

# Position Paper

## Guidelines to be adopted pursuant to the revised AVMS Directive

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### Summary

The revised Audiovisual Media Services Directive (AVMSD) which was published in the Official Journal on 28 November 2018 has enlarged its scope to cover platforms where the principal purpose of the platform or of a dissociable section thereof or an essential functionality of the platform is the provision of programmes and/or user-generated videos, so-called "video-sharing platforms". Pursuant to Recital 5 of the revised AVMSD, the Commission should, where necessary, issue guidelines, after consulting the Contact Committee, on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service'.

The revised AVMSD also aims at strengthening the promotion of European works. Pursuant to Article 13(1), video-on-demand services will be required "to secure at least a 30% share of European works in their catalogues and to ensure the prominence of those works". Article 13(6) provides for a mandatory exemption for companies with a low turnover or low audiences from this obligation. Pursuant to Article 13(7), the Commission shall, after consulting the Contact Committee, issue guidelines regarding the calculation of the share of European works in the catalogue of on-demand media service providers and the definition of low audience and low turnover.

Bitkom would like to take the opportunity to comment on both issues in order to contribute to the process of establishing the respective guidelines.

### The practical application of the essential functionality criterion of the definition of a 'video-sharing platform service'

#### 1. Preliminary remarks on the definition of a 'video-sharing platform service'

As is clear from the public policy objectives pursued and the related deliberation among the co-legislators and the European Commission when introducing regulation, through

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the revised AVMSD, on video-sharing (*sic!*) platform (VSP) services, the scope of application *ratione materiae* is oriented towards platform services on which audiovisual content (foremost “user-generated videos”) is principally made available by any member of the general public (the “content-generating user”) for a circle of recipients from among the same group. This becomes specifically clear in the case of social media services to the extent that these qualify for designation as VSP in the meaning of the Directive: “*Furthermore, they also have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users.*” (Rec. 4 sentence 4 Directive 2018/1808/EU (AVMSD 2018)). In particular where aggregated in form of an audiovisual media service (AVMS), audiovisual content for which there is a clear designation of editorial responsibility to a respective audiovisual media service provider (TV broadcaster and/or VOD service provider), however, does not trigger obligations to be obeyed to by the platform provider, but responsibility/liability continues to rest with the respective AVMS provider (see rec. 3 sentences 4 and 5 AVMSD 2018).

Therefore, the inclusion of the criterion “programme” in the definition of a VSP service (Article 1(b)(aa) AVMSD 2018) could be misleading when defining the kind of services subject to the rules on VSP services. For instance, retail TV service providers which aggregate numerous TV channels and market those as an overall package to consumers (in Germany currently regulated as so-called “platforms”) are not offering a VSP service in the meaning of the AVMSD 2018. This not least follows from the fact that this platform service is provided based on arrangements between the TV platform operator and the AVMS providers whose services are incorporated, i.e. TV broadcasters which leave unaffected the editorial responsibility for the AVMS vested with the TV broadcaster. Finally, according to the provisions of German media law applicable to such TV platform activities, the TV platform operator decides on the services to be included in the overall package offered; thus it is not about a video-sharing service where the content-generating user decides on what is made available on the platform. When offering direct access to the TV channels through a user interface, TV broadcasters must not be hindered or discriminated against; this implies that the TV platform operator has knowledge of all the services at hand and, based thereon, takes an active decision. Without consent from the TV broadcaster, there is no freedom for the TV platform operator on how to market the channels; which means that marketing (if at all) is an issue of negotiation between the TV broadcaster and the TV platform operator.

## 2. Objective of the service and importance of its audiovisual component

Article 1(b)(aa) of the revised AVMSD states: “the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to [...] in order to inform, entertain and educate”. In accordance with the revised AVMSD, this should be relevant in the determination of a video sharing platform. Marketplaces should not be the primary target. Similarly, whether the service is marketed or advertised or commonly referred to as a platform for the provision and sharing of audiovisual content is relevant in the determination of a video sharing platform. It is also relevant, whether users perceive the provision of audiovisual content as an important feature as compared to other types of content provided on the service. However, it is not clear how this can be objectively measured.

## 3. Technical features of the service regarding audiovisual content

Whether the functionalities regarding audiovisual content (e.g. allowing to upload or share a video) are as visible and prominent for the users and as easy to use as the ones available for other types of content is relevant in the determination of a video sharing platform. It should be made clear that video sharing platforms are services which allow users to upload and share videos. It is also relevant whether the service provides for specific functions tailored for audiovisual content. It is, however, not relevant whether the service has an “autoplay” functionality, whether the service allows users to download audiovisual content available or whether there is a limit to the number of times that users can watch a piece of content uploaded by a different user. It is furthermore confusing to use the term “curate” in the determination of a video sharing platform. It is unclear how ‘curate’ is different from ‘organize’. It could also make unclear how a video sharing platform is determined in contrast to an on-demand audiovisual media service.

## 4. Audiovisual commercial communications and audiovisual content monetisation

The determination of a video sharing platform should be business model neutral. Therefore, it should neither be relevant whether there is advertising around the audiovisual content available on the service, nor whether the service allows and facilitates that users who upload audiovisual content are able to monetize such content.

## **The calculation of the share of European works in the catalogues**

### **1. Technical feasibility of the reporting**

Before the details of the calculation method are being discussed, it is absolutely necessary to clarify on what grounds a video-on-demand (VOD) provider can technically carry out the reporting. The definition of European works is a complex one, partially also based on often opaque financing structures of the works. Metadata as part of the licenses generally do not contain information on whether a work is European or not. Without a standardized labelling, a proper reporting won't be possible or will only be possible with unreasonable effort. This is why Bitkom is requesting and has been requesting in the past that assets have to be labelled in the Metadata in a standardized manner as "European works" by the content provider/ producer/ right holder. We would like to refer to Recital 35 of the revised Directive, which encourages the labelling in metadata of audiovisual content that qualifies as a European work. However, an encouragement is not enough: if there is no labelling duty for content providers and those labels continue to be lacking in the metadata, VOD providers have to resort to other criteria they deem appropriate for their calculation.

### **2. Point of time of the reporting**

In addition to the necessity of labelling, it has to be determined when the reporting is to take place: what is the reference point in time or period, respectively, for the calculation. Many VOD providers continually change the content of their catalogue, presenting difficulties in terms of when to measure compliance with the European Works quota. One option would be to calculate the share of European works at a particular, pre-determined date during the year --> e.g. "flashlight" on 1<sup>st</sup> of June. Another option would be to calculate the share of European works on a look-back basis over the preceding 12-months period (i.e. include all the titles that were offered at any time during the period and calculate the average). In any case, the reporting should be carried out no more than once a year.

### **3. Calculation method**

Title count/calculation based on assets in the catalogue is more appropriate for the calculation of the share of European works in VOD catalogues than calculation based on hours/minutes. Hours/minutes cannot be reported in a proper manner due to lack of data and due to the established accounting systems. Therefore, a reporting in minutes would require new disproportionate investments in technical reporting systems. Within the

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Bitkom membership there are diverging views/opinions on whether the calculation should be based on titles for both series (or seasons of series) and films or on titles for films and episodes for series. Part of the membership prefers calculating title count for series at episodic level in order to prevent underrating series. Part of the membership prefers calculating title count for series at series or season level in order to prevent prioritizing series with a significant number of episodes. In addition, it might be reasonable to attach a certain factor (e.g. of 1.5) to the number of episodes of series in order to reflect the superior length of feature films and movies when compared to an episode of a series.

Where a VOD provider has several catalogues (e.g. for SVOD and TVOD), those are mostly integrated into one and the same service. Within the Bitkom membership there are diverging views/opinions on whether the share of European works should be calculated for each catalogue separately or rather overall. Part of the membership prefers calculating the share overall for all catalogues for the sake of simplicity (while a title that is included in both catalogues should not be double-counted). Part of the membership prefers a calculation separately for each catalogue (the same should apply to catch-up and instant replay services). In any case, we would like to clarify that separate catalogues usually form part of a shop-in-shop solution and only the providers of those services that are accessible via the media platform have editorial responsibility for the content.

For the sake of clarity, virtually linear services / broadcasting-related services and functionalities shouldn't be considered a VOD in this context. Neither instant restart (watching a linear programme from the beginning when you switch on your TV too late), nor backwards EPG / catch up (watching a specific linear programme within a limited time frame after the linear broadcast) functionalities represent VOD services in the meaning of the directive. First, they distinguish themselves clearly from VOD services such as broadcasters' VOD libraries, TVOD or SVOD services, which are under the editorial responsibility of the respective service provider, while those virtually linear services / broadcasting-related services and functionalities are practically under the editorial responsibility of the linear broadcaster, as the services solely project the linear broadcast and they are vested with the broadcaster. Second, the Directive's recitals stipulate that its rules for linear services are relevant where there is an adjacent non-linear service; this should even more hold true where a broadcasting-related service such as catch-up or instant restart is at hand (cf. re. 27 and 30 Directive 2010/13/EU).

## Defining low turnover and low audience

### 1. Indicators

For both business models (SVOD and TVOD), but also for advertising-funded or broadcasting licence fee-funded VOD, it is important that indicators are chosen which reflect the different business models and allow an accurate representation of the market conditions. We are concerned about the assignment of a specific indicator to a specific business model (as is done when representing examples in the above question). In addition, it is difficult to clearly identify separate business models: there are some mixed-forms and there could be different interpretations, e.g. in relation to services like electronic sell through (are they included in TVOD?) or licence fee-financed services (is this similar to a SVOD subscription fee?).

### 2. Reference market

For both the assessment of audience and turnover, a benchmarking along the line of 'in relation to all VODs' is problematic because this might include services on different markets used by different audiences. However, a reference based on the criterion 'in relation to all VODs with similar business models' is also problematic because the determination of what constitutes a 'similar business model' is difficult to make and might create problems of delineation, especially due to mixed-forms of VOD services. 'All households with broadband connection' is ineligible in this context, as the broadband market is indifferent from the content market and VOD usage is also possible via WIFI etc.

Bitkom members prefer a calculation of audience and turnover in relation to each national market where the VOD is present, as the markets are still characterized by national differences and specifics and often VOD services are tailored towards individual markets. When done differently, the calculation, particularly in the context of 'turnover' may need to be qualified according to individual market's characteristics (price-levels, income, specific spent for AV products or for VOD services).

### 3. Turnover

If providers offer other services in addition to on-demand audiovisual media services within the same subscription service, only turnover reasonably attributable to the VOD service should be determinative. Where a dedicated price tag is (theoretically) available for the VOD component of a bundled offer, this should be used; if such is not available, typical market prices (average, category-sized prices) should be applied). It has to be taken into

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account that there exist constellations which make the calculation of turnover difficult, such as advertising-financed services or services based on mixed financing (subscription + advertising). The turnover of a service financed by broadcasting licence fees, for instance, could be calculated based on the investment (cf. Filmförderungsgesetz: production costs, spend for licences) made for the content and be multiplied by a certain factor reflecting the surplus which would be added were the service marketable following a comparable business model.

Bitkom represents more than 2,600 companies of the digital economy, including 1,800 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.