the current proposal, consistency with other legislation in force has been taken into account. Some aspects that are related to the proposal are already regulated in other legislation and therefore the new proposal is seen in the IA as complementary to the following:

- [Directive 2000/31/EC](#) on electronic commerce (ECD) regulates video-sharing platforms regarding the removal of illegal content after they have been notified. The ECD is regarded in the IA as a lighter regulatory regime, as it does not deal with harmful content (IA, p. 5 and 17), but only with illegal content. The new proposal, according to the Commission, sets a higher standard for the protection of minors from harmful content (Article 28a).
- [Directive 2003/33/EC](#) on advertising and sponsorship of tobacco products ensures the required consumer protection regarding advertising of tobacco products (IA, p. 7).
- [Directive 2005/29/EC](#) on unfair commercial practices (UCPD) applies to misleading commercial practices, and self-regulatory or regulatory practices existing in the Member States to deal with this issue (IA, p. 7).

⁹ The average share of EU films in 75 big EU video on demand (VoD) catalogues was 27% in 2015 and 30% in 16 big subscription video on demand (SVoD) catalogues; EAO study, data from 2014 and 2015 (IA, p. 27).

- Non-regulatory initiatives of the European Commission on a safer internet for minors, regarding combating the sexual abuse and sexual exploitation of children and child pornography (detailed in the IA Annex 18, p. 335).
- Accessibility issues are not discussed in the IA, because in 'December 2015, the Commission adopted a [proposal for a European Accessibility Act](#),¹⁰ which sets accessibility requirements for a wide range of products and services including audio-visual media services' (IA, p. 4).

Quality of data, research and analysis

The Commission has relied on a vast amount of evidence found in numerous reports and studies for drafting the IA, namely: a REFIT analysis, application reports of the existing AVMSD, recommendations from other EU institutions, studies and opinions of ERGA, eight external studies, as well as two reports from the European Audiovisual Observatory (EAO) (IA, Annex 1, pp. 63-67).

It is at times difficult to read the IA as a stand-alone document. It is based largely on the results of the REFIT analysis, with which the reader has to be acquainted in order to understand the issues and the options offered for analysis in the IA. A lot of valuable information is included in the numerous annexes, whereas it could be more usefully have been included in the description of options and analysis of impacts for better readability. Understanding of the IA is at times rather hampered by a lack of accuracy and coherence, for example, the logic of taking into account the needs of SMEs when deciding on the 20% share of European works, and consecutively exempting SMEs from the rule on the share and prominence of European works, or indeed the inconsistencies in the cost calculations between the description of economic impacts and the summary tables after each section of options offered.

The REFIT evaluation summary (p. 2) states that 'Robust economic data to support the assessment has been difficult to find'. Nevertheless, a considerable effort is made in the IA to provide the cost calculations under various impacts affecting different stakeholders.

Terminology and acronyms are not always explained. Although a glossary is added to the IA, many acronyms have not been included (for example, what are CAGR, AVCC, UGC, ECD and OTT?). Some area-specific terminology has not been explained in the IA or Annexes, for example, 'TV likeness' and the ECJ ruling in the *New Media Online GmbH* case.

Stakeholder consultation

As part of the REFIT evaluation, a public consultation on the AVMSD, entitled [A media framework for the 21st century](#) was conducted from July to September 2015. Annex 2 of the IA (pp. 68-77) gives a detailed overview of this consultation in a form of a synopsis report, and mentions public service and commercial broadcasters, advertising companies, national regulators, NGOs and consumer organisations, ICT, digital, telecom, press and publishing and internet companies, and the satellite industry among the interested stakeholders (438 respondents in total). The general trends presented in the synopsis report seem to reflect the interests of the different stakeholder categories: the broadcasting sector calls to ensure a level playing field, the consumers' organisations call for strengthening viewer protection and the internet, telecom and ICT industries call for the Commission to refrain from a new regulation to preserve innovation. The main conclusions are that stakeholders agree on the need for a possible change in the rules on the scope of application of the directive, that they support the current rules on several topics (country of origin principle, must-carry/findability,¹¹ accessibility for persons with disabilities, major events for society, short news reports and right of reply), but that there is no clear consensus on commercial communications, protection of minors and promotion of European works.

Monitoring and evaluation

As regards monitoring, it seems that greater attention was given to the objectives related to the internal market than to the objective related to the protection of consumers and minors: the table displayed on page 57 of the

¹⁰ Currently under discussion in the IMCO committee, rapporteur Robert Rochefort (ALDE, France).

¹¹ Also known as 'discoverability'.

IA presents 21 impact indicators for the internal market and only 1 indicator for enhanced consumer and minor protection. Besides, the indicator proposed for consumer and minor protection is based on the number of complaints registered by Member State appointed authorities. Although the IA acknowledges that complaints do not form the best indicator ('Complaints are often used as an indicator to measure the performance of a self- or co-regulatory scheme; however they form a relatively ambiguous indicator' – IA, p. 6, footnote 23), no other indicator was proposed for protection of minors and consumers. An ex-post evaluation is foreseen 'no later than 10 years after adoption of the Directive' (IA, p.58).

Commission Regulatory Scrutiny Board

The Regulatory Scrutiny Board (RSB) has reviewed the IA twice, and gave a [positive opinion](#) after a second reading of the IA, on the understanding that the report will be further improved with respect to the recommendations expressed: further clarify the context and the scope of the initiative; strengthen the links with the evaluation results; better specify the options and enhance the analysis of their impacts; and stress the REFIT aspects of the initiative. Similar criticism was expressed in the first, negative, opinion (not available on the Commission's RSB website). It seems that the final IA report has strived to integrate most of the RSB recommendations. However, concerning 'better specify the options and enhance the analysis of their impacts', it seems at times superficial, inaccurate or incoherent.

Coherence between the Commission's legislative proposal and the Impact Assessment

Overall, the IA and the proposal appear to correspond. Article 9.2 of the proposal indicates that Member States and the Commission 'shall encourage the development of self- and co-regulatory codes of conduct regarding inappropriate audiovisual commercial communications, accompanying or included in programmes with a significant children's audience, of foods and beverages containing nutrients and substances with a nutritional or psychological effect'. Although this article could have a positive impact on children's health, it appears not to have been discussed under the social impacts in the IA. The same goes for the alcoholic beverages advertising mentioned in Article 9.3. There is a reference to Article 9 only in footnote 202 (p. 47 of the IA), which does not give any substantial information.

Conclusions

The background information, studies, and evidence base used in drafting the IA are vast and comprehensive; however, a lot of valuable information is added in the annexes, whereas it could have been more usefully included in the development of options offered and in the assessment of their impacts accordingly.

The IA presents the **problem** and its drivers in a clear and understandable way, with numerous examples and statistics to illustrate the current situation. The **objectives** are also very clear and in line with the problems identified. However, the IA could have examined **a broader range of options** to choose from, notably as regards the minor protection issue, as this is a crucial problem that is likely to worsen considering the growing popularity of video-sharing platforms among minors, as stated in the IA. The overall coherence of the IA suffers from some **inaccuracy and inconsistencies**, which, at times, makes it difficult to gauge the impacts of the proposal.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Culture and Education (CULT), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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