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**Working Group 3:  
Spotlight on audiovisual platforms  
Introduction and Objectives**

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**1. The ongoing developments in the audiovisual market**

The European and worldwide audiovisual markets are currently undergoing structural changes which redefine the roles of incumbent players, modify the established governance structures and, eventually, could redistribute the cards between traditional national players and new market entrants. Which forces are behind these winds of changes?

The digitization of information (and thus audiovisual content) and the distribution of digitised content over the internet (also called “Over-the-top” or simply OTT) are leading to the digitalisation of our societies and by extent of the audiovisual sector. Of course, the internet and digitisation solely did not have these profound impacts on audiovisual markets but rather the changes it brought to the supply of and demand for audiovisual services.

On the supply side, incumbent players, such as broadcasting companies and telecom operators, are challenged by new entrants from the tech world in the European audiovisual sector and by new forms of entertainment rendered possible by the internet, which leads to an increased competition for revenues, subscribers and viewers. In a field in which technology innovation is crucial and massive investments in R&D are needed in order to be able to compete with new entrants, these shifts are leading to an upheaval in the traditional audiovisual value chain and established market structures.

On the demand side, audiences are exposed to an abundance of entertainment options (films, TV shows, social media, video games, e-sports just to name a few) of audiovisual services and a multiplication of devices and screens on which audiovisual content can be consumed; these

<sup>1</sup> Parts of this paper are extracts from the soon-to-be-published IRIS Plus 2016-03 on “European works on VOD, platforms and OTT: which obligations?”, European Audiovisual Observatory.

combined factors are inducing audience fragmentation across services and screens, increasing the difficulties for traditional players to reach audiences as they have in an analogue world.

With the development of new audiovisual service offers and the increasing use of connected smart devices, the role of online video-sharing platforms has become very central to the consumption habits of viewers.<sup>2</sup> At the same time, the way in which the various services that provide audiovisual content online should be qualified becomes increasingly uncertain from a legal point of view.

## 2. The regulatory responses to the market developments

In the last few years, the concept of “**Over the top**” (OTT) services has emerged in the audiovisual sector and pops up often in the political debate. However, there is no legal definition of such concept, which covers in many occasions different types of services or applications.<sup>3</sup> The same applies to the concepts of **online platforms**, **distribution platforms**, or **video-sharing platforms**.

From a regulatory point of view, audiovisual media services are divided between linear services (television broadcasts) and non-linear ones (or “on-demand” audiovisual media service, ODAVMS), according to a set of fixed criteria. However, on-demand audiovisual services are now increasingly provided through online platforms that provide access to aggregated<sup>4</sup> or user uploaded content (or video-sharing platforms) which do not fulfil the traditional criteria used to categorise ODAVMS.

The blurring of definitions among these services is particularly relevant as, depending on the qualification that will be retained, they will fall under the scope of the Audiovisual Media Services Directive (AVMSD)<sup>5</sup>, which brings a set of obligations such as promotion obligations for European works and ex ante control on the content with respect to the protection of minors or human dignity, or they will be assimilated to technical intermediaries and benefit from the exemptions from liability set out in the e-Commerce Directive<sup>6</sup>.

However, companies operating as platforms, such as YouTube, are not defining themselves as “media companies” but as “tech players”, arguing that they don’t produce the content themselves. Although, based on their business model and the fact that they make an economic profit from enabling access to audiovisual content, thanks to advertising revenues, one could argue that they are also media companies.<sup>7</sup>

<sup>2</sup> The consumption of audiovisual content on linear TV in EU member states is either stagnating or declining depending on the country, although with no disruptive figures, which indicates a shift in the consumption habits. See Fontaine G. and Grece C., Measurement Of Fragmented Audiovisual audiences”, European Audiovisual Observatory, Strasbourg, 2015, [www.obs.coe.int/documents/205595/264625/DG+CNECT+-+Note+1-2015+-+Measurement+of+fragmented+audiovisual+audiences.pdf/](http://www.obs.coe.int/documents/205595/264625/DG+CNECT+-+Note+1-2015+-+Measurement+of+fragmented+audiovisual+audiences.pdf/).

<sup>3</sup> There is no single, generally agreed definition “over-the-top (OTT) service is an online service that can be regarded as potentially substituting for traditional telecommunications and audiovisual services such as voice telephony, SMS and television”. See Godlovitch I., Kotterink, B., et al., “Over-the-Top players (OTTs)”, Study for the IMCO Committee, Policy Department A: Economic and Scientific Policy, December 2015, [www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL\\_STU\(2015\)569979\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU(2015)569979_EN.pdf).

<sup>4</sup> The notion of “aggregator” can include the provision of a technical platform to store and retrieve content; the management of advertising, transactional or subscription sales related to the content; the recommendation of content proposed to the user. They are often supported by algorithms.

<sup>5</sup> European Commission, 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 (Audiovisual Media Services Directive), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0013>.

<sup>6</sup> European Commission, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0031>.

<sup>7</sup> Indeed, a recent Roland Berger study, commissioned by GESAC (Groupement européen des sociétés d’auteurs et compositeurs), found that cultural content represents 33% of Facebook’s revenues and 66% of YouTube’s revenues. See Berger R., “Contenus culturels dans un environnement en ligne: analyse du transfert de valeur”, Paris, 2016, [https://societe.sacem.fr/actuimg/fr/live/v4/La-Sacem/Actualites/2016/Etude\\_Roland\\_Berger\\_synthese\\_France.pdf](https://societe.sacem.fr/actuimg/fr/live/v4/La-Sacem/Actualites/2016/Etude_Roland_Berger_synthese_France.pdf).

### 3. Towards a legal definition of video-sharing platforms

**Audiovisual media services** are defined under Article 1 of the AVMS Directive which requires the media service provider to have editorial responsibility over the content, that its principal purpose is the provision of programmes in order to inform, entertain or educate, and that the provided programmes are “TV-like” – meaning that user-generated content (UGC) on video-sharing platforms is excluded from the definition.

The term “**Online platform**” does not have a clear definition as it may cover a large range of online services and tools, such as social media, e-commerce platforms, search engines. When it comes to **video-sharing platforms**, a legal definition is introduced in the Commission’s proposal<sup>8</sup> to revise the AVMS Directive, which should be read in the light of Recital 28 of the proposal:

Article 1, paragraph (1), point (aa)

“video-sharing platform service” means a service, as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, which meets the following requirements:

- (i) the service consists of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility;
- (ii) the organisation of the stored content is determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing;
- (iii) the principal purpose of the service or a dissociable section thereof is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate;
- (iv) the service is made available by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC”.

Recital 28

“An important share of the content stored on video-sharing platforms is not under the editorial responsibility of the video-sharing platform provider. However, those providers typically determine the organisation of the content, namely programmes or user-generated videos, including by automatic means or algorithms. Therefore, those providers should be required to take appropriate measures to protect minors from content that may impair their physical, mental or moral development and protect all citizens from incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin.”

The revision proposal also includes the definitions of “**video-sharing platform provider**” and “**user generated video**”:

Article 1, paragraph (1), point (da)

“video-sharing platform provider” means the natural or legal person who provides a video-sharing platform service;

Article 1, paragraph (1), point (ba)

“user-generated video” means a set of moving images with or without sound constituting an individual item that is created and/or uploaded to a video-sharing platform by one or more users;

The definitions pinpoint that video sharing platforms differ from traditional distributors as they, in principle, do not pre-arrange a package of content, but massively store all content uploaded to the platform by third-parties and give users the possibility to retrieve it.

<sup>8</sup> European Commission, Proposal for a 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/2016/0287 final, 25 May 2016, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464618463840&uri=COM:2016:287:FIN>.

#### 4. The obligations of video-sharing platforms foreseen by the revision proposal

Under the Commission's revision proposal, Article 28a addresses the responsibilities of video-sharing platforms regarding the protection of minors and violence and hatred, as follows:

Article 28a, paragraph (1)

*"Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers take appropriate measures to:*

- (a) protect minors from content which may impair their physical, mental or moral development;*
- (b) protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin."*

In order to fulfill these two objectives of protecting minors and against violence and hate speech, the proposal suggests the following measures to be used by the member states:

Article 28a, paragraph (2)

*"What constitutes an appropriate measure for the purposes of paragraph 1 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 and/or uploaded the content as well as the public interest.*

*Those measures shall consist of, as appropriate:*

- (a) defining and applying in the terms and conditions of the video-sharing platform providers the concepts of incitement to violence or hatred as referred to in point (b) of paragraph 1 and of content which may impair the physical, mental or moral development of minors, in accordance with Articles 6 and 12 respectively;*
- (b) establishing and operating mechanisms for users of video-sharing platforms to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 stored on its platform;*
- (c) 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;*
- (d) establishing and operating systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;*
- (e) providing for parental control systems with respect to content which may impair the physical, mental or moral development of minors;*
- (f) establishing and operating systems through which providers of video-sharing platforms explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (b)."*

Article 28a, paragraph (2)

*5. Member States shall not impose on video-sharing platform providers measures that are stricter than the measures referred to in paragraph 1 and 2. Member States shall not be precluded from imposing stricter measures with respect to illegal content. When adopting such measures, they shall respect the conditions set by applicable Union law, such as, where appropriate, those set in Articles 14 and 15 of Directive 2000/31/EC or Article 25 of Directive 2011/93/EU.*

#### 5. Assessing compliance with the new obligations under the revision proposal

Under the Commission's proposal, the accountability of video-sharing platforms will be accompanied by an involvement of the national regulators with regard to the assessment of the effectiveness of the measures envisaged in order to accomplish with the obligations to protect minors against impairing content and all citizens against violence and hate speech. It must be noted that this assessment of the measures is not accompanied by an involvement in the assessment of possible infringing behaviours.

Article 28a, paragraphs (4, 6 and 7)

“4. Member States shall establish the necessary mechanisms to assess the appropriateness of the measures referred to in paragraphs 2 and 3 taken by video-sharing platform providers. Member States shall entrust this task to the authorities designated in accordance with Article 30.”

“6. Member States shall ensure that complaint and redress mechanisms are available for the settlement of disputes between users and video-sharing platform providers relating to the application of the appropriate measures referred to in paragraphs 1 and 2.”

“7. The Commission and ERGA shall encourage video-sharing platform providers to exchange best practices on co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct.”

## 6. State of the art of existing obligations or commitments concerning online platforms

A look at the state of the art of existing obligations shows that some member states or stakeholders already have put in place some obligations for “platforms”.

Under the current legal frameworks many EU member states already have mechanisms within their national laws with regard to the protection of minors on platforms, especially with regard to technical measures.

A concrete initiative has recently involved some of the main online platforms (Facebook, Twitter, YouTube and Microsoft) who have signed a code of conduct that includes a series of commitments to fight hate speech online in Europe, by committing to the Notice and Take-down approach for user generated content followed by a suspension of the user’s account in case of repeated infringement.<sup>9</sup>

Apart from this self-regulatory initiative, video-sharing platforms remain subject to the e-Commerce Directive, meaning they are exempt from the duty to actively seek unlawful content, as long as they do not exercise editorial control over it.

## 7. Structure of the working group session

As has been shown from the introductory pages above, the topic of online platforms can be analysed from several angles. This working group can necessarily not cover all issues concerning, but will rather focus on a selection of topics that are connected to the on-going discussions around the revision process of the AVMS directive.

What appears crucial is the preliminary exercise concerning their definition. Only after having identified the subjects the new obligations may be applied to, it is possible to reason around the obligations themselves.

**Maja Cappello**, Head of the Department for Legal Information at the European Audiovisual Observatory, will briefly introduce the topic, before the panel is opened by the Chairperson of EPRA, **Celene Craig**. Our three panellists will provide us with an insight into their national experiences:

- **Thomas Fuchs**, Chairperson of the conference of media regulators – DLM (Germany),
- **Vianney Baudeau**, European and international affairs, CSA (France)
- **Bernardo Herman**, Director general, CSA (Belgium)

Topics to discuss will include the definition of online platforms and their current and possible future obligations.

<sup>9</sup> Code of conduct on countering illegal hate speech online, [http://ec.europa.eu/justice/fundamental-rights/files/hate\\_speech\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf)

## 8. Glossary<sup>10</sup>

**Age-verification system:** a technology used to control access to age-restricted products and services, i.e. PIN codes controlling access to adult content available only on subscription; Gambling online platforms use credit card verification system, by matching the user's identity with the credit card holder identity (who has to be an adult)<sup>11</sup>, identification of the end device.<sup>12</sup>

**Algorithm:** An algorithm is a set of instructions designed to perform a specific task. Search engines use proprietary algorithms to display the most relevant results from their search index for specific queries.

**Automatic means:** Automatic is a self-acting mechanism that performs a required act at a predetermined time or in response to certain ordinance, i.e. algorithm.

**Content rating:** Rating content in order to ensure that minors are not exposed to games that are unsuitable for their particular age group. i.e. PEGI (Pan European Games Information age rating system) is an example of a content rating initiative for video games; Yourateit.eu a tool enabling viewers and uploaders of user generated video to rate their own content but also by the internet community. Based on the location of the viewer, the classification used by this tool can be translated to the applying national rating.

**Displaying:** Showing (data or image) on a computer, television, or other screen.

**Editorial responsibility:** As stated in Article 1, paragraph (1), (c), of the AVMSD: The exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

**Flagging:** or reporting content, refers to clicking on a flag icon to report content (spam, hateful, or inappropriate),<sup>13</sup> for review by an administrator or by a designed moderator.<sup>14</sup>

**Hosting:** As stated in Article 14 of the e-Commerce Directive: 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.

<sup>10</sup> Where not specified otherwise, the definitions are taken from <https://www.oxforddictionaries.com/>.

<sup>11</sup> V. Nash, R. O'Connell et al., "Effective age verification techniques: Lessons to be learnt from the online gambling industry", University of Oxford, <https://www.oii.ox.ac.uk/archive/downloads/publications/Effective-Age-Verification-Techniques.pdf>

<sup>12</sup> Commission for the Protection of Minors and Human Dignity in the Media (KJM), "Criteria for the assessment of concepts for age verification systems constituting elements ensuring the proper functioning of closed user groups in telemedia in accordance with Article 4 Section 2, sentence 2 JMStV", 11 September 2012, [http://www.kjm-online.de/fileadmin/Download\\_KJM/Telemedien/Criteria\\_for\\_age\\_verification\\_systems.pdf](http://www.kjm-online.de/fileadmin/Download_KJM/Telemedien/Criteria_for_age_verification_systems.pdf)

<sup>13</sup> <https://help.salesforce.com/apex/HTViewHelpDoc?id=glossary.htm>

<sup>14</sup> IBM, [www.ibm.com/developerworks/community/help/index.jsp?topic=%2Fcom.ibm.lotus.connections.forums.help%2Fforums\\_mark\\_inappropriate.html](http://www.ibm.com/developerworks/community/help/index.jsp?topic=%2Fcom.ibm.lotus.connections.forums.help%2Fforums_mark_inappropriate.html)

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

**Parental control system:**<sup>15</sup> parental control online enables parents to do one or more of the following three actions:

- Customisation of web content filtering: allows CHILDREN/TEENAGERS to view content according to a set of specific criteria defined during the configuration of the tool. The PARENTS may ask the tool to block or show content indicating the topic, a list of URLs or some specific keywords;
- Blocking the usage: allows blocking the usage of a protocol /application notwithstanding the inappropriateness of the content (e.g. the tool might prevent the children to watch streaming through Media Player);
- Monitoring the application/protocol usage and the web content accessed: to be reported on if and/or when and/or for how long accessing a specific websites, entering/using a specific application/protocol.

**Reporting** see *Flagging*.

**Sequencing:**<sup>16</sup> video sequencing is the act of arranging or rearranging the order of video footage in order to convey an idea or story.

**Stored:** to retain or enter (information) for future electronic retrieval.

**Tagging**<sup>17</sup> is the process of attributing a *Tag* to a specific content. A *Tag* also known as *Metadata* refer to information about data. They are typically used to specify page description, keywords, author of the document, last modified, etc, and used by browsers (how to display content or reload page), search engines (keywords), or other web services. Metadata will not be displayed on the page, but will be analysed by the machine. One of the main issues with tagging is that it is not 100% reliable or representative of the content.<sup>18</sup>

**Uploaded**<sup>19</sup>: to *Upload* is to post something onto the internet

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<sup>15</sup> INNOVA Europe, Benchmarking of parental control tools for the online protection of children SIP-Bench II, [www.innova-europe.eu/files/executive\\_summary.pdf](http://www.innova-europe.eu/files/executive_summary.pdf)

<sup>16</sup> Media Production Center, Harvard University, <http://ims.fas.harvard.edu/glossary>

<sup>17</sup> W3schools, [www.w3schools.com/tags/tag\\_meta.asp](http://www.w3schools.com/tags/tag_meta.asp)

<sup>18</sup> A. S. Sharma and M. Elidrisi, Classification of Multi-Media Content (Video's on YouTube) Using Tags and Focal Points, [www-users.cs.umn.edu/~ankur/FinalReport\\_PR-1.pdf](http://www-users.cs.umn.edu/~ankur/FinalReport_PR-1.pdf)

<sup>19</sup> [www.bbc.co.uk/webwise/a-z/u/](http://www.bbc.co.uk/webwise/a-z/u/)