

New advertising rules for video-sharing platforms

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In November 2018, the European Commission adopted a new version of what started as the “Television without Frontiers Directive” in 1989, and is now known as the Audiovisual Media Services Directive 2018/1808/EU (“AVMS Directive”). This new AVMS Directive adds obligations for video-sharing platforms. The Netherlands, which is known to be liberal when it comes to media and advertising regulations initially voted against the AVMS Directive because of the new obligations for video-sharing platforms. Nevertheless, the AVMS Directive was passed and also The Netherlands will have to implement the new set of rules. The Directive had to be implemented by Member States by 19 September 2020. However, with respect to The Netherlands, the Dutch legislative proposal implementing the AVMS Directive, has been pending in Parliament for a while now and due to the COVID-19 pandemic the deadline of 19 September has not been met. The Dutch legislative proposal now lies before the Senate and the implementing law is expected to enter into force this fall.

In this article, we will discuss the obligations and restrictions regarding advertising for video-sharing platforms under the AVMS Directive.

What qualifies as a video-sharing platform?

As the line between traditional television and modern online audiovisual services has become thinner, the European Commission decided that video-sharing platforms should also be regulated under the AVMS regulatory framework. However, video-sharing platforms have as their principle purpose the sharing of videos to the general public without the provider having any editorial control. With video-sharing platforms the organization of the videos, is generally controlled automatically, by means of algorithms or otherwise, which has been the main reason to leave video-sharing platforms out of the traditional ambit (and still major focus) of the AVMS Directive.

The definition for ‘video-sharing platforms’ covers video-sharing services such as YouTube and Daily Motion, but it is also broad enough to cover most social network platforms, too (see also recitals 4 and 5 of the AVMS Directive). It, however, does not cover non-economic activities such as content on private websites and also not video clips embedded in the editorial content of electronic versions of newspapers and magazines and animated images such as GIFs are types of advertisements that are explicitly excluded from the regulatory framework.

According to the recitals of the new AVMS Directive, although, a significant share of the content provided on video-sharing platform services is not under the editorial responsibility of the video-sharing platform provider, those providers typically determine the organisation of the content, namely programmes, user-generated videos and audiovisual commercial communications, including by automatic means or algorithms. Therefore, it is stated that those providers should be required to take appropriate measures to protect minors from content that may impair their physical, mental or moral development. They should also be required to take appropriate measures to protect the general public from content that contains incitement to violence or hatred directed against a group or a member of a

group or the dissemination of which constitutes a criminal offence under Union law.

Subsequently, in the new AVMS Directive a video-sharing platform service is regarded to mean a service, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.

Advertising rules for video-sharing platforms

As mentioned above, the AVMS Directive contains a whole set of new rules that specifically apply to video-sharing platforms, which will be outlined below.

Before we go into the specific rules, it is important to note the changed definition of an “audiovisual commercial communication” (i.e. advertising). Forms of audiovisual commercial communication mentioned in the definitions under the old article 1h were television advertising, sponsorship, teleshopping and product placement. Therefore, some member states referred to this definition in their national advertising regulations and set up advertising rules for these services.

Under the amended article 1h audiovisual commercial communication, which accompanies or is included in a user-generated video, has been added to the definition. Consequently, national advertising regulations, referring to the definition of “audiovisual commercial communication”, will under the new regime ipso iure apply to advertisements in user-generated content. Member States that do not refer to this definition in the AVMS Directive, such as The Netherlands, will have to include a new legal concept in their national media- and advertising laws.

Under the new AVMS regime, Member States will have to respect a set of minimum qualitative requirements for video-sharing platforms, which are set out in article 28b of the AVMS Directive, and aim to develop a higher degree of protection against harmful content.

Video-sharing platforms need to take appropriate measures to protect:

1. minors from content and advertisements which may impair their physical, mental or moral development;
2. the general public from content and advertisements containing incitement to violence, hatred or discrimination;
3. the general public from content and advertisements of which the dissemination would be unlawful (e.g. content containing terroristic offences, child pornography or racism).

In addition to the provisions above (which only apply to video-sharing platforms) the video-sharing platforms need to comply with a few general advertising requirements (applying to all audiovisual media services), if the ads are marketed, sold or arranged by the platforms themselves. These general advertising rules state that ads shall:

1. be recognisable as such; use ads that shall be recognised as ads and are not disguised;
2. not undermine respect for human dignity;
3. not encourage behaviour that is prejudicial to health or safety;
4. not encourage behaviour that is grossly prejudicial to the protection of the environment;
5. not market tobacco products;
6. not use marketing of alcoholic beverages that targets minors or encourages immoderate consumption of alcohol;
7. not market medicines or medical products for which a prescription is required in the seller's market;

Liability and recommendations

Even when a video-sharing platform does not market, sell or arrange advertisements itself, it must take appropriate measures to ensure that third parties, which place content with those ads on their platform, comply with the general advertisement rules as outlined above. However, the exemption of liability rules for intermediaries, such as the safe harbour provisions in the E-Commerce Directive, are still applicable. The recitals are quite clear in stating that the new obligations for video-sharing platforms in no way detract from the already existing (and often criticized) secondary liability framework for online intermediaries, which might come as a relief for the platforms.

Therefore, it is recommended that platforms contractually require all of their uploaders to comply with the advertising criteria as set out above and require sufficient indemnification in case of violations. In order to be sure for the platforms to benefit from the liability exemptions for intermediaries, it is recommended to refrain from prior monitoring of third party advertising, but instead to rely on an efficient notice and take down procedure.

For now, we are curious to see how national legislators implement and courts will interpret the new provisions in the Directive.

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