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Influencers Challenging the AVMSD's Scope

In Need of Patching Up or Fundamental Rethinking?

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6.1 INTRODUCTION

Audiovisual media services (AVMSs) play a pivotal role in shaping and influencing society, democracy, and culture. Concerns linked to the power of mass media and technology made regulatory intervention in the form of content-related and structural measures indispensable.[1] The Audiovisual Media Services Directive (AVMSD)[2] – originally the Television without Frontiers Directive (TVWFD) – is the main instrument regulating audiovisual content in the EU. The TVWFD was enacted in 1989, triggered by the development of cable television and satellite television.[3] The Directive was envisaged to facilitate the circulation of television services throughout the EU by establishing minimum harmonisation of certain aspects of national legislation. Throughout the decades, technological and market developments – such as convergence – have regularly challenged the scope of the EU's regulatory framework for the audiovisual sector. In response to these challenges, the scope of the Directive has been extended several times. The first amendment to the TVWFD took place in 1997.[4] From the second half of the 1990s, the sector started to digitise and moved beyond traditional broadcasting. The emergence of on-demand services (e.g. online catch-up TV, Netflix, and Disney+) led to the

[1] P. Valcke and J. Ausloos, 'Audiovisual media services 3.0: (Re)defining the scope of European broadcasting law in a converging and connected media environment', in K. Donders et al. (eds.), *The Palgrave Handbook of European Media Policy* (London: Palgrave Macmillan, 2014), p. 312.

[2] 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, OJ 2010 No. L95/1, as amended by Directive (EU) 2018/1808 (hereafter: AVMSD).

[3] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 No. L298/23 (hereafter: TVWFD 1989).

[4] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1997 No. L202/60 (hereafter: TVWFD 1997).

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next set of amendments to the TVWFD in 2007.[5] At the time, the Directive was renamed as the Audiovisual Media Services Directive to reflect its broadened scope. A technology-neutral, graduated approach was introduced with a 'light regime' for on-demand services. A consolidated text of the Directive was codified in 2010.[6] In 2018, the AVMSD was revised again, bringing about a paradigm shift: traditional TV is no longer the benchmark as the requirement to be 'TV-like' has been deleted, the graduated approach towards linear and on-demand services has been diminished, and video-sharing platforms (VSPs) have been brought within the scope of application of the Directive.[7] Furthermore, user-generated videos (UGVs) seem no longer to be excluded from the scope of the AVMSD by their very nature (see Recital 21 AVMSD 2010 and Recital 3 AVMSD 2018), provided that the content qualifies as an AVMS in the sense specified in the Directive.

Throughout the amendments, the AVMSD was always underpinned by policy goals serving cultural, social, and economic purposes.[8] In the context of this chapter, the most significant policy goals are promoting the EU internal market for AVMSs; protecting freedom of expression and information; protecting viewers and users, in particular minors and other vulnerable groups; and promoting fair competition.

Even though today's regulatory framework has already been shaped considerably by continuous evolution, its ability to meet the challenges of the contemporary audiovisual media landscape can be questioned. What is, for instance, the legal status of hybrid services, such as short video clips on audio streaming platforms or audiovisual content within video games?[9] The aim of this chapter is to contribute to the ongoing discussions regarding the modernisation of the EU's regulatory framework for AVMSs. In particular, the focus will be on the appropriate delineation of the scope *ratione materiae* of the Directive. The question underpinning this research is whether the material scope of the AVMSD allows it to effectively and efficiently achieve its underlying objectives in today's audiovisual media landscape.

[5] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 2007 No. L332/27 (hereafter: AVMSD 2007).

[6] 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, OJ 2010 No. L95/1 (hereafter: AVMSD 2010).

[7] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities, OJ 2018 No. L303/69 (hereafter: AVMSD 2018).

[8] P. Valcke and D. Stevens, 'Graduated regulation of "regulatable" content and the European Audiovisual Media Services Directive: One small step for the industry and one giant leap for the legislator?' (2007) 24 *Telematics and Informatics* 285–302 at 288.

[9] E.g. the Kid Laroi concert within *Fortnite* (2023).

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The building blocks of the AVMSD's scope of application have regularly been under significant strain due to the rapidly evolving and converging audiovisual media sector. Even though the Directive's scope has faced repeated scrutiny in the past,[10] the media sector finds itself once more confronted with challenges leading to difficulties of application and interpretation. The exercise central to this chapter holds crucial significance in revisiting this area. Considering that pre-existing concerns regarding user-generated content have now materialised and new hurdles have surfaced, this chapter takes on a novel 'influencer angle' in order to pinpoint shortcomings in relation to the present scope of the AVMSD. While the traditional media law model is based on the premise of few and professional senders of content and many receivers, influencers are a phenomenon resulting from the democratisation of (audiovisual) content creation and dissemination. As a product of technological advancements and convergence they serve as an ideal point of reference to highlight contemporary issues regarding the Directive's scope of application.

Section 6.2 of this chapter focuses on influencers and the significant role they play in our society. In Section 6.3, the constitutive elements of the scope of the AVMSD will be critically assessed and applied to influencers as 'new' content providers. The question of whether the AVMSD is (still) able to reach its policy goals today will be addressed in Section 6.4. The chapter concludes with a number of critical and questioning remarks to stimulate debate on the EU's audiovisual media policy. The research is based on a doctrinal legal research method, focusing on the provisions of the Directive as such but also on the preparatory works, policy documents, legal doctrine, and relevant case law.

6.2 INTRODUCING INFLUENCERS AND THEIR IMPACT

The emergence of VSPs such as YouTube, Twitch, and TikTok has served as a catalyst for the democratisation of audiovisual content production and distribution. The empowerment of audiences to become content creators themselves has given rise to the influencer phenomenon.[11] At the moment, there is no legal definition of the notion 'influencer'. For the purpose of this chapter, influencers can be defined as creators of UGV[12] – such as video blogs, shopping hauls, (toy) reviews, gaming

[10] See e.g. Valcke and Stevens, 'Graduated regulation of "regulatable" content and the European Audiovisual Media Services Directive'; P. Valcke and J. Ausloos, '"What if television becomes just an app?" Re-conceptualising the legal notion of audiovisual media service in the light of media convergence' (2013) 17 *ICRI Working Paper Series* 1–28; S. Hartmann, *Die Europäische Regulierung audiovisueller Mediendienste* (Berlin: Peter Lang Verlag, 2019).

[11] Often also referred to as 'vloggers', 'content creators', 'streamers' or – according to the platform – 'YouTubers/TikTokkers/…'.

[12] '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' (Art. 1(1)(ba) AVMSD).

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content, but also entire formats such as talk shows – on VSPs, characterised by their peer-to-peer appearance and the potential to monetise their personality and influence by generating interest in something (e.g. a consumer product) via a post on social media.[13]

Influencers have become established sources of entertainment, information, education, and commercial communication and are in effective competition with traditional television and on-demand platforms.[14] Through engaging and interactive features – such as live streaming, chat functionalities and gifting mechanisms – influencers foster a sense of their own relatability, accessibility, and credibility.[15] This positions them effectively to influence the (consumption) behaviour of their audience. In fact, influencer marketing stands out as one of the most popular and impactful online marketing strategies.[16] This raises concerns about problematic commercial communication by influencers, such as undisclosed commercial communication or the promotion of dangerous products or food.[17] Furthermore, influencers are aware that controversial content attracts more views, which translate into increased (financial) rewards. This encourages them to share questionable and harmful material such as content glamorising gambling, unhealthy eating habits, or dangerous challenges.

As viewers and advertisers increasingly shift towards VSPs and influencers, the EU's regulatory framework and enforcement bodies have not kept pace with this transformation, resulting in an unlevel playing field vis-à-vis more traditional media services. The latter are required to comply with numerous provisions, encompassing transparency obligations, rules pertaining to harmful and commercial content, the protection of minors, the promotion of European works, and ensuring accessibility for people with disabilities. In a world where VSPs, as well as the countless creators who populate these platforms, are competing for the same audiences and revenues as traditional television, and considering the substantial presence of children and teenagers in this audience, it is imperative to conduct research on the legal status of influencers.[18]

[13] *Merriam-Webster's Dictionary*; C. Goanta, 'The regulation of social media influencers: An introduction', in C. Goanta and S. Ranchordás, *The Regulation of Social Media Influencers* (Cheltenham: Edward Elgar Publishing, 2020), pp. 4–9.

[14] O. Budzinski, S. Gaenssle and N Lindstädt-Dreusicke, 'The battle of YouTube, TV and Netflix: An empirical analysis of competition in audiovisual media markets' (2021) 1(9) *SN Business & Economics* 1–26 at 22.

[15] K. Sokolova and H. Kefi, 'Instagram and YouTube bloggers promote it, why should I buy? How credibility and parasocial interaction influence purchase intentions' (2019) 53 *Journal of Retailing and Consumer Services* 1–9 at 5.

[16] Statista, 'Influencer marketing market size worldwide from 2016 to 2023', February 2023, available at: www.statista.com/statistics/1092819/global-influencer-market-size.

[17] BEUC, 'From influence to responsibility – Time to regulate influencer marketing', 18 July 2023, 1.

[18] I. Katsarova, 'Briefing EU legislation in progress: The Audiovisual Media Services Directive', European Parliamentary Research Service (EPRS), 25 January 2019.

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6.3 SCRUTINISING THE MATERIAL SCOPE OF THE AVMSD

The AVMSD governs EU-wide coordination of national legislation on AVMSs and VSPs. Within this part of the chapter, the scope *ratione materiae* of the Directive will briefly be discussed (Section 6.3.1) before being critically assessed in the context of influencer videos (Section 6.3.2).

6.3.1 *Describing the Scope*

6.3.1.1 Audiovisual Media Services

The notion 'audiovisual media service' forms the cornerstone of the AVMSD, delineating the scope *ratione materiae*. It constitutes the central concept of the Directive, on which other definitions are based. According to Article 1(1)(a) AVMSD, an AVMS can either be a service meeting seven criteria – referred to as 'AVMS *sensu stricto*' – or audiovisual commercial communication (ACC).

6.3.1.1.1 AUDIOVISUAL MEDIA SERVICES *SENSU STRICTO* The first part of the definition sets out the following seven building blocks to define an AVMS: (1) it has to be an economic service in the sense of Articles 56 and 57 Treaty on the Functioning of the European Union (TFEU),[19] (2) the principal purpose of which or a dissociable section thereof (3) needs to be devoted to providing programmes, (4) to inform, entertain, or educate, (5) under the editorial responsibility of a media service provider, (6) provided to the general public, (7) and by means of electronic communications networks. Only influencers who meet all of the aforementioned criteria will be caught by the AVMSD, either as providers of linear services (live streams) or on-demand services (uploaded content).

6.3.1.1.2 AUDIOVISUAL COMMERCIAL COMMUNICATION The second part of the definition of an AVMS refers to ACC:[20]

> images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity; such images accompany, or are included in, a programme or user-generated video in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.[21]

[19] Treaty on the Functioning of the European Union, OJ 2012 No. C326/47.
[20] Art. 1(1)(a)(ii) AVMSD.
[21] Art. 1(1)(h) Ibid.

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The phrasing of Article 1(1)(a) of the Directive causes confusion regarding the relationship between the notions of AVMS and ACC: on the one hand it can be argued that ACC is a separate category of AVMS in addition to linear services and on-demand services, while on the other hand, ACC can be seen as an integral part of a linear or on-demand service instead of a service in its own right.[22] In a recent case, however, the Court of Justice of the European Union (CJEU) implicitly recognised that the concepts can exist separately from each other (see Section 6.3.2.3 of this chapter).

6.3.1.2 Video-Sharing Platform Services

Via the 2018 revision, the scope of the AVMSD was expanded to include VSPs.[23] Hereby, the EU legislator recognised the significant and influential role of platforms such as YouTube or TikTok.[24] The key distinction between AVMS providers and VSP providers lies in the absence of editorial responsibility on behalf of the latter, setting the stage for a more lenient – or 'light' – regulatory approach for VSPs.[25] They are solely required to take 'appropriate measures' such as age verification systems and reporting tools to safeguard their platform users from harmful content and commercial communication.[26] Considering its focus on influencers *in se*, this chapter is limited to AVMSs. Nevertheless, the provisions pertaining to VSPs indirectly hold relevance for influencers as well.

6.3.2 *Assessing the Scope*

Within this section, we will apply the material scope of the AVMSD to influencer video content. The analysis is limited to the four constitutive elements of the Directive's scope that are challenged the most in an influencer context: a service as defined by Articles 56 and 57 TFEU (3.2.1), editorial responsibility (3.2.2), the aim to inform, entertain, or educate (3.2.3), and 'provided to the general public' (3.2.4).

6.3.2.1 A Service as Defined by Articles 56 and 57 TFEU

6.3.2.1.1 UNPACKING THE CONCEPT A first prerequisite for something to qualify as an AVMS is that it must concern a service as defined by Articles 56 and 57 TFEU: that is, any form of economic activity, including that of public service enterprises.[27]

[22] O. Castendyk, E. Dommering and A. Scheuer, *European Media Law* (Alphen aan den Rijn: Kluwer Law International, 2008), p. 819.
[23] Art. 1(1)(aa) AVMSD.
[24] Rec. 4 AVMSD 2018.
[25] P. Valcke, N. Feci and V. Verdoodt, 'Herziening van de Richtlijn Audiovisuele Mediadiensten: Over Porsches en ezelswagens in tijden van convergentie' (2019) *Auteurs & Media*, 218–35 at 223.
[26] Art. 28b AVMSD.
[27] Rec. 21 AVMSD 2010.

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This requirement is rooted in the fact that the EU competence in light of the internal market is restricted to economic activities. It serves to exclude primarily non-economic activities (e.g. private websites or correspondence). Article 57 TFEU establishes that services within the meaning of the treaties are those which are 'normally provided for remuneration'. This is not further specified in the TFEU nor in the AVMSD.

The jurisprudence of the CJEU has, however, shed light on the concept of 'remuneration'. It is defined as consideration provided in exchange for a service.[28] This consideration can assume various forms, including non-monetary compensation such as receiving free products.[29] Notably, a profit-seeking nature and the amount of remuneration do not determine whether a service constitutes an economic service;[30] the activity should simply not be provided 'for nothing'.[31] Consequently, fully gratuitous services and services lacking a sufficient economic link between the provider and the ultimate recipient fall outside the scope of the treaty.[32] Furthermore, the consideration does not have to be paid directly by the beneficiaries of the services; payment can also come from a third party (e.g. advertising-based services such as YouTube as compared with subscription-based services such as Patreon).[33] In light of this, it is apparent that the CJEU's interpretation of an economic service is broad. Even activities labelled as 'amateur' can have an economic dimension based on the presence of sponsorship contracts or grants, for example.[34] Ultimately, the determination of whether certain activities constitute economic services rests with national courts, guided by the CJEU's interpretation.

6.3.2.1.2 APPLYING THE CONCEPT The application of the economic service criterion is no longer straightforward. The democratisation of audiovisual media production blurs the line between amateur and professional providers. AVMSD 2010 explicitly excluded UGVs – which were presumed to be 'shared and exchanged within communities of interest' – on the ground that they lacked an economic

[28] Case C-263/86, *Belgian State v René Humbel and Marie-Thérèse Edel*, ECLI:EU:C:1988:451, para. 17; Case C-157/99, *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen*, EU:C:2001:404, para. 58.

[29] Case C-196/87, *Udo Steymann v Staatssecretaris van Justitie*, ECLI:EU:C:1988:475, para. 14.

[30] Case C-157/99, *Smits and Peerbooms*, §§50,52; Case C-281/06, *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg*, ECLI:EU:C:2007:816, para. 33.

[31] Case C-281/06, *Jundt*, paras. 32, 34.

[32] Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan*, ECLI:EU:C:1991:378, para. 24.

[33] Case C-352/85, *Bond van Adverteerders and others v The Netherlands State*, ECLI:EU:C:1988:196, para. 16; Joined cases C-51/96 and C-191/97, *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée*, ECLI:EU:C:2000:199, para. 56; Case C-157/99, *Smits and Peerbooms*, para. 58; Only services which are fully provided by the state (e.g. public schools run by the government) are excluded from the EU concept of service and thus the rules on free movement of services.

[34] Joined cases C-51/96 and C-191/97, *Deliège*, para. 51.

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nature.[35] However, over the past decade, the avenues for influencers to generate income from their content on VSPs have expanded considerably, including: (1) influencer marketing, where there is a direct link between influencers (or their agencies) and the brand, without platform interference (e.g. endorsement deals, affiliate marketing, sponsorships, etc.); (2) ad revenue/on-platform influencer marketing that presupposes engagement of the platform (e.g. the TikTok Creator Marketplace) and ad revenue referring to creators earning a percentage of the revenue generated from ads played by the platform alongside their videos;[36] (3) subscriptions (e.g. subscription-based social media platforms such as Only Fans or subscriptions to Twitch channels in return for certain benefits such as ad-free viewing or access to custom emotes), tokenisation (i.e. in-platform currency that viewers can buy and use to show appreciation or engage in a certain way) and crowd funding (e.g. Go Fund Me); (4) direct selling of merchandising or other products through the platform or external websites; (5) creator funds that platforms directly grant to influencers to reward 'good' content, based on criteria set by the platform such as views, engagement, or duration of the content (e.g. TikTok Creator Fund and YouTube Shorts Fund).[37]

As already mentioned, the AVMSD 2018 took account of this evolution and no longer automatically excludes UGVs from its scope. It can, however, be challenging to assess whether certain influencer content is 'normally provided for remuneration'. The line between hobbyists and professional content creators is ambiguous and dynamic. Influencer income can easily fluctuate, and earnings are generally not consistent. Furthermore, influencers are often active on multiple platforms. Should the economic nature be assessed for each platform in isolation or across platforms? Another challenge related to the criterion is the issue of evidence, as national regulatory authorities may find it challenging to establish the presence of remuneration, and influencers will struggle to demonstrate its absence.

Due to the lack of clear guidance on the economic service criterion, diverging interpretations have arisen among media regulators across the EU. In the Flemish Community of Belgium, every audiovisual content creator who receives any benefit, regardless of its size, in exchange for video content is subject to scrutiny by the Vlaamse Regulator voor de Media (VRM), aligning with CJEU case law.[38] In contrast, the Netherlands, with a more established influencer landscape, has

[35] Rec. 21 AVMSD 2010.

[36] To receive such revenue, influencers usually have to be signed up to a partner programme by VSPs (e.g. the YouTube or Twitch Partner Program).

[37] C. Goanta and I. Wildhaber, 'In the business of influence: Contractual practices and social media content monetisation' (2019) 91(4) *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 346–57 at 350; C. Goanta and T.C. Bertaglia, 'Digital influencers, monetization models and platforms as transactional spaces' (2023) 3 *Brazilian Creative Industries Journal* 242–59 at 246.

[38] Flemish Regulator for the Media (VRM), 'FAQs about the Content Creator Protocol', available at: www.vlaamseregulatormedia.be/nl/content-creator-protocol/veelgestelde-vragen.

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implemented thresholds through the Commissariaat voor de Media (CvdM) – the Dutch media regulator – to determine which influencers fall under the regulator's active supervision. The CvdM associates the economic service requirement with (1) the generation of monetary income and the receipt of products, services, or any other benefit stemming from the creation and posting of videos; (2) registration of the business with the Chamber of Commerce.[39] The latter criterion is also endorsed by the European Regulators Group for Audiovisual Media Services (ERGA) – bringing together heads or high-level representatives of national independent regulatory bodies in the field of audiovisual services – as a strong indicator for the economic character of a service.[40] Other national regulatory authorities also use certain criteria to assess whether a service is of an economic nature.[41]

6.3.2.2 Editorial Responsibility

6.3.2.2.1 UNPACKING THE CONCEPT A second important concept for identifying the services covered by the AVMSD is editorial responsibility. This serves as a decisive element in the definition of a media service provider (scope *ratione personae)* and also shapes the definition of an AVMS (scope *ratione materiae*).[42] Editorial responsibility is the main criterion setting apart AVMSs from VSPs: VSP providers do not have editorial responsibility but merely determine the organisation of the programmes and/or UGVs, including by automatic means or algorithms.[43] Editorial responsibility implies (1) effective control over (2) the selection of the programmes and (3) their organisation in a chronological schedule in case of television broadcasts, or in a catalogue in case of an on-demand AVMS.[44] The three components are further clarified in what follows.

The first component of the definition requires 'effective control'. Service providers who merely have a technical, automatic, or passive character and thus lack actual control over the content are not AVMS providers (compare intermediary liability exceptions in the eCommerce Directive). This requirement entails that there is, at a minimum, knowledge of the structure and organisation of a programme, along with the possibility to influence these elements.[45]

The second element defining 'editorial responsibility' is the selection criterion. With this criterion, the legislator targets the natural or legal person who deliberately

[39] Step 4 and 5 Policy rule on qualification of commercial media services on demand 2022 (Dutch Media Authority).
[40] ERGA, 'Report: Analysis and recommendations concerning the regulation of vloggers', 2021, 28.
[41] ERGA, 'Learning from the practical experiences of NRAs in the regulation of vloggers', 2023.
[42] Rec. 25 AVMSD 2010; Castendyk, Dommering and Scheuer, European Media Law, p. 822.
[43] Art. 1(1)(aa) AVMSD.
[44] Ibid., Art. 1(1)(c)–(d); Castendyk, Dommering and Scheuer, European Media Law, p. 813.
[45] W. Schulz, S. Heilmann and S. Nikoltchev (eds.), 'Editorial responsibility' (2008) *IRIS Special* 1–39 at 15.

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chooses the content to be made available to the general public via its service. Influence on the content of the programme *in se* is not required, although certain Member States do interpret it that way.[46]

Finally, editorial responsibility presupposes effective control over the organisation of the audiovisual media offer. In particular, it concerns influence on the manner in which programmes are placed and presented in a schedule or catalogue of the service, for instance according to a specific genre or topic. Based on the prevailing view, sorting the content alphabetically or chronologically or implementing a search function is not sufficient to constitute editorial responsibility.[47]

Via Recital 25 of AVMSD 2010, the EU legislator has provided Member States with the freedom to further specify aspects of the definition, notably the concept of 'effective control'. Several Member States have made use of this discretion.[48] In the Netherlands, in the event that multiple parties have effective control over both the selection and organisation of the media offer, the party with the decisive influence on the selection of the content is editorially responsible.[49] The media regulator of the French community of Belgium, the Conseil Supérieur de l'Audiovisuel, takes the opposite approach in which the element of organisation is predominant.[50] While such perspectives may be pragmatically appealing, they are not in line with the Directive; there is no indication of any degree of 'decisiveness' but rather a concern with cumulative criteria. The use of different criteria by Member States could result in situations where a provider cannot be considered to be established in one single Member State. This would go against the regulatory purpose of the Directive.[51] By invoking the fact that recitals are not binding, Schulz and Heilmann recommend disregarding the discretion for Member States and to assume that the definition of editorial responsibility is fully harmonised at the EU level.[52]

6.3.2.2.2 APPLYING THE CONCEPT When applying the editorial responsibility criterion to the influencer context, it is essential to assess whether influencers are capable of carrying out the two key activities – content selection and organisation – at their own discretion.[53] Influencers utilise online platforms as a medium to share their content with the world: they make or select the content to upload on – or

[46] In Flanders, the preparatory work on the media decree defines editorial responsibility as the responsibility not only for the composition of the broadcast schedule but also for the programmes themselves.
[47] Valcke and Ausloos, '"What if television becomes just an app?"', 11.
[48] Ibid., 9.
[49] Step 4 and 5 Policy rule on qualification of commercial media services on demand 2022 (Dutch Media Authority).
[50] Conseil Supérieur de l'Audiovisuel (CSA), Recommendation relative au périmètre de la régulation des services de medias audiovisuels, 28 March 2012, 13; Within the Flemish Community of Belgium, editorial responsibility is not further specified.
[51] Rec. 34 AVMSD 2010.
[52] Schulz, Heilmann and Nikoltchev (ed.), 'Editorial responsibility', 15.
[53] ERGA, 'Report: Analysis and recommendations concerning the regulation of vloggers', 2021, 28.

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delete from – their channel and determine the organisation of the videos within that channel, which serves as a catalogue. Do note that influencers as platform users have only limited possibilities to modify their channels, as they are constrained by the platform's built-in features. In practice, influencers organise the audiovisual offer on their channel by categorising videos into playlists according to topic (e.g. travel vlogs, beauty tutorials, gaming videos) or length (e.g. 'shorts'). Additionally, they can enhance discoverability of the videos by supplying metadata and adding tags (i.e. descriptive keywords). Based on the foregoing, it can be concluded that influencers can exercise effective control over both the selection of programmes and their organisation. According to ERGA, only when audiovisual content is aggregated solely by automated means is the editorial responsibility criterion not fulfilled.[54] There are, however, some tensions. Determining which entity has editorial responsibility in an influencer context is not always self-evident considering the involvement of various parties beyond the creator; this includes media companies, agencies, advertisers, brands, and VSPs, all of whom potentially exert some form of influence on the content.

For example, VSPs offering users a platform without engaging in content preselection do not bear editorial responsibility as they have only organisational control.[55] Even though there is no *ex ante* selection of the content uploaded to the platform, it could be argued that VSP providers indirectly exert influence on the content users get to see: they are employing algorithms to offer tailored video selections to viewers as well as to highlight certain content, for instance in the trending section. They also remove certain content flagged as inappropriate. Furthermore, all content creators on VSPs are competing for viewers' attention within the same digital space. They are dependent on the platforms and their recommendation algorithms, which play a key role in determining the content that will be pushed or not. As a result, influencers often try to shape their content in line with what the platform is preferencing.[56] This concerns types of *ex post* control, which – according to the authors – should not trigger the criterion of editorial responsibility. Ultimately, it is the user who decides what gets posted. Equating VSPs with AVMSs could shift the balance too heavily towards protection measures, potentially causing overcompliance by platforms and thus risking censorship and a chilling effect on freedom of expression. Furthermore, it could result in two entities having editorial responsibility for the same service, which would contradict the purpose of the AVMSD. The definition of editorial responsibility is based on the premise that effective control over the programming of a service can only be attributed to a single entity. For jurisdictional purposes,

[54] Ibid.

[55] K. Lefever et al., 'Audiovisueel materiaal op Internet', in *Praktijkboek recht en ICT* (Brugge: Vanden Broele, 2009), p. 13.

[56] Z. Glatt, 'Precarity, discrimination and (in)visibility: An ethnography of "the algorithm" in the influencer industry', in E. Costa et al. (eds.), *The Routledge Companion to Media Anthropology* (London: Routledge, 2022), p. 551.

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there cannot be shared responsibility. Nevertheless, the Directive does not provide guidance on how to identify the entity with editorial responsibility in these cases.[57]

When applying the editorial responsibility criterion to influencers, a number of grey zones come to the fore. One situation is where there is some form of preselection by the platform. This is for instance the case with the TikTok STEM feed. Creators who want to post on this science page must go through an admission process where partners to the platform check the appropriateness and trustworthiness of the video.[58] After approval of the video, will the platform and not the creator bear editorial responsibility? A second example relates to double-posting. Brands working with influencers sometimes require the posting of the video on both the creator's and the brand's accounts separately. It could be argued that the brand and influencer are each editorially responsible for the video they post as it concerns two distinct AVMSs; it is not a case of shared responsibility.[59] Collaborative posting on Instagram is a different scenario. It involves a single post resulting in the video appearing on two different channels simultaneously. This type of post is initiated by the 'original' poster, who invites one or more collaborators. Once they accept, the collaborator becomes a 'co-author', which means that their username will be added to the post and the post will be shown on their profiles and shared to their own audiences. Here the question is how to interpret the act of accepting the invitation. Finally, influencers, brands, and/or platforms might have agreed on a contractual clause determining the editorially responsible party. Is it possible to contractually assign editorial responsibility?

A last issue with the definition of editorial responsibility is the reference to the organisation of programmes 'within a chronological schedule or a catalogue'. It remains unclear how such a requirement applies to content provided through 'dark posting',[60] which is by definition not offered through chronological schedules or catalogues, or to audiovisual content provided via live streams or within video games (e.g. the Eminem concert in Fortnite).

6.3.2.3 Inform, Entertain, or Educate

6.3.2.3.1 UNPACKING THE CONCEPT The definition of an AVMS covers only programmes that are intended to inform, entertain, or educate. There are two elements to this requirement: the service provider's volition ('in order') and the

[57] Castendyk, Dommering and Scheuer, European Media Law, p. 823.

[58] TikTok, 'Take discovery to a new level with the STEM feed', TikTok Newsroom, 14 March 2023, https://newsroom.tiktok.com/take-discovery-to-a-new-level-with-stem-feed/?lang=en.

[59] This situation is comparable to when a certain programme is first aired through linear television and later appears on an on-demand platform such as Netflix.

[60] Dark posting refers to the posting of sponsored videos in a manner in which they can only be found on the feed of people they are targeted at, without appearing on either the channel of the creator nor that of the brand.

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purposes ('inform, entertain or educate'). Both elements are rather subjective and vague. This requirement was introduced into the Directive in 2007.[61] The absence of deliberation during the legislative process has resulted in confusion on whether the criterion is purely illustrative or intentionally excludes audiovisual services that do not aim to inform, entertain, or educate.[62] If the latter is true, guidance on which services are to be excluded is necessary for legal certainty.

Some argue that this requirement serves to exclude audiovisual content that lack editorial aspects, such as webcam content of live traffic or ski slopes.[63] This interpretation links the requirement 'to inform, entertain or educate' with editorial control and responsibility, which actually implies that the criterion does not have standalone value. The concept is also frequently mentioned in the same breath as other elements defining an AVMS, particularly those relating to the principal purpose of the programme and its mass media character.[64]

The ambiguity caused by the vagueness and subjectivity of the criterion 'to inform, entertain or educate' also emerged before the CJEU. In the context of the New Media Online case, Advocate General Szpunar criticised the requirement for not being particularly selective as it encompasses almost every conceivable spectrum of audiovisual content.[65] In 2018, the CJEU itself shed some light on this matter by providing explicit guidance on the meaning of 'to inform, entertain or educate' in the *Peugeot* case.[66] The case concerned Peugeot Deutschland, which had posted a short video about a new vehicle model on its own YouTube channel. An action was brought against the company for failing to provide certain information in the video. Central to this case was the question of whether the video constitutes an AVMS within the meaning of Article 1(1)(a) AVMSD, as such services are exempt from the information obligation in the German law. The court decided that a purely promotional video (channel) is not an AVMS in the sense of Article 1(1)(a)(i) of the Directive because the principal purpose of such a video (channel) is to promote a product or service and not to inform, entertain or educate.[67] Furthermore, the court stated that videos such as the one concerned are not ACC because they are individual elements independent of one another and are not accompanying or included within a programme as required by Article 1(1)(h).[68]

[61] Before this, the TVWFD only indirectly mentioned information, education, culture, and entertainment as characteristics of television.
[62] Castendyk, Dommering and Scheuer, European Media Law, p. 815.
[63] Ibid.; Explanatory Memorandum, Ontwerp van Decreet betreffende de radio-omroep en televisie, Parliamentary Document Flanders 2008–09, 2014/1; Lefever et al., 'Audiovisueel materiaal op Internet', p. 22.
[64] See, for instance, ERGA, 'Learning from the practical experiences of NRAs in the regulation of vloggers', 2023, 4–5.
[65] Case 347/14, *New Media Online GmbH v. Bundeskommunikationssenat*, ECLI:EU:C:2015:709, para. 40.
[66] Case C-132/17, Peugeot Deutschland GmbH v Deutsche Umwelthilfe eV, ECLI:EU:C:2018:85.
[67] Ibid., paras 21–24 and 32.
[68] Ibid., paras 28–32.

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An interesting take-away from the *Peugeot* case in terms of the requirement 'to inform, entertain or educate' is that the purely promotional purpose of a video channel can suffice to exclude the application of the AVMSD.[69] To the extent that a promotional video can inform, entertain, or educate viewers, it is believed to be done with the sole aim of achieving the promotional purpose of the video in question. What is remarkable about this case is that there was no opinion by an Advocate General (AG). If the court determines that a case does not raise a new point of law, it may decide to proceed without seeking an opinion from the AG.[70] This is often the case if the issue has already been addressed in one or several judgements.[71] Based on the foregoing, it can be concluded that the court considered the solution to this case rather straightforward.

Another source of confusion is Article 25 AVMSD and, in particular, its relationship vis-à-vis the *Peugeot* ruling. The article stipulates that the Directive shall apply *mutatis mutandis* to television channels exclusively devoted to advertising and teleshopping as well as to television channels exclusively devoted to self-promotion. These are channels without conventional programme elements such as news, sports, films, documentaries, or drama.[72] In the preparatory work, the European Commission established that conventional channels and channels exclusively devoted to forms of commercial promotion or direct selling each have a different purpose and do not compete on the same market segments.[73] This corresponds to what was later said in the *Peugeot* case, where the court rejected the argument that the principle of equal treatment required the inclusion of a promotional video channel under the AVMSD's scope for not being in a comparable situation to non-promotional programmes, taking into account the objective they pursue.[74] However, in the *Peugeot* case the CJEU declared the AVMSD inapplicable in light of purely promotional VSP channels, while Article 25 AVMSD declares only a limited number of rules inapplicable to promotional TV channels. The only difference that can be perceived in these situations seems to be that Article 25 concerns linear AVMSs, while the CJEU dealt with an on-demand video channel. Nevertheless, the reasoning underlying the *Peugeot* case could also be applied to purely promotional TV channels: (1) it does not concern an AVMS in the sense of Article 1(1)(a)(i) AVMSD given that purely promotional channels do not inform, entertain, or educate; (2) it is also not an AVMSD in the sense of Article 1(1)(a)(ii) AVMSD because the advertising is

[69] Ibid., paras 22–24.

[70] Statute of the Court of Justice of the European Union, Art. 20(5).

[71] EP, 'Role of Advocates General at the CJEU, briefing Court of Justice at work, 2019', 4, available at: www.statewatch.org/media/documents/news/2019/oct/ep-briuefing-a-g-cjeu.pdf.

[72] Rec. 38 TVWFD 1997.

[73] EC, Amended proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, Brussels, 7 May 1996, COM(96) 200 final.

[74] Case C-132/17, *Peugeot*, para. 27.

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not accompanying or included within a programme as is required by Article 1(1)(h) AVMSD. This leads to the question of whether different treatment of promotional TV channels and promotional VSP channels is justified, especially considering that the AVMSD aims to apply the same rules to actors competing for the same audience and to promote fair competition on the audiovisual media market.[75]

6.3.2.3.2 APPLYING THE CONCEPT Thus the 'inform, entertain or educate' requirement does not seem to constitute a hurdle to bringing influencers under the scope of the Directive. Nevertheless, the CJEU interpretation in the *Peugeot* case – according to which videos made for purely commercial purposes cannot be regarded as having as their principal purpose the provision of programmes in order to inform, entertain, or educate the general public – raises important questions, given that influencers are often relied upon for commercial purposes.

Certain videos by influencers, such as unboxing videos or product reviews, could be considered of a purely promotional nature, dealing with the promoted product or service from start to finish (e.g. an entire video dedicated to showcasing a toy and how to play with it). So far, it seems that Member States and media regulators are treating such video channels as AVMSs.[76] In light of a correct and consistent application of the AVMSD, it will be important to establish a clear boundary between content that informs, entertains, or educates and content that does not. Inspiration could be drawn from the grounds for distinguishing between advertising spots and infomercials in some Member States. In Flanders, for example, advertorials (*publi-reportages*) are defined as commercial communication taking up more time than advertising spots because the emphasis is on editorial and informative content.[77] The same argument could be made for influencer advertising.

An inconsistency can be found in the fact that Article 25 AVMSD explicitly includes promotional television channels in the scope of the Directive. This *a fortiori* means that the individual programmes on this channel are also purely promotional, yet still are covered by the AVMSD. By process of elimination, these programmes must be AVMSs in the sense of Article 1(1)(a)(i) since they do not meet the criteria for ACC (i.e. images accompanying or included in a programme or UGV). Contrary to what is suggested in the *Peugeot* case, this seems to imply that purely promotional content can also serve an informative, entertaining, or educational purpose. A final concern relates to monetisation on social media: any speech on social media is content that can turn into money.[78] This creates financial incentives for participating in social networks, transforming the latter from public squares

[75] Rec. 44 and 53 jo. Art. 30(2) AVMSD 2018.
[76] See e.g. Policy rule on qualification of commercial media services on demand 2022 (Dutch Media Authority).
[77] Art. 81, para. 5 *in fine* Act on Radio and Television Broadcasting of 27 March 2009, as amended.
[78] Goanta and Bertaglia, 'Digital influencers, monetization models and platforms as transactional spaces', 250.

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to shopping malls.[79] Plenty of social media platforms currently offer the possibility to mix e-commerce with AVMSs. One can think of live stream shopping on VSPs, where platform users promote certain products in a live stream while responding to questions posed by viewers – potential customers – in the chat. Some VSPs also provide shopping features allowing influencers to connect to their own stores (e.g. Shopify). On YouTube, influencers can use direct tagging to sell specific products shown in their content. Viewers will see an overlay promoting the product. If they click on the tag, extra information is provided while they continue to watch the video. Another possibility is to passively promote products by showing them on a 'product shelf' that can be displayed below video content. Some of these practices could be described as a modern form of teleshopping. According to Article 25, a video or channel devoted to live shopping seems to be informing, entertaining, or educative, while this is not so straightforward based on the *Peugeot* case.

Following up on this CJEU case, ERGA discussed the consequences of the ruling for channels that do not solely provide purely promotional video content.[80] In particular, it focuses on discerning the tipping point at which channels are seen to primarily serve to inform, entertain, or educate the general public. This challenge is complicated even more by the fact that editorial content and advertisements are not always clearly distinguishable in the online environment. Interviews conducted with ERGA members revealed that a diversity of both quantitative and qualitative indicators are being considered to evaluate whether a channel's primary purpose is to inform, entertain, or educate. These indicators include the proportion of solely promotional videos, user perception of the channel, the nature and origin of the platform user providing that channel, and whether it concerns a company channel. ERGA concludes by referring to the necessity of conducting a general analysis of each channel, employing a combination of qualitative and quantitative criteria.

6.3.2.4 Provided to the General Public

6.3.2.4.1 UNPACKING THE CONCEPT Another requirement delineating the concept of an AVMS is that it must concern services provided to the general public. This implies that the service must be a mass medium: that is, a service intended for reception by, and which could have a clear impact on, a significant proportion of the general public.[81] Through this requirement, the EU regulator targets services intended to be available to anyone who wants to access them under the generally applicable terms and conditions set by the provider. Audiovisual services that are

[79] J. Van Dijck, T. Poell and M. De Waal, *The Platform Society: Public Values in a Connective World* (New York: Oxford University Press, 2018).
[80] ERGA, 'Learning from the practical experiences of NRAs in the regulation of vloggers', 2023, 5.
[81] Rec. 21, 22 and 39 AVMSD 2010.

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accessible only through payment or password are not excluded *per se*.[82] However, practices such as private correspondence or narrowcasting (i.e. closed-circuit broadcasting in public spaces) are not considered mass media as they target a specific group of recipients in a specific location (e.g. in-store television, screens in a railway station) rather than the general public.[83]

To assess whether content is provided to the general public, the intention of the service provider plays an important role, while the actual size of the audience is irrelevant. Assessing intention, however, can be complex. The Contact Committee – an autonomous, independent, and non-political assembly of the heads of supreme audit institutions of the EU Member States and the European Court of Auditors – addresses this by excluding recipients who are individually identified or identifiable.[84] This approach, however, is incongruent with today's audiovisual media reality, which is characterised by plenty of services that are directed at the general public but can be tailored to specific individual needs (e.g. Netflix).

6.3.2.4.2 APPLYING THE CONCEPT Content on VSPs is accessible by an indeterminate number of viewers, whether on public platforms, password-protected platforms, or subscription-based platforms such as OnlyFans or Patreon. Due to the lack of concrete guidance, some Member States or their regulators have set thresholds related to the mass media criterion. The CvdM in the Netherlands limits its active supervision on influencers to YouTube, Instagram, and TikTok, considering them the largest and most societally relevant platforms.[85] They used to also link mass media character to a minimum of 500,000 followers or subscribers per account, however, this threshold was abolished in June of 2025.[86] In the Flemish Community of Belgium, the VRM keeps an internal list of more than 2,000 Flemish accounts on YouTube, Instagram, TikTok, and Twitch.[87] Finally, in Germany, the Interstate Media Treaty exempts broadcasting services (i.e. linear AVMS) with fewer than 20,000 simultaneous users over a period of six months from being required to hold a broadcasting license.[88] ERGA also advocates for the introduction of minimum thresholds.[89]

[82] Valcke and Ausloos, '"What if television becomes just an app?"', 19; Lefever et al., 'Audiovisueel materiaal op Internet', p. 23.
[83] Schulz, Heilmann and Nikoltchev (ed.), 'Editorial responsibility', 49.
[84] Contact Committee, 'Minutes of the 27th meeting of the contact committee established by the Television without frontiers Directive', Doc CC TVSF (2008) 4, 2.
[85] Step 1 Policy rule on qualification of commercial media services on demand 2022 (Dutch Media Authority).
[86] Step 2 Ibid.
[87] F., Perdaens, 'Request for clarification on the status of influencers in the Media Decree', Report on the meeting of the Committee for Culture, Youth, Sport and Media (Flemish Parliament), 2022–23, 6 July 2023, no. 3153.
[88] Para. 54 (1) 2 German Interstate Media Treaty.
[89] ERGA, 'Report: Analysis and recommendations concerning the regulation of vloggers', 2021.

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Although the pragmatism of such an approach offers benefits such as legal certainty and easier enforcement due to the smaller pool of providers under supervision, four concerns can be raised. First, it is essential to remember that the AVMSD employs a minimum harmonisation approach; the implementation of thresholds may not result in Member States being less strict than the Directive. Secondly, working with minimum thresholds to identify mass media in the sense of the Directive should be an EU-wide effort. Otherwise, cross-border discrepancies will lead to an unlevel playing field throughout the EU, also hindering the goal of harmonisation. Thirdly, applying minimum criteria linked to the mass media criterion is at odds with the principle of fair competition underlying the Directive. On the one hand, a general application could lead to the exclusion of small regional and/or thematic channels, while on the other hand, imposing these criteria exclusively on influencers would be arbitrary and unjustifiable. Finally, influencers are typically active on multiple platforms simultaneously. It needs to be clarified whether the mass media character should be assessed on a per-platform basis or collectively across platforms.

6.4 EVALUATING THE AVMSD'S POLICY GOALS IN THE INFLUENCER REALM

The exercise central to this section is limited to four policy goals: the proper functioning of the internal market for AVMSs, the protection of freedom of expression, the protection of viewers and users – minors in particular – and the promotion of fair competition. Based on preliminary research, these policy goals are considered to be challenged the most by the emergence of influencers on the audiovisual media field. Originally, the AVMSD policy goals were introduced in a context where spectrum scarcity, pervasive influence on public opinion, and lack of user control were invoked as justifications for regulatory interference. Even though these grounds are no longer (as) relevant today, it can be concluded that new barriers to achieving these policy goals have emerged (see Table 6.1).

Two overarching problems that touch upon all four policy goals are legal uncertainty and enforcement issues. The AVMSD leaves the status of UGVs somewhat ambiguous. The sole mention of its potential inclusion can be found in Recital 3 of the Directive, which does not provide a solid legal basis. The fact that EU regulation of audiovisual media was originally written for twentieth-century media providers causes difficulties in its application and interpretation. This has led to legal uncertainty on behalf of media service providers, advertisers, viewers, and national regulatory authorities.

Additionally, the scale and complex architecture of VSPs,[90] as well as the dispersed nature of enforcement competencies (i.e. media regulators, consumer authorities, data protection authorities, gaming commissions, competition authorities,

[90] Opinion AG Szpunar Case C-347/14, *New Media Online GmbH*, ECLI:EU:C:2015:434.

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TABLE 6.1 *Overview of AVMSD policy goals*

Policy goals	Tools	Current tensions
Proper functioning of the internal market	E.g. EU coordination of national legislation on AVMSs, rules on jurisdiction and the country of origin principle, Commission guidelines to help Member States with the implementation of certain aspects of the Directive.	Outdated definitions delineating an 'AVMS', combined with the minimum harmonisation nature of the Directive, lead to differences in interpretation and application in Member States. Significant discrepancies are undesirable from an internal market point of view, considering that influencer content is often consumed across national borders, while enforcement remains a national matter. This means that a single viewer can encounter different levels of protection depending on the country of origin of the content creator. In case of 'editorial responsibility', discrepancies can even lead to the inability to designate one single provider as the editorially responsible entity.
Protection of freedom of expression	E.g. a 'light regime' for VSPs, transparency of media ownership, promoting media pluralism.	This policy goal is challenged by the current interpretation of the reference to Articles 56 and 57 TFEU ('the economic service criterion'). Applying too low a threshold could result in a disproportionate regulatory burden. It blurs the line between hobby and professional activities, potentially creating a chilling effect in light of freedom of expression: platform users could be discouraged from producing audiovisual content. Increasing interference by platforms and brands in influencer content could also impact freedom of expression.
Protection of viewers and users, minors in particular	E.g. rules regarding commercial communication, restrictions regarding AVMSs which may impair the physical, mental, or moral development of minors, obligation for a content description system to indicate the potentially harmful nature of content, accessibility requirements.	Influencer marketing is one of the most popular and effective forms of online marketing. This can be problematic considering the significant presence of questionable practices on VSPs (see Section 6.2). Furthermore, influencers do not (yet) consistently identify the presence of commercial communication in their videos.[a] Knowing that they are particularly popular with minors, this requires additional attention. From a viewer/user protection perspective, it therefore essential to clarify exactly when an influencer is considered to be an AVMS provider, and consequentially has to abide by the AVMSD's rules. Legal uncertainty in this regard negatively affects compliance and enforcement. What does the exclusion of purely promotional audiovisual content via the 'to inform, entertain or educate' criterion mean for influencer videos dealing with the promoted product or service from start to finish, such as unboxing videos, product reviews or live stream shopping?

Promoting fair competition	E.g. moving away from the graduated approach, inclusion of VSPs and certain UGC under the Directive.	The current scope of the AVMSD leads to an uneven playing field on three levels. Among influencers with a differing degree of professionalism: regardless of their following and impact, all are treated the same from the moment they are remunerated in some form. Among influencers from different Member States: as the AVMSD is not straightforward, Member States/their media regulators have their own interpretation of the Directive's scope and sometimes even introduce tools to facilitate monitoring and enforcement (e.g. minimum thresholds to distinguish between active and passive supervision). Influencers versus other AVMS providers: influencers often still escape scrutiny as regulatory authorities are reluctant to enforce the rules. This can be due to lack of clarity regarding the application and interpretation of some provisions as well as to the fact that they are still fairly new to the AVMSD. The ruling in the *Peugeot* case also raises questions regarding fair competition (see Section 6.3.2.3.1).

[a] European Commission, 'Investigation of the Commission and consumer authorities finds that online influencers rarely disclose commercial content', Press Release, 14 February 2024, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_708.

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self-regulatory bodies, etc.), are complicating enforcement. So are the active role and high number of users on those platforms.[91] Another difficulty when applying the AVMSD vis-à-vis influencers is that there is still some level of interference by the platform (e.g. organisation of the platform, inserting advertisements before, during, or after videos, or adding overlays). Finally, bringing influencers under the scope of the AVMSD represents a significant increase in the workload of media regulators, which is challenging in terms of human and financial resources.

This discussion demonstrates that the policy goals in this area still stand today and continue to necessitate regulatory protection. Lack of clarity regarding the Directive's scope of application leads to legal uncertainty and enforcement difficulties and stands in the way of achieving the underlying normative goals. This highlights the need to update the regulatory toolbox.

6.5 CONCLUDING THOUGHTS

Continuous technological and market developments present challenges in delineating the scope of the AVMSD. This chapter has sought to highlight some of the interpretation and application issues the sector is facing. By providing considerations for a consistent and future-proof regulatory framework it aims to contribute to the ongoing debate regarding the scope of the AVMSD.

It is evident that the selected elements of the Directive's material scope of application are under strain. Bringing influencers under the scope is laudable, as money and influence should come with responsibility. However, doing this solely by an indirect reference in a recital is not sufficient. The Directive's definitions and provisions are outdated, leading to problems in practice. Instead of stretching old concepts and ideas, it is time to make some fundamental changes in light of today's reality.

(1) The demarcation between hobbyists and professionals must be clearly delineated. A balance should be struck between fostering creativity and internal market growth, and effectively ensuring consumer protection. Over-regulation should be avoided: rules for audiovisual content still need to constitute a justifiable and proportionate restriction on freedom of expression. One potential solution could be for the CJEU to reassess its interpretation of Articles 56 and 57 TFEU reflecting the current audiovisual media landscape where 'ordinary individuals' sometimes engage in economic activities, such as creating user-generated content on (video-sharing) platforms, selling clothes on platforms such as Vinted, or listing items on eBay. A more pragmatic approach would involve establishing remuneration thresholds, although these should not be

[91] L. Kuklis, 'AVMSD and video-sharing platforms regulation: Toward a user-oriented solution?', LSE blog, 28 May 2019, available at: https://tinyurl.com/ykzxtvy7.

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determined by media regulators or national regulatory authorities as is currently the case. Introducing *de minimis* thresholds in light of Articles 56 and 57 TFEU cannot be reconciled with the current CJEU interpretation of these articles and, hence, would go against the minimum harmonisation nature of the Directive. Instead, the EU legislator could define these thresholds within the AVMSD or a Union code of conduct, limiting its scope to services as defined by Articles 56 and 57 TFEU that meet a certain remuneration threshold. Determining the appropriate threshold requires further research.

(2) With a view to legal certainty and future-proofing, it is crucial to clearly delineate not only the boundary between amateur and professional content, but also that between purely promotional content and content that informs, entertains, and educates.

(3) Instead of moving away from a graduated approach (i.e. linear and on-demand services), one could argue for reinforcing it, albeit in a different manner because nowadays traditional TV, on-demand TV, and UGV are to a large extent in competition. Drawing inspiration from the current definition of editorial responsibility, rules could be attributed based on the potential influence of the provider: on the choice of the content, the organisation and accessibility thereof, or both.

(4) In light of the principle of equal treatment, further research is warranted to determine whether influencers should be subject to the same rules as traditional media. Consider, for instance, the relationship between live streamers on VSPs and traditional broadcasters. If we treat live streamers like linear AVMS providers – as is already the case in some Member States – do they also benefit from exclusive rights and short news reports?[92]

Directly regulating influencers enables media regulators in their country of origin to tackle non-compliant content at the source, instead of holding VSPs responsible. The leading providers of such platforms are situated in a limited number of countries, which means that the media regulators of those countries would be responsible for monitoring all content available on the platforms they use.

It is important to bear in mind that the AVMSD should not be viewed in isolation. Various other legal instruments within the realms of consumer law, competition law, civil law, and criminal law as well as self- and co-regulation can also be relevant and applicable. Therefore, providers who do not fall within the AVMSD's scope need not be left in a legal void. In the context of influencer marketing, significant actions have for instance been taken under consumer law and competition law. At the EU level, one notable initiative is the Influencer Legal Hub established by the European Commission.[93] This is a freely accessible resource library

[92] Arts. 14 and 15 AVMSD.

[93] EC, 'Influencer legal hub', available at: https://tinyurl.com/35px44bj.

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containing information on influencer marketing in accordance with European consumer protection rules. At the national level, the German Federal Court of Justice (Bundesgerichtshof) has decided on a number influencer-related cases, particularly in relation to competition law.[94]

The fact that the media sector is intertwined with a multitude of other sectors requires strong cooperation between media regulators of different countries, but also between media regulators and other regulators (including consumer authorities, data protection authorities, gaming commissions, and competition authorities).

It can be concluded that the material scope of the AVMSD currently does not allow it to effectively and efficiently achieve its underlying objectives. The analysis presented in this chapter underscores the lack of legal certainty on the audiovisual media field. As a product of its time, the AVMSD has navigated technological advancements and market shifts to regulate audiovisual content effectively. However, in the era of influencers and pervasive online platforms, the Directive stands at a crossroads once again. Although the definitional criteria and concepts were intended to be technology-neutral, this research has demonstrated the precariousness when applying the scope of the AVMSD to influencers: outdated concepts (e.g. 'programme schedule'), the involvement of multiple actors influencing content (including VSPs, influencers, and brands), information asymmetries (e.g. was the influencer remunerated for the content made?) and so on. There are many types of influencer content and many different ways to deliver it, which makes it impossible to apply the AVMSD in a correct and consistent manner today. To remain meaningful, the Directive requires a revision that cuts ties with old and outdated concepts and ideas, reflecting the current audiovisual media market and anticipating future shifts beyond influencers.

[94] BGH 9 September 2021 – I ZR 90/20 (Influencer I), ECLI:DE:BGH:2021:090921UIZR125.20.0; BGH 9 September 2021 – I ZR 125/20 (Influencer II), ECLI:DE:BGH:2021:090921UIZR125.20.0; BGH 13 January 2022 – I ZR 35/21 (Influencer III), ECLI:DE:BGH:2022:130122UIZR35.21.0; BGH 13 January 2022 – I ZR 9/21 (Influencer IV), ECLI:DE:BGH:2022:130122UIZR9.21.0.

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