

COMMUNICATION FROM THE COMMISSION
Guidelines on the practical application of the essential functionality criterion of the definition of a
‘video-sharing platform service’ under the Audiovisual Media Services Directive

(2020/C 223/02)

I. INTRODUCTION

The Audiovisual Media Services Directive (hereinafter ‘the AVMSD’) ⁽¹⁾ aims at reinforcing the protection of users, especially minors, from certain forms of illegal and harmful audiovisual content online. For this reason, the scope of the AVMSD has been extended to impose certain obligations on video-sharing platform providers.

Pursuant to Article 28b(1) of the AVMSD, Member States have to ensure that video-sharing platform providers under their jurisdiction adopt appropriate measures in order to protect minors from harmful content and all users from content containing incitement to violence or hatred and from content the dissemination of which constitutes an activity which is a criminal offence under Union law (namely public provocation to commit a terrorist offence ⁽²⁾, offences concerning child pornography ⁽³⁾ and offences concerning racism and xenophobia ⁽⁴⁾). Under Article 28b(2), video-sharing platform providers are also subject to certain obligations regarding audiovisual commercial communications.

Recital 4 of Directive (EU) 2018/1808 recognises that ‘[v]ideo-sharing platform services provide audiovisual content which is increasingly accessed by the general public, in particular by young people. This is also true with regard to social media services, which have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos. Those social media services need to be included in the scope of Directive 2010/13/EU because they compete for the same audiences and revenues as audiovisual media services. Furthermore, they also have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users. Therefore, in order to protect minors from harmful content and all citizens from incitement to hatred, violence and terrorism, those services should be covered by Directive 2010/13/EU to the extent that they meet the definition of a video-sharing platform service.’

It is therefore clear that certain social media services fall within the scope of application of the new rules on video-sharing platforms when they meet certain criteria.

⁽¹⁾ For the purposes of these guidelines, the references to the ‘AVMSD’ shall be understood as references to Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1), as amended by Directive (EU) 2018/1808 (OJ L 303, 28.11.2018, p. 69).

⁽²⁾ As set out in Article 5 of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.3.2017, p. 6).

⁽³⁾ As set out in Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1).

⁽⁴⁾ As set out in Article 1 of Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008, p. 55).

According to Article 1(1)(aa) of the AVMSD, a 'video-sharing platform service' is a 'service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, 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 within the meaning of point (a) of Article 2 of Directive 2002/21/EC 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'.

Recital 5 of Directive (EU) 2018/1808 further clarifies that '[w]hile the aim of Directive 2010/13/EU is not to regulate social media services as such, a social media service should be covered if the provision of programmes and user-generated videos constitutes an essential functionality of that service. The provision of programmes and user-generated videos could be considered to constitute an essential functionality of the social media service if the audiovisual content is not merely ancillary to, or does not constitute a minor part of, the activities of that social media service. In order to ensure clarity, effectiveness and consistency of implementation, the Commission should, where necessary, issue guidelines, after consulting the Contact Committee, on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service'. Those guidelines should be drafted with due regard for the general public interest objectives to be achieved by the measures to be taken by video-sharing platform providers and the right to freedom of expression' ⁽⁵⁾.

In accordance with Recital 5, these guidelines take duly into account the need to ensure freedom of expression and the attainment of objectives of general interest ⁽⁶⁾.

In the process of drafting these guidelines, the Commission has duly consulted the Contact Committee, as required by Recital 5.

II. CATEGORIES OF VIDEO-SHARING PLATFORMS UNDER THE AVMSD

Based on their definition under Article 1(1)(aa) of the AVMSD, video-sharing platform services may be identified on the basis of the following three criteria:

- (1) Services whose principal purpose is to provide programmes, user-generated videos, or both, to the general public;
- (2) Services of a wider nature offering, amongst other elements, a dissociable section whose principal purpose is to provide programmes, user-generated videos, or both, to the general public;
- (3) Services for which *an essential functionality* is devoted to the provision of programmes, user-generated videos, or both, to the general public.

It should be noted that the above criteria are not necessarily mutually exclusive. In particular, services having a dissociable section which could constitute a video-sharing platform under the principal purpose criterion (category 2), may at the same time also qualify as a whole as a video-sharing platform on the basis of the essential functionality criterion (category 3).

In view of the above, the present document aims to provide guidance on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the AVMSD. The present guidelines are not binding. To the extent that they may interpret the AVMSD, the Commission's position is without prejudice to any interpretation by the Court of Justice of the European Union.

⁽⁵⁾ Also relevant in this regard is Recital 6 of Directive (EU) 2018/1808, which excludes from the scope of the definition of video-sharing platform services those 'non-economic activities, such as the provision of audiovisual content on private websites and non-commercial communities of interest.'

⁽⁶⁾ According to Recital 51 of Directive (EU) 2018/1808, when taking the appropriate measures to protect users and minors, the applicable fundamental rights, including freedom of expression, should be carefully balanced.

III. RELEVANCE OF THE AUDIOVISUAL CONTENT FOR THE ACTIVITIES OF THE SERVICE

Recital 5 of the Directive (EU) 2018/1808 clarifies that, in order for the provision of audiovisual content to constitute an essential functionality of the service, such audiovisual content must not be 'merely ancillary to, or a minor part of' the activities of the service concerned. Audiovisual content should be considered as ancillary to the activities of the service where it is exclusively accessory to an underlying activity or functionality provided by the platform concerned. This could be the case, for example, of videos uploaded exclusively with a view to supporting economic transactions, for instance videos presenting particular goods or services with a view to a potential or actual sale (this may include, for example, e-commerce platforms including users' videos showing a product while in use).

Audiovisual content can be considered as a 'minor part' of the activity of the service whenever, on the basis of quantitative and/or qualitative considerations, it appears that it plays an insignificant role in the overall economy of the service. From a quantitative perspective, for example, the fact that the platform hosts a significant number of videos may suggest that audiovisual content is a non-minor part of the service. At the same time, irrespective of quantitative considerations, videos may constitute a non-minor part of the platform service whenever they contribute in an important manner to the attractiveness, functionality or market success of the service itself. This can be inferred from a number of elements, such as for instance the fact that users consume significant amount of videos or programmes or that the platforms invests in, or gives prominence to, audiovisual content.

The Commission considers that in order to assess whether the audiovisual content functionality is essential, Member States, including their national regulatory authorities should consider, especially, the nature and the particular role played by user generated videos and programmes in the service offered by the platform. In particular, national authorities should carry out an overall analysis of the service, taking into account qualitative and/or quantitative indicators, with a view to ascertaining whether the audiovisual content provided is merely ancillary to, or a minor part of, the activities of the service ⁽⁷⁾.

When assessing a certain service, particular attention should be given to whether the audiovisual content is instrumental for the commercial success or positioning of the service on the market. However, the essential functionality requirement should not, in any case, be interpreted as requiring that the audiovisual content available on the platform be of such a crucial commercial relevance that, in its absence, the service would not be able to function or continue to be provided on the market. Such a narrow interpretation would not guarantee an adequate level of protection of users and minors when they consume audiovisual content on many popular platforms, such as certain social media services, and would thus not be in line with the aim pursued by the AVMSD ⁽⁸⁾.

Also, services that rely on audiovisual content as a non-minor or not merely ancillary component of their economic activity tend to expose their users more to such content. Therefore, the Commission considers that, in the application of the essential functionality criterion, Member States, including their national regulatory authorities, should also pay particular attention to the users' perspective and, in particular, to the degree of their exposure to audiovisual content when accessing the relevant services.

In line with the above-mentioned approach, the Commission has identified some relevant indicators that national authorities should consider when applying the essential functionality criterion of the definition of a video-sharing platform service provider. For presentation purposes, these indicators may be grouped into four categories: (1) the relationship between the audiovisual content and the main economic activity or activities of the service; (2) quantitative and qualitative relevance of the audiovisual content available on the service; (3) monetisation of, or revenue generation from, the audiovisual content; and (4) the availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content.

⁽⁷⁾ This approach is also consistent with Recital 4 of Directive (EU) 2018/1808, which clarifies that social media services should be included in the scope of the Directive when they compete for the same audiences and revenues as audiovisual media services.

⁽⁸⁾ Recital 4 of the AVMSD refers to social media services which 'have become an important medium to share information and to entertain and educate, including by providing access to programmes and user-generated videos' and 'have a considerable impact in that they facilitate the possibility for users to shape and influence the opinions of other users'.

These indicators should not be applied cumulatively. In particular, the absence of one or more of them should not automatically lead to the conclusion that the service is not a video-sharing platform. Instead, a service should be considered as fulfilling the test of essential functionality where, on the basis of an overall assessment, a sufficient number of indicators analysed support the conclusion that the audiovisual content provided by a service is not merely ancillary to, or a minor part of, the activities of the service.

1. Relationship between the audiovisual content and the main economic activity or activities of the service

In general terms, if the audiovisual content has value on its own on the platform, users may consume videos and programmes as stand-alone items of the platform service, i.e. independently of another underlying economic activity. In these cases, it is likely that such audiovisual content is not merely ancillary to, or a minor part of, the activities of that service and that users will be exposed to an important degree to such content.

In this regard, Member States, including their national regulatory authorities, should, in particular, take the following indicators into account:

- **The overall architecture and external layout of the platform.** Where the platform is geared towards the sharing of content in view of informing, educating or entertaining users rather than, for example, facilitating economic transactions, the audiovisual component is likely not to be considered as merely ancillary to, or a minor part of, the activities of that platform. In this context, relevant elements could be the overall structure and external layout of the service, for example whether or not its main pages (including the sharing interface) or platform timeline include prominent video-sharing features (as opposed to mere e-commerce driven features), such as the presentation or suggestion of new or popular videos or live broadcasting, listing of video categories, a 'take a video' button or a direct link with the phone or computer gallery feature and the content stored therein. In the presence of such elements, it is likely that audiovisual content would not constitute a minor or merely ancillary part of the service.
- **Stand-alone nature of the audiovisual content.** Where videos are uploaded or shared on a platform as 'stand-alone' items, rather than with a view to facilitating economic transactions, and watched by users by virtue of their intrinsic informational, entertaining or educational value, they are more likely to be of particular relevance for the activities of that platform. Conversely, the fact that the platform is designed essentially as a vehicle to market, or to facilitate the marketing of goods or services (other than provision of audiovisual content) is an indication that the audiovisual functionality is ancillary to, or a minor part of, the underlying economic activity. For example, if an e-commerce platform allows vendors to use videos solely to illustrate specific products, this would suggest that the platform should not be considered a video-sharing platform. In this context, national authorities may verify whether users upload, share or download videos as stand-alone items rather than to promote the sale of goods or services. In such cases, videos are also more likely to lead to an important users' exposure, and, consequently, the audiovisual component could be regarded as being more than merely ancillary to, or a minor part of, the activities of the platform.
- **Specific functionalities of the service tailored for, or specific to, audiovisual content.** The fact that the platform includes specific features tailored for, or specific to, audiovisual content is an indication of the particular importance of the audiovisual content in the overall economy of the service. Particularly relevant would be elements such as the existence of an auto-play functionality, especially when enabled by default, or a livestreaming functionality. Similarly, the fact that the platform allows searching only video content or filtering the results of a particular search by showing only videos could be taken into account. The existence of such functionalities indicates that the audiovisual content is not merely ancillary to, or a minor part of, the activities of the service and usually leads to greater exposure of users to such content.
- **The way the service positions itself on the market and the market segment it addresses.** Relevant indicators of a non-ancillary or non-minor nature in this regard could be drawn from the way the service self-identifies in its communication to the public and the way it markets or advertises its services to the users on the market segment it addresses. The fact that the service markets itself, or refers to itself in public communication, as a video-sharing platform or that it specifically refers to its audiovisual component or offer should be taken into account in this regard.

2. Quantitative and qualitative relevance of audiovisual content for the activities of the service

In principle, the Commission considers that the greater the amount and importance of audiovisual content on the service, the less likely it is that such content is merely ancillary to, or a minor part of, the activities of the service. In these cases, the services are more likely to lead to an important users' exposure to audiovisual content.

The amount and relevance of audiovisual content can be assessed on the basis of both quantitative and qualitative indicators. Member States, including their national regulatory authorities should, in particular, take the following indicators into account:

- **The amount of audiovisual content available on the platform.** If the platform includes a significant amount of videos, the audiovisual functionality of the service is not likely to be merely ancillary to, or a minor part of, the activities of the service. This assessment should be based on meaningful and reliable evidence. If meaningful data is available, national authorities may frame this assessment in quantitative terms, by taking into account for example the number or the proportion of videos present on the platform as compared to other type of available content. National authorities are encouraged to gather or verify such data or elements autonomously or from sources independent from the service provider concerned. In the absence of precise data, national authorities may have recourse to relevant qualitative evidence, such as sample analysis of portions of the platform during a time lapse or surveys of users/stakeholders.
- **The use of audiovisual content on the platform.** The fact that users of a platform make substantial use of videos available on that platform is an indication that audiovisual content is of particular relevance for the service. As explained in relation to the previous indicator, in their analysis national authorities are encouraged to rely on meaningful and reliable evidence. For instance, whenever meaningful data is available, national authorities may use such quantitative data, such as the number of clicks, shares and likes relating to videos. Where possible, national authorities may also draw appropriate comparison between the usage of audiovisual content and other types of content within the platform. National authorities are also encouraged to gather or verify such data or elements autonomously or from sources independent from the service provider concerned. In the absence of precise data, national authorities may have recourse to relevant qualitative evidence, such as sample analysis of portions of the platform during a time lapse or surveys of users/stakeholders.
- **Reach of the audiovisual content.** Popular videos, even if limited in number, may reach large numbers of users, especially via sharing and recommendations. The presence in the platform of popular video content aiming to inform, educate or entertain users is an indication of the non-ancillary or non-minor character of such content. In these cases, the audiovisual functionality is not likely to be considered merely ancillary to, or a minor part of, the activities of the service. Consistent with Recital 5 and the need to give due regard to the general public interest to be achieved by the new rules, particular attention could be given, in this context, to the target audience of the platform and, in particular, to whether the platform is targeting minors or, even if it is not explicitly targeting minors, is regularly used by minors and takes no measures to discourage such use. In particular, in these cases, an important number of (vulnerable) users can be exposed to the audiovisual content available on the platform, even if the relative amount of such content on the platform is limited. Therefore, the assessment should take into account the degree of risk of exposure of minors to audiovisual content on the service.

3. Monetisation or revenue generation from the audiovisual content

The fact that platforms monetise or generate revenues from the audiovisual content usually indicates that such content is not merely ancillary to, or a minor part of, their activities. This is generally also an indication of the commercial relevance of such content for the service.⁽⁹⁾ In practice, these services are more likely to expose users to such content to an important degree in order to increase the resulting revenues or other related benefits.

⁽⁹⁾ The notion of monetisation of audiovisual content encompasses direct revenues and indirect gains obtained by the service. Even in cases where the service does not receive revenues directly it can indirectly benefit from the audiovisual content uploaded and monetised by users. Generally, the perspective of monetising their content will incentivise creators to produce content of higher quality in order to attract views and, in turn, revenues. Ultimately, this can be expected to have a positive impact on the popularity and success of the service.

Member States, including their national regulatory authorities should, in particular, take the following indicators into account:

- **Inclusion of commercial communications in or around audiovisual content** (such as pre-, mid- or post-rolls ⁽¹⁰⁾). This indicator should be understood as including both the commercial communications controlled by the service as well as the sale of advertising space to third parties, such as advertisers. In this context, policies implemented by the services aimed at guaranteeing the appropriateness of the audiovisual content around or within which commercial communications of a specific third party brand would be displayed are further elements to consider.
- **Making the access to audiovisual content subject to payment.** The fact that the platform makes access to audiovisual content subject to payment, such as subscription or pay-per-view, proves that the service generates revenues from such content. The use of such payment systems is relevant regardless of whether the monetisation system is managed directly by the service or by the uploaders/creators.
- **Sponsorship agreements between brands and uploaders.** Sponsorship or product placement agreements between different kind of third party brands of products and services and uploaders (creators of audiovisual content) are becoming a common way of monetising audiovisual content as more and more brands enter into agreements with popular creators or influencers who garner large number of views. In some cases, services expressly encourage or facilitate such agreements by, for instance, organising events for third party brands and creators or by offering logistical support. While the video-sharing platform services may not participate directly in these agreements, they indirectly benefit from the popularity of those creators and the number of views they attract. Therefore, the presence of these arrangements is an indicator of (indirect) monetisation of audiovisual content on the platform.
- **Tracking of users' platform activities.** The fact that the platform tracks users' interaction with audiovisual content available on the service for various marketing/commercial purposes, such as targeted behavioural advertising or data-sharing agreements, should also be considered as a means of indirect monetisation.

4. Availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content ⁽¹¹⁾

The presence in a particular service of specific tools aimed at enhancing the visibility or the attractiveness of audiovisual content usually indicates that such content is not merely ancillary to, or a minor part of, their activities. Such tools usually also lead to greater exposure of users to the audiovisual content.

Member States, including their national regulatory authorities should, in particular, take the following indicators into account:

- **Specific features or actions prompting the consumption of audiovisual content.** The fact that the user interface includes specific features prompting the consumption of audiovisual content indicates the relevance of such content, both for the users and the activities of the platform. For example, the fact that videos are suggested or shown by the platform on the main page or in the platform's timeline, without any specific request or input by the user, is a relevant element to consider. National authorities could also take into account whether the service promotes or prioritises audiovisual content in the results of user searches and, thus, whether audiovisual content could be considered as being actively pushed to the users.

⁽¹⁰⁾ These terms refer to video advertisements run, respectively, before, in the middle or after the content which they accompany.

⁽¹¹⁾ In accordance with the definition of video-sharing platforms set out in Article 1(1)(aa) of the AVMSD, it is presumed for the purpose of this category of indicators that such tools are not such to confer on the platform under consideration a degree of actual control over the audiovisual content akin to a form of 'editorial responsibility', an element that would qualify them as media service providers rather than a video-sharing platform service (whether this is the case is an assessment to be undertaken on a case-by-case basis by the national regulatory authorities concerned). The guidelines are also without prejudice to Articles 12, 13 and 14 of Directive 2000/31/EC, as further clarified in Recital 48 of Directive (EU) 2018/1808, and Article 28b of the AVMSD.

- **Tools available within or around videos that are designed to attract users and encourage their interaction.** The presence of tools or systems, such as filters, sharing options, live chats specifically linked to audiovisual content or watch parties is an indication of the willingness of the service to foster users' engagement with videos and programmes and capture users' attention thereto. The use of such tools and systems is aimed at facilitating, improving or boosting users' audiovisual experience on the platform and the popularity of the audiovisual content. It can therefore be seen as an indication of the particular relevance of such content for the activity or activities of the service. This indicator also includes any development or investment made by services in innovative, more immersive and interactive ways of sharing and consuming audiovisual content. In particular, the fact that the service supports a specific application for 'smart TV' could be seen as an indication that it not only enables but also actively encourages consumption of audiovisual content.
- **Tools or systems allowing users to select the audiovisual content they wish to be offered.** Certain services offer users the possibility to personalise their own audiovisual offer by declaring what they are interested in or specifically opting out from certain types of content. This is usually done through questionnaires, samples or similar means. These tools or systems are offered to users in order to retain users' attention and engagement with audiovisual content and are thus an indication of the particular relevance of the audiovisual functionality for the activities of the service.
- **Tools or systems to track the performance and manage content uploaded on the platform.** Services can also enhance the attractiveness of their audiovisual content by offering uploaders tools or systems to track and manage the performance of the content uploaded onto the service. By doing so, services allow uploaders to have a better understanding of the preferences of their viewers which would lead to more attractive content being provided on the platform. The presence of such tools should thus be seen as an indication of the particular relevance of the audiovisual content for the activities of the service.

IV. PROCEDURAL REMARKS

The decision on whether the service has the provision of audiovisual content as an essential functionality (for the purposes of Article 1(1)(aa) of the AVMSD) lies with the Member State having jurisdiction over such service according to Article 28a of the AVMSD.

When performing the assessment of whether a service fulfils the essential functionality criterion, the national authority should work on a case by case basis and take into account the specificities of the relevant service.

National authorities should inform the service providers about the on-going assessment and the legal implications of being considered as a video-sharing platform provider, in conformity with the AVMSD and in order to obtain the necessary information for the purposes of the ongoing assessment.

However, this should not preclude national authorities from cooperating with their regulatory counterparts in other Member States to support their assessment. This cooperation could be desirable especially in order to gather the relevant data or information and to limit the risks of divergent interpretations of the above indicators by national regulatory authorities. The European Regulators Group for Audiovisual Media Services (ERGA) is the appropriate forum to facilitate such cooperation.

National regulatory authorities are invited to keep ERGA duly informed when assessing whether certain services fulfil the essential functionality criterion and thus constitute a video-sharing platform service. In particular, national regulatory authorities should inform ERGA of the preliminary conclusions as well as of the underlying reasoning of their assessment. In this context, ERGA should bring any significant or persistent inconsistencies in the approaches taken by national regulatory authorities to the attention of the Commission. The Commission will keep the AVMSD Contact Committee informed about such developments.
