

Regulation of video sharing platforms in the European Union and Hungary

**Dr. Gábor Hulkó, PhD., associate professor – Dr. András Lapsánszky, PhD.,
associate professor**

Széchenyi István University, Faculty of Law, Győr, Hungary

Annotation

Since the 2007 revision of the AVMS Directive, the nature of audiovisual media services and the viewing habits of viewers, especially the younger generations, have changed significantly. Thanks to the convergence of television and Internet services, new types of contents and services, such as user-generated content, video-on-demand services and video-sharing platform services, have entered the market in addition to traditional linear broadcasting services. All this made it necessary to rethink the legislation. EU Member States had until 19 September 2020 to bring into force the laws, regulations and administrative provisions necessary to comply with amendment of the AVMS Directive. In my study, I would like to present the European Union and Hungarian regulation of video-sharing platform services.

Key words

Video-sharing platform service, media, YouTube

1. Introduction

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 (hereinafter the AVMS Directive) was amended in November 2018. The reason for this amendment is that since the AVMS Directive was adopted, the convergence of television and internet services has led to the emergence of new types of content and new players, such as user-generated content, on-demand media services, video sharing platform services, etc., competing with traditional linear broadcasting services. In addition, the nature of audiovisual media services and the media consumption habits of consumers, in particular the younger generations, have changed significantly.^[1] A survey by Ofcom, the UK's media authority, asking children aged 5-15 and their parents about their media consumption habits and knowledge, showed that children were twice as likely to watch audiovisual programmes via on-demand media services than linear media services. The use of video-sharing platforms among children is almost universal (96%). None of the children in the sample regularly watched linear media services, and they used their television set more for on-demand content than for linear programming. The most popular platforms for television-like content were YouTube and Netflix rather than traditional television channels. Nothing shows the change in habits better than the fact that the children surveyed overwhelmingly used the term „watching TV“ to refer to watching on-demand content.^[2]

A similar phenomenon was reported by the National Media and Infocommunications Authority of Hungary (hereinafter NMIA) based on its market research conducted between November and December 2019. According to the study, half of internet users are no longer getting their information from TV, radio or print media, and the internet is also gaining ground in the field of entertainment. Around 46% of teenagers watch little or no TV and prefer to spend their leisure time online (15% have given up traditional TV altogether and 26% watch less). Seven in ten teenagers now read the news online, while eight in ten choose the internet to watch films and TV series. A similar shift can be observed among the older age group, although they are much slower to switch from television to the internet.^[3]

The statistics clearly show that YouTube and other video sharing platforms play a prominent role in today's media and their importance is growing year on year. At the same time, the problems of video-sharing platforms, such as hate speech and online harassment, incitement to commit crimes such as terrorism, have also emerged, against which video-sharing platforms seem to be powerless so far. They are gradually tightening their standards and are increasingly effective in enforcing compliance. However, most of these positive developments come only after a major scandal, following pressure from the online community and the media (e.g. Twitch has created a category for hot tube streams following pressure from the community, and YouTube has taken a more proactive role in removing harmful content since the Tide Pod challenge scandal, among others). In many cases, however, the rules that are put in place are not enforced or are not enforced consistently enough by users.^[4]

Another problem is that excessive rules are often introduced and videos that are not considered harmful are blocked from platforms. This was the case when YouTube blocked the channel of a British history teacher after he uploaded an educational video that YouTube deemed to be in breach of its hate speech policy.^[5] In contrast, many videos that pose a real threat to members of society can remain on YouTube for weeks, such as the Tide Pod challenge videos, which encouraged people to record themselves eating Tide Pod capsule detergent and then ask five friends to do the same.^[6]

The changed market inevitably required a change in regulation, as new media services could not fit into the existing conceptual framework, leading to uncertainty about new technologies and services. An outdated regulatory environment can also be detrimental to competition and innovation, as it can hinder the introduction of new business models. A rethink of regulation was needed to balance consumer protection and competitiveness.^[7]

2. Regulation of video-sharing platform services in the EU

The AVMS Directive covers audiovisual media services, which before the amendment was defined as a service for which a media service provider has editorial responsibility and the primary purpose of which is the transmission of programmes to the public for information, entertainment or education purposes over an electronic communications network. Such an audiovisual media service is either a television broadcasting service or an on-demand audiovisual media service.^[8] The amendment also changes the latter concept: 'audiovisual media service' means: a service [...], where the principal purpose of the service or a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, in order to inform, entertain or

educate, by means of electronic communications networks [...]; such an audiovisual media service is either a television broadcast or an on-demand audiovisual media service.^[9]

Whichever definition is used, video-sharing platform services cannot be considered audiovisual media services, as they do not involve editorial responsibility, as they merely provide a means of storing, making available and uploading content to users, which is merely organised in some way, possibly by means of an algorithm. However, they have no real control over the content that appears on the service.^[10] They were therefore not covered by the previous AVMS Directive.

Because video-sharing platform services provide audiovisual content that is increasingly viewed by audiences, in particular young people, and compete for the same audience and revenues as traditional audiovisual media services. This is why the amendment to the AVMS Directive already defines and covers them, in order to adapt to the needs of the ever-changing digital world.^[11] The purpose of the extension of the scope is to ensure that video sharing platform providers (hereinafter referred to as „VSPPs“), in line with their growing role in media content consumption, are no longer merely passive in the transmission of online content, but bear a certain degree of responsibility for the content uploaded by third parties to their hosting platform and thus made available to users.^[12]

For the purposes of the Directive, a video-sharing platform service means 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.'^[13]

In the context of video-sharing platform services, three concepts need further explanation: user-generated video, essential functionality, and dissociable section. A user-generated video is a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user. The Directive does not cover GIFs, videos embedded in the editorial content of electronic versions of newspapers and magazines, or non-economic activities.^[14]

The delivery of programmes and/or user-generated videos to the audience can be considered a core function of a service if the audiovisual content is not merely ancillary to or a minor part of the activities carried out in the context of the social media service. An audiovisual service is considered to be ancillary to the activities of the service if it is exclusively related to an underlying activity or function provided by the platform concerned (e.g. a video uploaded by an e-commerce platform about the products they sell). Audiovisual content is a minor part of the service if it plays only a minor role in the overall profitability of the service. This can be inferred from quantitative or qualitative considerations. For example, if a significant number of videos are uploaded to the platform or if the videos contribute significantly to the success and popularity of the platform. In a guideline issued in 2020, the European Commission stressed that the essential functionality requirement should in no way be interpreted as requiring that the audiovisual content available on the platform is of such fundamental commercial importance that without it the service would not be viable or could not continue to be provided on the market. It may also take into account whether the platform derives revenue from the feature, to what

extent it seeks to promote the feature and to what extent this is a significant element of its commercial policy, and the ultimate purpose of the service and the general perception of users.^[15]

In cases where a service is composed of several parts (e.g. a chat service appears alongside a video-sharing service), only the separable part of the service that constitutes the video-sharing platform service is covered by the Directive, only in respect of programmes and user-generated videos. In the *Tiroler Tageszeitung* case, the Court of Justice of the European Union ruled that the classification of each part of a service must be based on whether it has an independent content and function.^[16] For example, in the case of a news portal, videos embedded in articles are such an inseparable complementary element because of the interconnection between audiovisual and textual offerings that they are part of the online media product and cannot be considered as a separate, distinct media service. By contrast, the Facebook Watch function, which is hosted on a separate Facebook sub-page, is not an integral part of Facebook as a social media platform and can therefore be considered to be a separable part of the service.^[17]

The amended AVMS Directive therefore defines video-sharing platform services as a separate category of services, distinct from media services and other content services. One of the main reasons for this distinction is the lack of editorial responsibility. Indeed, video-sharing platform services only store programmes and user-generated content, for which the service provider has no editorial responsibility. While the media service provider exercises effective control over the selection and compilation of programmes, the VSPPs only organise the stored content, for example by automatic means or algorithms, in particular by displaying, tagging and queuing, but have no influence on the actual content. The primary purpose of a video-sharing platform service, or a separable part of the service, is to deliver programmes stored on its server or user-generated videos to the public for information, entertainment or education purposes over an electronic communications network. It is the users' choice which of the programmes or content stored on the video-sharing platform service they wish to view.^[18] VSPPOs, by virtue of the above-mentioned characteristics, only store and transmit programmes and videos uploaded to their servers, and are therefore considered to be media content sharing and transmission providers.

In transposing the amendment to the AVMS Directive into national law, Member States should also take into account that the procedures and conditions restricting the free provision and consumption of audiovisual media services should be the same for linear and non-linear services and for VSPPs and should be based only on overriding reasons in the public interest (e.g. to achieve a higher level of consumer protection), in line with EU principles. The restriction must not only be justified, but must also meet the criteria of necessity and proportionality.^[19] The aims of the amendment include the protection of the physical, mental and moral development of minors and the fight against incitement to violence or hatred, public provocation to commit terrorist offences, and other criminal offences and harmful content against certain groups in society, which are increasingly threatened by the development of devices and services capable of distributing content over electronic communications networks.

Member States must take the necessary measures, in compliance with the principles of necessity and proportionality and with the rights and principles enshrined in the Charter of Fundamental Rights of the European Union, to ensure that audiovisual media services provided by media service providers

(and, of course, by VSPPs) under their jurisdiction ensure the fulfilment of these general interest objectives. Member States have a relatively wide margin of manoeuvre as regards the specific measures to be introduced by VSPPs, as the AVMS Directive lists them only by way of example. This gives Member States the possibility to take into account their national specificities by introducing more detailed and stricter rules, while respecting freedom of expression and information and media pluralism.^[20]

Under the AVMS Directive, and more specifically Article 15 of the E-Commerce Directive referred to therein, Member States may not oblige VSPPs to take prior control measures or to filter the uploading of content which would imply a general obligation to monitor the information they transmit or store in the course of providing their services or to investigate facts or circumstances indicating illegal activity.^[21] Exceptions to this rule are made if the national investigating authority so instructs. Instead, the AVMS Directive puts the emphasis on informing users and on how complaints are handled (e.g. flagging). It is important to note that the obligation of the VSPPs does not end with the installation of complaint reporting systems, but that they must take the necessary measures to delete or make inaccessible the content complained about on the basis of the complaints received. Furthermore, the AVMS Directive imposes an obligation on VSPPs to promote media awareness.^[22]

Self- and co-regulation is also mentioned in the explanatory memorandum of the Directive as a possible means of regulating VSPPs. Self-regulation involves the adoption by the market players concerned of common guidelines for their own activities, which they are responsible for developing, monitoring and ensuring compliance with.^[23] And co-regulation is about national regulators and bodies sharing their regulatory role with stakeholders.^[24] In this case, the Member States will finance and control the processes of the co-regulatory system, while recognising it. In the event that the objectives of co-regulation are not met, the possibility of public intervention should be provided.^[25] The EU legislator explains that although self-regulation and co-regulation are not mandatory for Member States, it may be appropriate to establish codes of conduct for VSPPs, as regulation with or without the active support of stakeholders allows for a more effective pursuit of public interest objectives.

A stable legal framework, regular, transparent and independent monitoring and evaluation of the achievement of the specific objectives and targets set, and effective enforcement of the co-regulatory codes of conduct (including effective and proportionate sanctions) can greatly contribute to compliance with these codes.^[26] Codes of conduct must be accepted by the main stakeholders in the Member State concerned. The AVMS Directive also calls for the development of co-regulatory codes of conduct at EU level, to be drawn up by Member States and the Commission in cooperation with media service providers, VSPPs, or their representative organisations, in cooperation with other sectors as appropriate.^[27]

3. Regulation of video sharing platform services in Hungary

3.1. General ruleset for VSPPs

EU Member States had until 19 September 2020 to transpose into law the changes brought about by the amendment to the AVMS Directive. The Hungarian legislation also separates the requirements for VSPPs from the regulation of media service providers, users and the media content included in the service. Following the existing Hungarian legal system, the Directive's provisions relating to video

sharing platform services are not regulated in Act CLXXXV of 2010 on Media Services and Mass Communications (hereinafter: Media Services Act), but in Act CVIII of 2001 on Certain Aspects of Electronic Commerce Services and Information Society Services (hereinafter: Electronic Services Act), in view of their information society service nature.

According to Section 2(f) of the Act, „information society service“ means a service provided electronically, usually for remuneration, to remote users, to which the recipient of the service has individual access.^[28] On the basis of Article 2 (l) of the Electronic Services Act, the Act included the VMPSOs in the category of intermediary service providers within the scope of information society services (including simple data transmission and access security, caching, hosting, search services and application service providers).^[29] By regulating CMOs in the Electronic Services Act, the provisions on the same type of service providers and services have been brought together in one piece of legislation, thus the legislator has managed to avoid the creation of parallel legislation. However, the definitions of video-sharing platform service and user-generated video were not included in the Electronic Services Act but in the Media Services Act (the definitions used in the AVMS Regulation were adopted by the Hungarian legislator in one single text) and the existing definitions were clarified in order to extend the general rules to programmes made available through video-sharing platform service and user-generated video. The domestic legislation only lays down specific rules on the content and structure of programmes made available by the VSPPs in the narrowest possible scope. To a large extent, the obligations of the VSPPs relate to the organisation of the content, not to the content itself.^[30]

VSPPs therefore have no editorial responsibility, but they do use various automated tools or algorithms to organise the content they make available, whether it is programmes, user-generated content or commercial communications. This is the basis for the fact that, following the amended AVMS Directive, Hungarian legislation obliges them to ensure the protection of the physical, mental and moral development of minors and the establishment and effective application of an appropriate system of measures against content which incites violence or hatred against a particular group or a member of a group.

The VSPPs must take appropriate action if the content they transmit is likely to harm the physical, mental, spiritual or moral development of minors, or to incite hatred or violence against others, or to offend the human dignity of others, or to constitute a criminal offence or an incitement to commit a criminal offence.^[31] The law does not specifically define what constitutes appropriate and effective action for each type of harmful media content. Nor would it be useful to list them and make them mandatory, given that new innovations can easily render obsolete previous measures to protect minors. Instead, the legislation lays down the general principle that measures and effective technical solutions must be proportionate to the harm and inconvenience caused by the content.^[32]

With regard to the proportionality of the measures, the law establishes the aspects that the VSPP must pay attention to. This includes the nature of the content, the disadvantage caused by the content, the extent of the damage, the characteristics of the group of people at risk, the scale and nature of the given video sharing platform service, as well as the rights and interests at stake, including VSPPs and the interests of those who create or upload videos and the public interest. The statute contains special regulations in order to protect minors: VSPPs must, among other things, provide effective age verification and a parental control system, and must provide users with transparent, efficient and user-

friendly information about content that adversely affects the physical, mental, spiritual or moral development of minors. Electronic Services Act 15/F. Section (5) states that the measures introduced by the VSPP in order to enforce the requirements specified in the Electronic Services Act cannot lead to preliminary control measures or filtering of content uploads that do not comply with the provisions of this law.[\[33\]](#)

3.2. Special regulation and rules concerning VSPPs

The NMIA has published a Recommendation on effective technical solutions for the protection of children and minors, which sets out a number of soft law standards for VSPPs. The Recommendation lists a non-taxative list of solutions for on-demand media services provided in the context of digital broadcasting services: (a) the use of parental controls to make content recommended for minors above a certain age inaccessible on the device itself; (b) the use of a parental lock to prevent programmes not recommended for minors from appearing in the list of contents without requesting a secret code; (c) the use of parental filtering software to make content not recommended for minors inaccessible; (d) the display of an age rating in the source code, url; (e) the insertion of a warning before the content is displayed.

The recommendation adds that parental locking and other technical solutions can only work effectively if the MPAs monitor the success of the solutions they use and continuously improve them, and inform parents and guardians of underage consumers about their availability (e.g. during the sale of the service or through illustrative videos). In addition to technical solutions, the recommendation also highlights the need to develop media awareness, especially among minors.[\[34\]](#)

In relation to advertisements, the AVMS directive stipulates that VSPPs, as media service providers, are responsible for the commercial announcements appearing on the advertising platforms it sells (e.g. embedded advertisements). On the other hand, VSPPs bear only limited responsibility in connection with commercial announcements placed by the user (e.g. product display). The VSPPs must incorporate the regulations regarding commercial announcements into their terms of use.[\[35\]](#) Regarding the commercial announcements appearing on the video-sharing platform, it is a requirement that the VSPPs are obliged to develop systems that allow the uploader of a user-created video to declare whether the video uploaded by him contains a commercial announcement. They are also obliged to create mechanisms by which users can report or flag content that violates the requirements for commercial communications of the VSPP or complain about such content.[\[36\]](#)

Commercial announcements distributed, sold and organized by VSPPs must meet the requirements for media content, such as the requirement that advertising appearing in media content must be easily recognizable and distinguishable from other media content, and must not encourage behavior that is harmful to the health and safety of individuals and to the environment, cannot promote cigarettes and other tobacco products, cannot violate human dignity, etc.[\[37\]](#) The VSPP is obliged to provide the user with clear information that the program or user-generated video contains commercial announcement, if the uploader stated so, or if the VSPP is aware that it contains commercial announcement.[\[38\]](#)

The VSPPs are obliged to include in their general terms and conditions the requirements for individual media content, including what requirements the videos and commercial announcements uploaded by users must meet, furthermore, claims enforcement options for out-of-court and judicial settlement of

legal disputes related to the application of measures against certain media content between users and VSPPs.^[39] In addition, they must alert users to take appropriate measures to protect minors from content that may harm their physical, mental or moral development, and to protect the public from content that incites violence or hatred, as well as content that the dissemination of which is considered a crime under EU law (e.g. provocation to commit a terrorist crime, child pornography, crimes related to racism and xenophobia).^[40]

Pursuant to Electronic Services Act VSPPs are obliged to design its service in a transparent and user-friendly manner. In this regard, by introducing appropriate measures, they must ensure that users have the opportunity to flag or report content that may be harmful to minors or violate the human dignity of others, or the requirements set out in the general terms and conditions.^[41] Ekertv also contains specific regulations regarding the process of these reports. If the content made available to the public by the hosting service provider infringes the copyright of a person or the personal rights of a minor, the copyright owner or, in the case of a minor, their legal representative may report it to the VSPP and ask for its removal with a public deed or a private deed of full probative value. However, it is important to emphasize that this provision is basically not a regulation tailored to the VSPPs.

Within 12 hours of receiving the notification, the service provider – in addition to informing the uploader of the video who violates the rights of the user – must take measures to prevent access to the information specified in the notification or to remove the information, and to indicate why it was considered to infringe the rights of others. Within eight days of receiving the information, the uploader can file an objection with the service provider against the removal of the affected information in a private or public document with full evidential force.

In the event of an objection, VSPP is obliged to immediately make the relevant information available again and to notify the right holder of this by sending the objection, unless the removal or the prohibition of access has been ordered by a court or authority. The right holder can then apply to a court or other authority to remove the infringing content. If such an objection was not used, or if it does not meet the form and content requirements, or if the violation was acknowledged, then the service provider is obliged to maintain the inaccessibility. It is important to note that VSPPs cannot be held responsible for removing the relevant information or blocking access to it, if it acted in good faith and in accordance with the above procedure.^[42]

The legislator transferred the tasks related to the inspection and supervision of the VSPPs to the Office of the NMIA. The Office of the NMIA carries out the tasks related to the registration of VSPPs within its authority, as well as supervises the enforcement of the regulations regarding video sharing platform providers and services.^[43] In addition, the Office of the NMIA analyzes, assesses and evaluates the appropriateness and effectiveness of the measures taken by the VSPPs at regular intervals, for this purpose it can request data from them.^[44] According to the Electronic Services Act VSPPs under the jurisdiction of Hungary are obliged to notify the NMIA of their intention to start providing video sharing platform services for the purpose of registration. Registration is not a prerequisite for the start of the service, i.e. the right to provide the service is not created by the fact of registration.^[45]

If the Office of NMIA detects a violation of the law, it is entitled to apply the following legal consequences:

- - can prohibit the demonstration of unlawful behavior, oblige the VSPPs to terminate the violation, and establish an obligation to comply with the provisions of the law;
- - it may oblige the VSPPs to publish the notice or the decision on the opening page of its website in the manner and for the period specified in the decision;
- - can impose a fine of up to one hundred million forints;
- - you can oblige VSPPs to suspend their service for a period ranging from fifteen minutes to one week, or
- - you can delete the video sharing platform service from the registry.

When applying the legal consequence, the Office of the NMIA is obliged to take into account the principles of equal treatment, as well as gradation and proportionality.

The Office of the NMIA determines the legal consequence – depending on the nature of the violation – on the gravity of the violation, the repetition, continuity, and duration of the violation, the financial advantage achieved by the violation, and the harm to interests caused by the violation, and the number of people whose interests have been harmed and who are at risk, as well as for the damage caused by the infringement, the infringement of personal rights and the impact of the infringement on the market, furthermore, it is established with regard to other aspects that can be evaluated in the individual case.[\[46\]](#)

Therefore, although the VSPPs do not have editorial responsibility, they are responsible for the information they make available that violates the law. VSPPs are not responsible for the information provided by the user, if it is not aware of illegal behavior related to the information, or that the information violates the rights or legitimate interests of anyone, or as soon as it becomes aware of them, it immediately takes measures to remove the information, or does not provide access. The VSPP's exemption from liability does not preclude the person who has been harmed by information with illegal content from asserting their claims for the prevention or cessation of the violation through a court of law against the infringing party as well as the intermediary service provider.[\[47\]](#)

Electronic Services Act in accordance with the AVMS directive, creates an opportunity for self- and co-regulation in connection with video sharing platform services. In order to promote effective legal enforcement, the regulation brings the professional self-regulatory organizations and alternative dispute settlement forums of the VSPPs into the framework of the regulation and shared enforcement, when it states that in a public administrative contract with a cooperation content, the Office of the NMIA can authorize the self-regulatory organization to act in a self-administrative manner instead of the Office of the NMIA.[\[48\]](#)

The public administration contract can also be concluded for the purpose of the cooperative performance of tasks that are not regulated as authority powers, in accordance with the legislation. In the official cases included in the public administration contract, the official application of law is therefore withdrawn and space is given to self-administration and co-regulation. In this way, the professional self-regulatory organizations gain a significant role in the process of legal enforcement and in the development of legal practice along the goals and principles defined in the law.[\[49\]](#)

5. Conclusion

In the last decade, the media consumption habits of members of society, especially the younger generations, have changed significantly. More and more people are choosing on-demand media services (e.g. video sharing platform services) instead of traditional linear media services (e.g. radio, television). However, the new audiovisual media services did not fit into the conceptual framework established by the AVMS directive or the Hungarian regulations. That is why the AVMS directive first, and then the Electronic Services Act and Media Services Act also changed, as the video sharing platform service appeared as an independent category in them, distinguishing them from media services and other content services.

One of the main reasons for the demarcation is the lack of editorial responsibility, because in the case of the video sharing platform service, only programs and content produced by users are stored, the VSPPs do not have editorial responsibility for making them available, while the traditional media providers are responsible for the selection of programs and exercise actual control over their compilation. In the case of VSPPs, preliminary filtering and categorization of content is not carried out – in contrast to traditional media service providers – and even this would be impossible with the amount of content to be uploaded. The legislator realized that the ever-increasing number of users of VSPPs is exposed to danger when consuming content via electronic communication networks, so it is necessary to transform the liability system of VSPPs. In order to protect content consumers, VSPPs are obliged, among other things, to inform users about published content, how to make a complaint or report, and they must also take appropriate measures to remove infringing content.

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