



Subgroup 1

**Consistent implementation and enforcement of the new AVMSD  
framework**

Workstream 2

**Technical expertise: Interpreting and providing guidance on the  
most complex new provisions**

**Report: Analysis and recommendations concerning the regulation  
of vloggers**



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## 1 Introduction

ERGA, in its 2018 Analysis and Discussion Paper accompanying the revision of the Audiovisual Media Services Directive (AVMSD)<sup>1</sup>, stated:

*“The extension of the material scope of the Directive to ‘dissociable section(s)’ of audiovisual media services, combined with the deletion of the TV-like criteria in the definition of ‘programme’, is going to bring an increasing number of audiovisual content under the supervision of media regulatory authorities. Provided that the relevant rules applicable to audiovisual programmes (Article 6 on ethics and Article 6a on the protection of minors) and audiovisual commercial communications (Article 9) are effectively enforced, it should mean that the protection of audiences will be strengthened across a growing number of services. These changes were supplemented by the introduction of a definition of ‘user-generated video’ in Article 1, paragraph 1, letter (ba), which tracks the one of ‘programme’, at least as far as the format and material are concerned, and is mirroring the inclusion of video-sharing platform services into the material scope of the Directive...”*

*“Even though the determining criterion to qualify as ‘user-generated video’ is the nature of the uploader, the material difference between programmes and user-generated content may sometimes be unclear. For example, so-called user-generated content (UGC) can look very professional and may include excerpts of content from other sources which may themselves be considered programmes in specific contexts, or materially constitute a programme according to some NRAs.”<sup>2</sup>*

These considerations, drafted in 2018, reflect the varying regulatory perspectives within ERGA on the question whether vlogger channels or comparable audiovisual offers constitute audiovisual media services (AVMS). The term vloggers or vlogger channels is a term that was chosen at the occasion of ERGA’s previous activities and also referred to in its Work Programme 2021. However, it should be noted that this report aims to provide also guidance for a wider range of similar or comparable services that can be witnessed on video platforms nowadays. In practice, also other terms or labels are used for such activities, such as “YouTubers”, “YouTube channels”, “influencers”, “creators” or “uploaders”. What all these activities have in common is that consist of audiovisual content, mostly user-generated, which is uploaded on video platforms and - depending on the platform - usually organised and distributed via channels. With that respect the term “uploaders” seems to be a more technology-neutral and adequate term. Also

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<sup>1</sup> AVMSD: Directive 2010/13/EU as amended by Directive 2018/1808 (EU); ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive, *Towards the application of the revised Directive by National Regulatory Authorities (NRAs)*, <https://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf>, page 21, emphasis added

<sup>2</sup> ERGA Analysis & Discussion Paper, [ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf](https://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf) (erga-online.eu), page 37



because vloggers seems to suggest it is content uploaded by individual persons, while in practice it could also be companies. Nevertheless, with regard to ERGA's previous activities and the reference in ERGA's Work Programme for 2021, this report predominantly uses the notion of vloggers or vlogger channels, without ignoring it could capture other services on video platforms. Whereas the qualification of livestreams on VSPs as programmes does generally not pose major interpretation issues, notable differences in the interpretation of whether vlogger channels may constitute on-demand audiovisual media services (OD AVMS) can be identified. This does not only give cause for concern in regard of the consistent implementation of the relevant provisions throughout the internal market, but is also the determining factor in regard of the scope of the AVMSD and thus the applicability of the obligations foreseen in the AVMSD. This is why the present report addresses the issue of those vlogging services possibly constituting on-demand audiovisual media services.

The question whether a vlogger channel constitutes an OD AVMS should be clarified in view of legal certainty and transparency, and this question constitutes an unambiguous priority for ERGA. However, the AVMSD, in its nature as a Directive, lays down a number of abstract concepts open to quite wide interpretation. Member States transpose the relevant provisions of the AVMSD on this basis and ultimately, NRAs develop their own practices and gain experience in applying the rules. Against this background, a full harmonisation of national provisions transposing the AVMSD cannot be expected, nor was it intended by the European co-legislators. This is especially the case for the implementation of material provisions of the AVMSD laying down minimum harmonization rules and where Member States can opt for stricter and or more detailed rules. At the same time, it is paramount that all Member States apply the rules to the same types of media services to ensure optimal protection of users and a level playing field between media service providers. The need for coherent approaches when it comes to determining the scope of OD AVMS regulation and its application on the situation of vloggers was also explicitly stressed by participants in ERGA's workshop on vloggers in September 2020<sup>3</sup>.

ERGA, in accordance with its Statement of Purpose<sup>4</sup>, is committed to support an effective and consistent implementation of the Directive, but takes note of the differences in material notions and regulatory practices in the various Member States. The present report strives therefore to identify common issues in regard of the assessment of vlogger channels in the light of the AVMSD, and aims at detecting possible lines of action to face these challenges.

Another caveat must be made in regard of the possibility, given the material differences between these types of channels and the wide concepts of the Directive, to conceive generally applicable guidelines. The analysis of the NRAs' practice in this regard has shown that, notwithstanding the efforts to clearly determine all criteria of assessment

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<sup>3</sup> Activity Report on the ERGA Workshop "Regulation of Vloggers on Video-Sharing Platforms" (2020); [https://erga-online.eu/wp-content/uploads/2021/01/ERGA-SG1-Report-Vlogger-Workshop-Sept-2020\\_final\\_21122020.pdf](https://erga-online.eu/wp-content/uploads/2021/01/ERGA-SG1-Report-Vlogger-Workshop-Sept-2020_final_21122020.pdf)

<sup>4</sup> [https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-02\\_Statement-of-Purpose-adopted.pdf](https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-02_Statement-of-Purpose-adopted.pdf)



and to ensure utmost transparency, ultimately, assessments have to be performed on a case-by-case basis.

In conclusion, this report is meant to put into context the issue of audiovisual services offered on video-sharing platforms (VSPs), to identify common challenges in the assessment of vloggers with regard to the application of the AVMSD and to offer some guidance which could contribute to a common understanding to this issue.

## **2 Creating a level playing field**

Audiovisual regulation on a pan-European level started in 1989<sup>5</sup> with the “Television without Frontiers Directive” (TWF-Directive). Reviews were accomplished roughly every 10 years (1997, 2007, 2018), aiming at creating a both well determined and sufficiently flexible legal framework for the free flow of television, and then audiovisual media services on the Internet.

Currently, the AVMSD covers many types of services including audiovisual content, irrespective of the technology used to deliver the content. The rules apply regardless of the means of transmission, be it the Internet, cable, satellite or terrestrial and of the type of device used, TV, PC, mobile devices or tablets.

Taking into account the degree of choice and user control over services, the AVMSD basically differentiates between linear (television programmes) and non-linear (on-demand) services. Also, it acknowledges a set of core societal values applicable to all audiovisual media services, such as the preservation of human dignity, the protection of minors and the ban on hate speech. Initially (by way of revision of the TWF-Directive in 2010), it provided for lighter regulation for on-demand services, based on the higher degree of consumer control in deciding on the content and the time of viewing. The Directive (EU) 2018/1808, however, practically aligned the rules applicable both to TV programmes and OD AVMS.

The general objective of the current AVMSD is to ensure that the core values referred to above are applied in a non-discriminatory manner to all types of audiovisual content. The new trends in consumption of audiovisual media services, the growing impact of on-demand media services, and the importance of protecting the audiences and safeguarding the core values underpinning media regulation did no longer justify less strict and detailed rules for OD AVMS.

### **2.1 Regulating on-demand audiovisual media services**

In Europe, the first discussions on how to deal with new on-demand audiovisual services emerged in the early 2000s. At that time, the EU’s Television without Frontiers Directive only covered traditional television, but in view of the emerging new services providing content similar to the ones offered on TV, it was felt that a review of the regulatory

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<sup>5</sup> Directive 89/552/EEC



framework was needed. This was achieved in 2007 with the adoption of the Audiovisual Media Services Directive<sup>6</sup>, which introduced a set of specific rules applying to traditional broadcasting as well as on-demand audiovisual services considered to be in competition with the former.

The rationale of including on-demand media services into the scope of the AVMSD was the perception of the necessity of creating a level playing field for services increasingly competing for the same audiences and of protecting core values inherent to media regulation. In this regard, the EU legislator formulated the following policy goals underpinning the AVMSD<sup>7</sup>:

- providing rules to shape technological developments
- creating a level playing field for emerging audiovisual media services
- preserving cultural diversity
- protecting children and consumers
- safeguarding media pluralism
- combating hate speech

In this line, two major arguments were put forward by the EU legislators and the European Court of Justice (ECJ) for continuously extending the material scope of regulation of the AVMSD: first, the fact that the considered services are/were competing for the same audience and revenues as traditional services, and second, the potential impact of the services to influence and shape the opinion of their audience.

Accordingly, in Recital 24 of Directive 2010/13/EU, it was stated that OD AVMS are competing for the same audience as television broadcasts. The so-called “TV-like criterion”, which materialised the competition between services. The regulatory objective of including such services was to avoid distortion of competition: *“It is characteristic of on-demand audiovisual media services that they are ‘television-like’, i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of ‘programme’ should be interpreted in a dynamic way, taking into account the developments in television broadcasting.”* (Recital 24 of Directive 2010/13/EU)

On 21 October 2015, the European Court of Justice (ECJ), made the same reference in regard of a level playing field between television and on-demand services, as well as the

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<sup>6</sup> Directive 2010/13/EU

<sup>7</sup> In the following, it is referred to Directive 2010/13/EU as amended by Directive 2018/1808 (EU) as “AVMSD”



impact on public opinion, to justify the classification of short videos as programmes and include them into the scope of regulation (C-347/14, “New Media Online”):

*“Recital 21 – [...] like a television broadcast programme, the videos at issue in the main proceedings are aimed at a mass audience and are likely to have a clear impact on that audience within the meaning of recital 21 in the preamble to Directive 2010/13.*

*Recital 22 – [...] the purpose of that directive is to apply, in a particularly competitive media landscape, the same rules to actors competing for the same audience and to prevent on-demand audiovisual media services, such as the video collection at issue in the main proceedings, from engaging in unfair competition with traditional television.”*

## **2.2 Regulating on-demand audiovisual services on video-sharing-platforms**

In 2016, for the first time, the internet captured more advertising investment than television in Europe and the United States<sup>8</sup>. This trend has since then continued. In the first half of 2018, online sites and platforms reinforced their position as the leading advertising medium. For instance, in France a market share of 39.2%, i.e. an increase of 5 points in one year, could be witnessed<sup>9</sup>. The growing consumption of online videos partly explains this development, as digital advertising markets are increasingly driven by audiovisual content, in particular the one provided on social media. Audiovisual content is expected to account for more than 80% of global data traffic on the Internet in the near future, with a growing share on mobile networks.

In this light, the revision of the AVMSD in 2018 echoed the same considerations in regard of the regulation of audiovisual services online as was the case in the review of 2007. In particular, the 2018 revision referred to social media, namely the competition dimension as regards audiences and revenues and its impact on the opinion of users:

*“[...] 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.[...]” (Recital 4 of Directive (EU) 2018/1808)*

In line with the growing consumption of AVMS on social media, the latter were, as video-sharing platforms (VSPs), included in the scope of the AVMSD.

At the same time, to reflect market developments adequately, the formulation in Recital 24 of the AVMSD, deleted the reference stating that OD AVMS are deemed to offer content comparable to television programmes (“TV-like criterion”) in Directive 2010/13/EU. Equally, the reference to TV-likeness “the form and content of which are comparable to the form and content of television broadcasting” was also deleted from

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<sup>8</sup> European Audiovisual Observatory Yearbook 2016, 35

<sup>9</sup> Observatoire de l’e-pub, conclusions 1er semestre 2018 (Les régies Internet, UDECAM).



the definition of “programme” in Article 1, paragraph 1 of the AVMSD. In the same vein, Recital 3 of Directive (EU) 2018/1808, made explicit that channels or any other audiovisual services under the editorial responsibility of a provider can constitute audiovisual media services on their own, even when they are offered on a video-sharing platform which is characterised by the absence of editorial responsibility on the platform level. In a nutshell, the question whether audiovisual services offered on VSPs constitute audiovisual media services in their own right became relevant around 2016, and ensuingly started to be discussed within ERGA.

## 2.3 ERGA’s engagement

In 2020, an ERGA Workshop, organised by the Spanish media authority and ERGA-member CNMC, devoted to the issue of vloggers<sup>10</sup>, was held to identify legal issues and other challenges relating to this type of services, based on the experiences acquired by a number of NRAs.

As a follow-up to the Workshop in 2020, the 2021 ERGA Work Programme<sup>11</sup> foresaw the elaboration of a Guidance for Vloggers, and in this vein, the Terms of Reference for the ERGA Subgroup on the “Consistent implementation and enforcement of the new AVMSD framework”, among others, includes the following commitment:

*“...In order to ensure a coherent implementation of the Directive, ERGA will issue guidance on the interpretation of certain complex new provisions of the revised AVMSD, notably in the area of video-sharing platforms and questions around the concrete nature of vloggers, signal integrity and accessibility.”<sup>12</sup>*

## 3 The concept of vloggers

### 3.1 Common definitions

In view of the lack of a concrete, legal definition of what has to be understood under the notion of vlogger, reference is made to the common understanding of the notion.

Commonly, a vlogger designates an individual producing vlogs and publishing them online. A vlog is generally defined as a video blog or video log, a form of blog constituted by a video and uploaded on VSPs, where the videos are hosted and made available to the general public. Therefore some NRAs also use the more general notion of “uploaders” since the notion of vloggers could be considered as a too narrow concept. If and when

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<sup>10</sup> Activity Report on the ERGA Workshop “Regulation of Vloggers on Video-Sharing Platforms” (2020); [https://erga-online.eu/wp-content/uploads/2021/01/ERGA-SG1-Report-Vlogger-Workshop-Sept-2020\\_final\\_21122020.pdf](https://erga-online.eu/wp-content/uploads/2021/01/ERGA-SG1-Report-Vlogger-Workshop-Sept-2020_final_21122020.pdf)

<sup>11</sup>[https://erga-online.eu/wpcontent/uploads/2020/08/ERGA\\_WorkProgramme2021.pdf](https://erga-online.eu/wpcontent/uploads/2020/08/ERGA_WorkProgramme2021.pdf)

<sup>12</sup> Terms of Reference of Subgroup 1: [https://erga-online.eu/wp-content/uploads/2021/02/SG1\\_ToR\\_2021\\_final.pdf](https://erga-online.eu/wp-content/uploads/2021/02/SG1_ToR_2021_final.pdf)





these groups of videos are identified as audiovisual media services hosted on VSPs, they are often referred to as “channels”<sup>13</sup>, although this is also depending on the specific features of the video platform. Vlog entries often combine embedded videos (or a video link) with supporting text, images, and other metadata. As mentioned, vloggers normally use VSPs, typically YouTube, to distribute their content, often organised via channels<sup>14</sup>. For that reason, vloggers are also sometimes referred to as “YouTubers” or “YouTube” channels. But since their activities are not necessarily limited to YouTube as distribution platform and thus the notion of vloggers could be considered as a too narrow concept, some NRAs prefer to use the more general and platform-independent concept of “uploaders”<sup>15</sup>. Other concepts or labels used to describe these activities are “creators”, “influencers” or “influencer channels”. No matter the specific notion used for these activities; what they usually have in common is that the audiovisual material consists of user-generated content and that it is uploaded to a video platform. Although the central notion in the report is “vloggers” it aims to capture and provide guidance for all similar activities, even when different notions or labels are used.

The concept of vlogger includes all types of actors, individual persons or other (legal) entities. However, it is rather typical for vlogging services to be provided by individuals or small teams, which may pose challenges to enforcement of the rules applying to OD AVMS.

Vloggers may offer live-streams and, more frequently, videos on an on-demand basis. Also, in the case of live-streams, the streams are often, following live transmission, offered on an on-demand basis anyway. In the event of a vlogger solely offering live-streams, which seldom occurs in practice, the rules applying to television programmes apply, provided the service would be offered on the basis of a programme schedule and meet all definition criteria of an AVMS<sup>16</sup>.

### **3.2 Vloggers as on-demand audiovisual media services providers**

The main purpose of this ERGA report is to provide guidance on to what extent vloggers or uploaders in general may be considered as OD AVMS provider, or, in other words, to offer guidance on the criteria of the AVMSD when applied to the specific situation of vloggers or uploaders. In this vein, the report also aims to provide an overview of current approaches by mapping existing best practices in several Member States.

Some NRAs<sup>17</sup> took the view that vloggers may constitute OD AVMS in the years preceding the adoption of Directive (EU) 2018/1808, even when this not always led to registration with the NRA and formal supervision of these services. For others, the explicit acknowledgment in Recital 3 of Directive (EU) 2018/1808 was a decisive factor:

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<sup>13</sup> Recital 3 of Directive 2018/1808 (EU)

<sup>14</sup> <https://en.wikipedia.org/wiki/Vlog>

<sup>15</sup> E.g. the Dutch CvdM has taken this approach in a currently ongoing internal project.

<sup>16</sup> This is why this report exclusively refers to issues related to OD AVMS.

<sup>17</sup> Such as KommAustria, CSA Be, CSA or AGCOM.



*“As such, channels or any other audiovisual services under the editorial responsibility of a provider can constitute audiovisual media services in themselves, even if they are offered on a video-sharing platform which is characterised by the absence of editorial responsibility. In such cases, it will fall to the providers with editorial responsibility to comply with Directive 2010/13/EU...”<sup>18</sup>.*

From this follows that the question, whether a vlogger constitutes an OD AVMS, merely depends on the question whether the relevant criteria of the Directive are met, assessed on a case-by-case basis and interpreted by the relevant Recitals (the legal assessment will be dealt with below).

## **4 Legal assumptions**

### **4.1 Legal basis**

The basic elements of the definition of an OD AVMS are enshrined by Directive 2010/13/EU as amended by Directive (EU) 2018/1808. Additionally, Recitals shed light on the interpretation of what is an OD AVMS and subsequently when a vlogger channel can be considered as an OD AVMS<sup>19</sup>.

### **4.2 Definition of an on-demand audiovisual media services in accordance with Directive 2010/13/EU as amended by Directive (EU) 2018/1808**

Art. 1 Para 1 point (a) (i):

*“‘audiovisual media service’ means:*

*(i) 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 a dissociable section thereof is devoted to providing programmes, under the editorial responsibility of a media service provider, to the general public, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC; such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;”*

Art. 1 Para 1 point (b):

*“‘programme’ mean a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by*

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<sup>18</sup> All emphasis added in quotations of the AVMSD in this guidance were added by the authors.

<sup>19</sup> In the quotations as per below, emphasis is added in regard of parts relevant for the present analysis.



*a media service provider, including feature-length films, video clips, sports events, situation comedies, documentaries, children's programmes and original drama;"*

Art. 1 Para 1 point (c):

*"‘editorial responsibility’ means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;"*

Art. 1 Para 1 point (d):

*"‘media service provider’ means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;"*

Art. 1 Para 1 point (g):

*"‘on-demand audiovisual media service’ (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;"*

### **4.3 Recitals specifying the definition of an on-demand audiovisual media service**

#### **4.3.1 Directive 2010/13/EU**

Recital 21

*"For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on- demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non- economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest"*

Recital 22

*"For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public,*



*and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.”*

#### Recital 23

*“For the purposes of this Directive, the term ‘audiovisual’ should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive, which should not affect the freedom of the Member States to regulate such services at national level in accordance with the Treaty on the Functioning of the European Union.”*

#### Recital 24<sup>20</sup>

*“It is characteristic of on-demand audiovisual media services that they are ‘television-like’, i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of ‘programme’ should be interpreted in a dynamic way taking into account developments in television broadcasting.”*

#### Recital 25

*“The concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the concept of ‘effective control’, when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on*

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<sup>20</sup> To date, there is no official consolidated version of Directives 2010/13/EU and (EU) 2018/1808 including all recitals, and therefore it remains unclear – with a view to the deletion of the TV-like criterion – which parts of this Recital will remain.



*certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)."*

#### Recital 26

*"For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties."*

#### Recital 27

*"Television broadcasting currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is an on-demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned."*

#### Recital 28

*"The scope of this Directive should not cover electronic versions of newspapers and magazines."*

#### Recital 29

*"All the characteristics of an audiovisual media service set out in its definition and explained in recitals 21 to 28 should be present at the same time."*

### **4.3.2 Directive (EU) 2018/1808**

#### Recital 1

*"The last substantive amendment to Council Directive 89/552/EEC (4), subsequently codified by Directive 2010/13/EU of the European Parliament and of the Council (5), was made in 2007 with the adoption of Directive 2007/65/EC of the European Parliament and of the Council (6). Since then, the audiovisual media services market has evolved significantly and rapidly due to the ongoing convergence of television and internet services. Technical developments have allowed for new types of services and user experiences. Viewing habits, particularly those of younger generations, have changed significantly. While the main TV screen remains an important device for sharing audiovisual experiences, many viewers have moved to other, portable devices to watch audiovisual content. Traditional TV content still accounts for a major share of the average daily viewing time. However, new types of content, such as video clips or user-generated content, have gained an increasing importance and new players, including providers of*



*video-on-demand services and video-sharing platforms, are now well-established. This convergence of media requires an updated legal framework in order to reflect developments in the market and to achieve a balance between access to online content services, consumer protection and competitiveness.”*

#### Recital 3

*“Directive 2010/13/EU should remain applicable only to those services the principal purpose of which is the provision of programmes in order to inform, entertain or educate. The principal purpose requirement should also be considered to be met if the service has audiovisual content and form which are dissociable from the main activity of the service provider, such as stand-alone parts of online newspapers featuring audiovisual programmes or user-generated videos where those parts can be considered dissociable from their main activity. A service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audiovisual offer and the main activity such as providing news in written form. As such, channels or any other audiovisual services under the editorial responsibility of a provider can constitute audiovisual media services in themselves, even if they are offered on a video-sharing platform which is characterised by the absence of editorial responsibility. In such cases, it will fall to the providers with editorial responsibility to comply with Directive 2010/13/EU.”*

#### Recital 4

*“Video-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.”*

### **4.3.3 Conclusion**

Based on these legal provisions, it may be assumed that, if and when, a vlogger is uploading several videos on a VSP, the vlogger or uploader could qualify as OD AVMS provider.

From the definition of an OD AVMS follows that a vlogger or uploader can only be considered as an OD AVMS provider if as minimum requirement the following conditions, constituting the key elements of the definition, are met:



- The (vlogger) channel constitutes an economic service in accordance with Articles 56 and 57 of the TFEU.
- The principal purpose of the channel is the provision of programmes which inform, entertain or educate.
- The vlogger or uploader holds editorial responsibility, including effective control over the selection of the programmes and their organisation.
- The offer consists of a catalogue of programmes selected by the media service provider.
- The target audience of the channel is the general public.
- The programmes are delivered via electronic communications networks in the meaning of Article 2 of Directive 2002/21/EC.
- The service is provided by the vlogger or uploader for the viewing of programmes chosen by the user and at his individual request.

Every assessment of a vlogger channel may, in addition, take into account the Recitals as quoted above, especially with regard to the suitability of the offer to be regarded as “[...] *mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public [...].*” and “[...] *mass media in their function to inform, entertain and educate the general public.*”

#### **4.4 Analysis of recurring interpretation challenges**

As per below, several challenges regarding the interpretation concerning the qualification of channels as OD AVMS, by no means exhaustive, are raised, which have been considered by ERGA Members as challenging interpretation issues in regard to vloggers.

##### **4.4.1 (Lack of) Thresholds**

500 hours of content are uploaded every minute only on YouTube<sup>21</sup>. Even only with regard to practical implications, it seems obvious that only a small share of these offers fulfil the criteria of the Directive in regard of OD AVMS, or, in other words, that the AVMSD did not intend, a priori, to capture all social media channels with user-generated content within the definition of an OD AVMS<sup>22</sup>. However, a clear delineation would only be possible if all these types of channels/services were included or excluded. One could take the view that vloggers merely constitute – with reference to their early days – user-generated content, itself regulated by the AVMSD by conferring obligations on the respective VSP. However, as assessed by several NRAs independently from each other

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<sup>21</sup> <https://www.oberlo.com/blog/youtube-statistics>

<sup>22</sup> Ref. to Recital 21





since a few years, market realities, technical developments and consumption patterns would not do justice to such an interpretation. This is also because co-regulation on the VSPs alone might not always offer sufficient safeguards to users and ensure a level playing field between services competing for the same audiences. Previously, the notion of “user-generated content” effectively covered content produced by individual users. Nowadays, it rather describes a certain type of content (e.g. typical YouTube-formats), which frequently is produced professionally and may in certain cases be qualified as a programme in the meaning of the AVMSD.

Consequently, the issue of thresholds must be taken into consideration, as low viewing figures, poor economic performance and little to no investments indicate that the relevant service is outside the scope of the AVMSD (Recital 21 “...*but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting...*”). Insofar, the biggest challenge in relation to the assessment of vloggers as OD AVMS is the absence of thresholds in the Directive, as the latter would constitute clear, transparent and absolutely objective criteria.

However, it must be borne in mind that such thresholds were never considered for linear services regulated by the AVMSD and its predecessors, even if those are very small. The definition of an audiovisual media service (and before of television) was solely based on qualitative criteria, following the logic that it is difficult to justify that smaller services must not comply with the principle-based regulatory objectives of the AVMSD. Therefore, the aim to create a level playing field for all services covered by the AVMSD could command that, in a first step, the definition of a vlogger as an OD AVMS should be based on qualitative criteria, as currently foreseen in the AVMSD. By contrast to Art. 13 AVMSD, the definition of an OD AVMS service per se does not provide for an exception for smaller providers. However, in particular the service and the mass media criteria both allow NRAs to exclude services of a smaller size. When NRAs follow such an approach, it would seem advisable to ensure, while safeguarding the independence of every NRAs assessment, to the extent possible the coherence of potential thresholds in the European context and to issue guidelines on their respective approach and criteria, which should then be brought to the attention of other ERGA Members. It should also be borne in mind that linear services of small- and medium-sized companies, especially predominant in smaller Member States, are, independently of their size, subject to the rules of the AVMSD and that a level playing field must be safeguarded between linear and non-linear services.

In regard of vlogger regulation however, the sheer number of channels suggests a more pragmatic approach compared to linear services, essentially based on the assumption that the scope of the AVMSD only covers “mass media”. There are several upsides of this in regard of the assessment of vlogger channels, as the volatility of their performance, in terms of clicks, views, subscriptions and advertising revenues is frequently high. Advertising revenue online highly depends on the number of clicks, views, subscriptions and other traffic indicators. Therefore a sudden decline in traffic could rapidly affect also advertising revenues and as a consequence the economic performance of the offer. Also, if these figures rapidly change, this might affect the assessment of whether the service can be regarded as a mass medium.





Another characteristic of vlogging demonstrating the fluidity and the volatility of their performance must be noted. The activities of vloggers or uploaders often do not require considerable resources as is the case with traditional broadcasting or even the (professional) production of videos. Therefore, many young people carry out such activities in their leisure time as a hobby, but then, when successful, begin to participate in the partnership programmes offered by VSPs and start to generate income, which might lead to a sudden change of the character of the channel, becoming more professional and generating income (and becoming a “service”, see below).

It can be concluded, as a number of regulators are already considering, that the criterion of “mass media” allows to – in addition to the other qualitative criteria of the AVMSD – think about a quantitative dimension for the assessment. Indicators such as the average performances over an observation period, ranking of the vlogger in listings such as SocialBlade, Statista, Gospel Stats<sup>23</sup> and others, could be used to affirm the presence of the “mass media” criterion of the AVMSD. This appears to be even more justified in the light of the fact that the VSPs itself bear certain legal responsibilities in regards of the audiovisual offer they carry, which ensures regulatory protection of the users as provided for by the AVMSD.

#### **4.4.2 Presence of the service element in accordance with Art. 56 and 57 of the Treaty on the Functioning of the European Union (TFEU)**

Art. 56 of the TFEU reads:

*“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.*

*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.”*

Art. 57 TFEU of the TFEU reads:

*“Services shall be considered to be services within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.*

*Services shall in particular include:*

*(a) activities of an industrial character;*

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<sup>23</sup> Refer to <https://socialblade.com/>; <https://www.statista.com/>; <https://www.gospelstats.com/>



*(b) activities of a commercial character;*

*(c) activities of craftsmen;*

*(d) activities of the professions.*

*Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.”*

Audiovisual media services must, according to Art. 1 Para 1 point (a) (i) of the AVMSD, constitute services in accordance with Art. 56 and 57 of the TFEU. However, the case law relating to the notion of “service” as defined above is very diverse and casuistic. In principle, the requirement of remuneration (“*normally provided against remuneration*”) must be understood in a wider sense, e.g. direct consideration is not compulsory, neither is a direct contractual relationship.

In the audiovisual sector, remuneration is mainly provided by commercial communications (e.g. ECJ of 30.04.1974, C-155/73 “*Sacchi*”, of 26.04.1988, C-352/85 “*Bond van Adverteerders*” or ECJ of 09.07.1997, joint cases C-34/95, C-35/95 and C-36/95 “*De Agostini*”).

This also applies to vlogging channels, which generate profits through all forms of commercial communications. Vloggers frequently benefit from participation in the partnership programmes offered by the VSPs to share advertising revenues.

Consequently, the challenge in assessing the presence of the service element consists in whether revenues are sustainably realised. In addition, the transition from a hobby channel, where the provider adheres to the partnership programme, to a commercial operation with regular income is fluent.

An approach could be to exclude vloggers who do not generate revenue on a sustainable, regular base, from the scope of the AVMSD on the grounds of the lacking of the service criterion (ref: Art. 57 TFEU: “*...Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration...*”; Recital 21: “*but should not cover activities which are primarily non-economic...*”). The observation period for the assessment of sustainability/regularity could be, for example, a year, taking into account a certain relevance of the revenue (e.g. minimum amount subject to taxation<sup>24</sup>). Taxation would thus be the indicator for the presence of revenue.

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<sup>24</sup> E.g. in Austria this would be: 700 Euro for a secondary income, 11.000 Euro for self-employed and 15.000 Euro for employed)



#### 4.4.3 Potential impact on a significant proportion of the public

As the AVMSD does not provide for any threshold, the notion of a “significant proportion” is the most difficult to assess. At the same time, the number of views on a given channel can be very volatile over time, ranging from millions of views of a given video and a couple of thousand of the next video. Consequently, the AVMSD speaks of the “potential” impact on a significant proportion of the public<sup>25</sup>, thus introducing a theoretical perspective and not requiring a de facto assessment. In the same sentence, it is referred to an intentional element from the perspective of the service provider (“*intended for reception by*”).

In a nutshell, the relevant Recital 21 therefore demands an ex-ante (“intended” and “potential” impact) assessment, compelling the NRA to forecast the performance of the channel (“clear” impact, on a “significant proportion” of the public) upon its characteristics. This paves the way to a perspective upon which certain channels can, as per their subject-matter, be excluded, even if theoretically (and upon the qualitative criteria as described), they could fit into the definition of an OD AVMS. One could argue that the legal requirement to “*inform, entertain or educate the general public*”, should be assessed restrictively. Otherwise any audiovisual content could fit into this definition, which would be an undesirable outcome. This means that it might be, irrespective of a case-by-case analysis, considered to exclude certain offers targeted at a very narrow/specialised audience, such as – by way of example – hotel cooks, high level pc experts or magicians, could be an important indicator for its exclusion. This obviously does not apply to special interest channels, which can have an important reach in terms of audience share (significant “proportion” of the public), comparable to special interest channels on TV.

Furthermore, the choice by the provider of formats frequently offered on VSPs, which generate wide audiences such as pranks, cooking shows, music videos, sports, and, more generally, so-called influencer channels, could be an indicator for the potential of the relevant channel to have a significant impact on the audience.

Another evidence could be the amount of monetary investment made into the content offered (with reference to: “intended” for reception by a significant proportion of the public), although there are at times channels who exceptionally reach wide audiences without much or any expenses or professionalism in the production. The presence of product placement, games of chance and/or sponsoring may be an additional indicator.

At the same time, the Recital equally implies an ex-post dimension, whose substance, at least at some point, should have effectively been realised, whether there was a “clear impact” on a “significant proportion” of the public, now from an ex-post perspective. Here, the wording of the Directive implies a quantitative dimension, putting the performance of the channel into relation with the market where the vlogger is active. This could be an average, combining subscriptions and views over a year to assess

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<sup>25</sup> Recital 21 of the AVMSD



whether there is some sustainability in the performance (see above), and put into comparison with the relevant market in the respective Member State.

It should be noted, in this specific context, that the success of a channel can also be determined by a qualitative perspective, for instance by the vlogger having a “significant” impact on general opinion or in a certain debate.

#### **4.4.4 The notion of mass media which inform, entertain or educate the general public**

Directive (EU) 2018/1808 has seen the deletion of the so-called “TV-like”-criterion. However, the regulatory intention still remains to subject audiovisual services to certain obligations with a view to achieving a level playing field between competing services, whose goal it is to inform, entertain or educate the general public. Therefore, characteristics applying to linear services are transposed to OD AVMS, namely the requirement to provide programmes to the general public in order to inform, entertain or educate. The European Court of Justice’s judgment on the case “Peugeot Deutschland” of 21 February 2018<sup>26</sup> sheds further light on the interpretation of the reference of “programmes that inform, entertain or educate the general public”. In this case the Court examined the qualification of a video posted by Peugeot Deutschland on its YouTube channel about one of its vehicle under Article 1 (1)(a)(i) of Directive 2010/13. A promotional video channel on YouTube could not, the Court of Justice said, be said to have, as its principal purpose, the provision of programmes that inform, entertain or educate the general public. The clear purpose of the video was to promote, for a purely commercial purpose, a product or service and that even if it were to inform, entertain or educate viewers, its promotional purpose would suffice to exclude it from the scope of that provision.

The definition of programmes ensuingly cites, by way of example, certain formats, which are essentially known from television.

Thus, to approximate the definition of mass media, equally the notion of programme is key. A programme “*means a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider*” (Art. 1 para 1 point b of the AVMSD). The formats cited in the definition include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama. In addition, as a consequence of the “New Media Online” judgement, “video clips” have been added to this definition. Whereas the formats cited indicate the type of content involved, the term of video clips rather reflects the technical dimension (this is consistent with in the argumentation of the “New Media Online”-Judgement)

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<sup>26</sup> Judgment of the Court (Ninth Chamber) of 21 February 2018, Peugeot Deutschland GmbH v Deutsche Umwelthilfe eV, Request for a preliminary ruling from the Bundesgerichtshof, Case C-132/17, EUR-Lex - 62017CJ0132 - EN - EUR-Lex (europa.eu)



Therefore, the following elements could be taken into account when assessing this criterion:

The Directive puts programmes in the context of information, entertainment and education of the general public. As mentioned above, this definition per se is rather extensive and potentially includes nearly every type of content. However, notwithstanding the deletion of the TV-like criterion, the formats enumerated in the definition of a programme point at the intention of the legislators to converge the type of content covered by the AVMSD along the line of the cited formats, which are such usually offered on linear services. This follows the logic that most “typical” formats available on VSPs – in broad terms – correspond to formats available in traditional services. For example, “product reviews” can be interpreted as the equivalent of consumer shows, and “challenges” or “pranks” as an equivalent of entertainment shows.

In a system of matrix, the other elements of the definition need to be equally considered. Programmes must potentially interest the general public. As mentioned in relation to target audiences, offers aimed at a specific group should be assessed according to their potential to attract other audiences (as those targeted), too. In other words, what differentiates offers to inform, entertain or educate from those not captured by the definition, is the lack of an entertainment element, which is inherent to a mass medium offer. Entertainment element means that the content is staged in a manner potentially attracting the interest of users, namely those who up to this point have not been already attracted to the issue. This is in line with the wording according to which the offer must be “intended for reception” (Recital 21: “by the general public”). If this is not the case and the offer solely satisfies the need for information of a dedicated group, it could be an important indicator that may refute that the offer aims at the general public.

It is reiterated that special interest offers obviously can constitute mass media, but the unlimited availability of capacity on VSPs and the easy access to create such offers may/could indicate that a restrictive standard should be applied with this type of offer.

As mentioned, another element in a qualitative perspective to the term of “mass media”, notwithstanding its size, could be the consideration that the offer has a certain relevance to public opinion.

#### **4.4.5 Other issues**

NRAs encounter various other issues when assessing vlogging channels. In this regard, by no means exhaustive, the following issues can be mentioned:

##### **4.4.5.1. Definition of catalogue:**

The definition of catalogue might seem to be rather straightforward but also here NRAs can use certain criteria for narrowing down the concept. In this respect, a de minimis rule (threshold) such as a minimum amount of videos present may be an option.

##### **4.4.5.2. Editorial responsibility:**



Some have argued that the discretion of a vlogger (uploader) to manipulate its channel is limited, both technically and legally, which indicates a lack of editorial responsibility. However, also with regard to the notion of “effective control” (Art. 1 (1) (d) of the AVMSD), it should be noted that the vlogger has the possibility to choose the content of the video offer, upload it to a platform and eventually also delete it from the platform. When a vlogger (uploader) is able to perform all these activities at his own discretion, it justifies the conclusion that the vlogger exercises effective control over the selection of programmes, and their organisation into a catalogue. The presence of a catalogue may be affirmed when the selection of content on the channel has been performed solely by the vlogger. In this regard, the creation of playlists constitutes an additional element, but is not compulsory in this respect (the same would apply to a catch-up service). This means that the absence of editorial responsibility can be concluded if and when there is not a deliberate act by the vlogger to offer the content in a given composition on a given platform. For instance, predominantly non-audiovisual services offer video sections in which the videos posted in the timeline of the service are automatically aggregated in this section. When assessing the issue of editorial responsibility, the aim to create a level-playing field between programmes on VSPs and other OD AVMS should be taken into account.

#### 4.4.5.3. Identification of the provider:

As certain VSPs do not require the (open) disclosure of the identity of the vloggers, except an e-mail address, enforcement by the NRA in the case of regulatory breaches of the provider may be considerably hampered. In some cases, not even the location (and thus the jurisdiction) can be identified. Vloggers have argued that as they are offering their services as individuals, the disclosure of their identity, which is also required by the E-Commerce-Directive (Art. 5 (1)), may put them into peril. However, in view of the disclosure of obligations provided by the AVMSD, no discretion is left to national legislators to allow for alternative forms of identification (such as alias, etc.). It should also be borne in mind that the disclosure of the identity of the media service provider is a core principle of media regulation. Also, many national media laws require the disclosure of the media owner, which equally may be a natural person. This matter, being an important issue of enforcement, has been discussed in a broader context among ERGA Members<sup>27</sup>. Typical enforcement challenges in the online environment are especially addressed in ERGA’s contributions to the discussion on the DSA<sup>28</sup>. And also ERGA’s Memorandum of Understanding aims to strengthen enforcement in cross-border cases<sup>29</sup>.

#### 4.4.5.4. Listing of vloggers captured by the Directive:

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<sup>27</sup> [https://erga-online.eu/wp-content/uploads/2020/01/ERGA\\_2019\\_SG3\\_Report-1.pdf](https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_SG3_Report-1.pdf)

<sup>28</sup> Statement on the proposals for a Digital Services Act (DSA) and a Digital Markets Act (DMA), [https://erga-online.eu/wp-content/uploads/2021/03/ERGA-DSA-DMA-Statement\\_29032021.pdf](https://erga-online.eu/wp-content/uploads/2021/03/ERGA-DSA-DMA-Statement_29032021.pdf) and Proposals aimed at strengthening the Digital Services Act (DSA) with respect to online content regulation, <https://erga-online.eu/wp-content/uploads/2021/06/2021.06.25-ERGA-DSA-Paper-final.pdf>

<sup>29</sup> ERGA Memorandum of Understanding of 3 December 2020, [https://erga-online.eu/wp-content/uploads/2020/12/ERGA\\_Memorandum\\_of\\_Understanding\\_adopted\\_03-12-2020\\_l.pdf](https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_l.pdf)



Member States dispose of varying systems in view of the possibility to monitor vlogger channels. So far, no system of licensing was identified among Member States. Some jurisdictions foresee registration or notification obligations for OD AVMS, bearing the difficulty – in the light of the requirement to make a case-by-case assessment – for NRAs to “find” the services on the Internet. By contrast, such systems provide legal certainty for the media service provider, in particular if and when the relevant system is combined with the possibility to file a request for assessment whether or not the vlogger channel constitutes an OD AVMS. The downside of such registration systems, which naturally entail the obligation for the NRA to search for illegally non-registered vloggers, are that they tie considerable resources of the NRA, which could be used effectively to enforce the material provisions in regards of the latter.

In this regard, ERGA notes that a useful tool to ensure transparency and legal certainty for providers, offered in some jurisdictions, is the option for a provider to request a decision by the NRA whether or not his service is captured by the Directive.

#### 4.4.5.5. Operations of the channel in the past:

Another challenge lies in the assessment of a channel if and when it is no longer under operation and merely constitutes an archive. Undoubtedly, the need for regulatory protection remains and it is the question if the service element still can be affirmed and whether a certain frequency and/or regularity of the uploads is required.

## 5 Material vlogger regulation

In the context of the revision of Directive 2010/13/EU, the European Commission carried out an Impact Assessment in parallel to the ex-post evaluation of the said Directive under the Regulatory Fitness and Performance Programme (REFIT). The overall conclusion of the Impact Assessment was that the objectives of Directive 2010/13/EU still remain relevant. The REFIT evaluation identified three main types of problems:

- Insufficient protection of minors and consumers on VSPs
- Lack of a level playing field between traditional TV and on-demand services, and internal market weaknesses stemming from the fact that some of the Directive’s rules are not sufficiently precise
- Rules on commercial communications no longer fit for purpose.<sup>30</sup>

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<sup>30</sup> Brussels, 25.5.2016 SWD(2016) 169 final COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT Accompanying the document Proposal for a Directive of the European Parliament and of the Council 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 in view of changing market realities {COM(2016) 287 final} {SWD(2016) 168 final, page 2, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0173&from=EN>





One of the general conclusions of the REFIT evaluation stated: *“While the Directive’s objectives are still valid, market developments and changes in viewing patterns have led to some of its rules being outdated. Consumers increasingly watch audiovisual content on-demand and online, yet video-sharing platforms and on-demand service providers are either not regulated or subject to lighter regimes. As a result, consumer protection is not adequately ensured and broadcasters are put at a competitive disadvantage.”*<sup>31</sup>

More in particular in the area of the regulation of commercial communication many stakeholders expressed concerns about asymmetry in the application of advertising regulation and failures to offer adequate protection to (young) audiences:

*“Moreover, as also affirmed by 6 Member States, 4 regulators and by most broadcasters in the 2015 Public consultation, some of the AVMSD rules do not ensure a level playing field in times of media convergence and in light of the shift of advertising revenues online. Media services compete for the same advertising market but are not all subject to the same regulatory constraints (some because they are on-demand services subject to lighter AVMSD rules than broadcasting, others because they are not regulated by the AVMSD). The consequences of this differential treatment are even more remarkable when millennials are targeted.”*<sup>32</sup>

The obligations of linear and OD AVMS where practically aligned by the revision of Directive (EU) 2018/1808. Many of the new elements clearly demonstrate that the protection of audiences and the safeguard of the same public values that underpin traditional broadcasting regulation are deemed equally important where the online media in general and OD AVMS in particular are concerned.

However, in practice, the issue of commercial communications or, more precisely, its lack of transparency on vloggers’ channels, is the most pressing challenge for NRAs. Many NRAs count on media literacy initiatives for both vloggers and the users of vloggers’ channels<sup>33</sup>.

There appears to be consensus among ERGA Members that the regulation of vlogger channels must follow a risk-based and proportionate approach, also taking into account

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<sup>31</sup> Brussels, 25.5.2016 SWD(2016) 171 final COMMISSION STAFF WORKING DOCUMENT Executive summary of the ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU Accompanying the document Proposal for a Directive of the European Parliament and of the Council 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 in view of changing market realities {COM(2016) 287 final} {SWD(2016) 170 final, page 2 and 3, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2016:0171:FIN:EN:PDF>

<sup>32</sup> Brussels, 25.5.2016 SWD(2016) 170 final COMMISSION STAFF WORKING DOCUMENT Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU Accompanying the document Proposal for a Directive of the European Parliament and of the Council 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 in view of changing market realities {COM(2016) 287 final} {SWD(2016) 171 final, page 34 and 35, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0170>

<sup>33</sup> For example, the Landesmedienanstalten: [https://www.die-medienanstalten.de/fileadmin/user\\_upload/Pressemitteilungen/KEK/Dokumente/FAQ-Flyer\\_Werbung\\_Social\\_Media\\_02.pdf](https://www.die-medienanstalten.de/fileadmin/user_upload/Pressemitteilungen/KEK/Dokumente/FAQ-Flyer_Werbung_Social_Media_02.pdf); CvdM: <https://van-kaam.nl/nl/article/155/Regels-voor-vloggers>;





practical implications. Given this new field of regulation, emphasis must also be given to the use of media literacy instruments and other tools contributing to user's empowerment. In addition, self- and co-regulation schemes appear to be adequate tools to tackle regulatory concerns such as advertising or protection of minors.

## **5.1 Regulatory requirements for vloggers constituting on-demand audiovisual media services**

Following the alignment of obligations of AVMS and OD AVMS, the obligations applying to all media service providers in the Directive (EU) 2018/1808 are the following:

- Identification of media service providers (Article 5)
- Prohibition of incitement to hatred and public provocation to commit a terrorist offence (Article 6)
- Protection of minors (Article 6a)
- Accessibility for people with disabilities (Article 7)
- Qualitative requirements for commercial communications (Article 9)
- Sponsoring (Article 10)
- Product Placement (Article 11)
- Promotion of the production and distribution of European works (OD AVMS: Article 13, TV programmes: Articles 16, 17 and 18)
- Promotion of media literacy (Article 33a)

Only a few obligations are not applicable to OD AVMS, which is due to the very nature of the mode of distribution/transmission of both types of services:

- Rules about exclusive rights on events of major importance and short news reporting (Chapter V)
- Time limits for TV advertising and teleshopping (Chapter VII)
- Right of reply (Chapter IX)

## **5.2 Regulatory requirements for vloggers constituting on-demand audiovisual media services versus those of video-sharing-platforms**

The regulatory framework for both vloggers and VSPs is adapted to the nature of the respective service. While the aim is to regulate the relevant audiovisual content, the common regulatory principles are as follows: Identification of commercial communications, protection of minors, ban of incitement to hatred and terrorist content, and the preservation of human dignity. However, linear media service providers are subject to obligations relating to accessibility, whereas VSPs must provide for offers promoting media literacy.

Although the AVMSD has not yet been fully implemented by all Member States, it is foreseeable that there will be challenges in relation to the (potential) difference of the jurisdiction of the OD AVMS and of the VSPs concerned, possibly setting different



standards for the same offer as the AVMSD does not provide for full harmonisation, e.g. in the field of advertising as explained below.

To help address such issues, ERGA has already taken steps in the direction of enhanced collaboration by adopting a MoU<sup>34</sup>, which provides for a specific procedure in regard of the cross-border dimension in VSP-regulation.

Regarding the advertising standards, the qualitative ones applying to OD AVMS were aligned with those applying to linear services and therefore apply to vlogger channels. However, as regards the provisions of the Directive, a legal uncertainty remains: Art. 28b (3) (b) of the AVMSD provides for the requirement for VSPs to include and apply in their terms and conditions the provision in Art. 9 (1) of the Directive (rules pertaining to commercial communications). On the other hand, the same provision applies to OD AVMS, which means that, in view of the principle of minimum harmonization and ensuingly the possibility for Member States to adopt stricter measures, different rules may apply to the same service (i.e. the channel of the vlogger).

## 6 Recommendations

The observations and findings described above lead to the following suggestions and recommendations for the interpretation of the key criteria of the notion of OD AVMS when applied on the specific situation of vloggers:

### 6.1 Mass media criterion

To assess whether the service of a vlogger has an impact on a significant proportion of the general audience an ex-ante assessment could be useful. It would require the NRA to forecast the performance of the channel (“clear” impact, on a “significant proportion” of the public) upon its characteristics. This paves the way to a perspective upon which certain channels can, as per their subject matter, be excluded, even if theoretically (and based on qualitative criteria), they could fit into the definition of an OD AVMS.

In a system of matrix, the other elements of the mass media criterion could be evaluated. Programmes must potentially interest the general public. Offers aimed at a specific (niche) audience should be assessed according to their potential to attract other audiences (as those targeted). In other words, what differentiates these (niche) offers from those captured by the definition, is that they are not even potentially attractive for other audiences, which is inherent to a mass medium offer. Entertainment element means that the content is staged in a manner potentially attracting the interest of users, namely those who up to this point have not been already attracted to the issue. This is in line with the wording according to which the offer must be intended for reception by the general public. If this is not the case and the offer solely satisfies the need for information

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<sup>34</sup> ERGA Memorandum of Understanding, adopted on 3 December 2020: [https://erga-online.eu/wp-content/uploads/2020/12/ERGA\\_Memorandum\\_of\\_Understanding\\_adopted\\_03-12-2020\\_l.pdf](https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_l.pdf)



of a dedicated group, it could be an important indicator that may refute that the offer aims at the general public.

It is reiterated that special interest offers obviously can constitute mass media, but the unlimited availability of capacity on VSPs and the easy access to create such offers indicates that a restrictive standard should be applied with this type of offer.

Furthermore, the choice by the provider of formats frequently offered on VSPs, which generate wide audiences such as prank videos, cooking shows, music videos, sports, and, more generally, so-called influencer channels, could be an indicator for the potential of the relevant channel to have a significant impact on the audience.

Alternative or additional evidence could be found in the amount of investment made into the content offered. Nevertheless, it should be noted that there will be vloggers who exceptionally reach wide audiences without much expenses or professionalism in the production phase.

It should also be evaluated whether there was, at least at some point in time, a “clear impact” on a “significant proportion” of the public, now from an ex-post perspective. Here, in addition to qualitative indicators a quantitative dimension, putting the performance of the vlogger into relation with the market where he is active, could be considered. In that regard, average performances of vloggers measured over a certain observation could be useful indicators. This could be an average, combining subscriptions and views over a year to assess whether there is some sustainability in the performance, and put into comparison with the relevant market in the respective Member State. Rankings of vloggers in listings such as SocialBlade or Statista could be helpful tools to assess the presence of the “mass media” criterion of the AVMSD.

In that respect the number of followers or subscribers of a vlogger’s channel could be a useful indicator when assessing the mass media criterion. Also from a practical perspective it could be helpful since the number of subscribers or followers is usually visible from the frontend of a platform and would not require in-depth research or monitoring. The same would go for views but with practical drawback of having to calculate and compare all views on different platforms which could be a more challenging and time-consuming exercise.

It should be noted, in this specific context, that the influence of a vlogger on the audiences can also be determined by a qualitative perspective, for instance by capturing vloggers that demonstrated to have a “significant” impact on general opinion or in a certain debate.

## **6.2 Economic service criterion**

The main challenge in assessing the presence of the economic service element consists on whether revenues are sustainably realised. In the current online environment the



transition from hobby channel, where the vloggers join a partnership programme with a commercial operation with regular and significant income is very fluent.

When evaluating the economic service criterion, it could be useful to assess whether the vloggers generate revenues on a sustainable, regular base. The observation period for assessment of sustainability/regularity could be a year, taking into account a certain relevance of the revenue (e.g. minimum amount subject to taxation). Taxation would thus be the indicator for the presence of revenue.

In addition, the cooperation of a vlogger in partnerships programmes, directly or via so-called Multi Channel Networks (MCNs), could also imply that the economic service criterion is fulfilled. It goes without saying that the presence of sponsoring, product placement and games of chance could also constitute evidence for assessing the presence of an economic service.

Furthermore, the registration with a local Chamber of Commerce or similar organisation could also be a strong indication that a vlogger's activity constitutes an economic service. In many countries such registration is mandatory for every private person or company that wants to operate as an enterprise. Also national tax regulations often require registration with a local chamber of commerce when private persons or companies generate revenues with their business activities.

### **6.3 Editorial responsibility criterion**

The criterion of editorial responsibility implies effective control over two main activities: the selection of programmes, and their organisation into a catalogue. When a vlogger is able to perform both activities at his own discretion, it suggests the criterion is fulfilled. Editorial responsibility can be affirmed when the selection of the videos on a channel or similar outlet has been performed solely by the vlogger. The creation of playlists constitutes an additional element, but would not be compulsory in this respect since the same would apply to a catch-up service. In other words: only when there would be no deliberate act by the vlogger to offer the content in a given composition on a given platform, the editorial responsibility criterion would not be met, namely where audiovisual content is aggregated solely by automated means.

### **6.4 Catalogue criterion**

The criterion of catalogue might seem to be rather straightforward but also here NRAs can consider certain indicators for the interpretation and application of this specific concept. Here as well quantitative considerations such as thresholds or other de minimis rules could provide added value when evaluating the criterion.

In that vein a minimum amount of videos present in a catalogue could be worth considering for NRAs when assessing the presence of a catalogue. When applying such a threshold, the minimum number of actual videos uploaded on a platform could be taken into account as well. As a consequence, parties who have not uploaded any new videos over a recent period could fall out of scope of regulation and supervision.



## **6.5 Other instruments, complementary and/or statutory regulation**

As the practical experiences of several NRAs demonstrate, in addition to formal regulation of vloggers, schemes based on self- and co-regulation can be useful complementary instruments to ensure the achievement of important public policy objectives. In some situations, it could even function, if only temporarily, as an alternative to mandatory requirements. This goes especially for areas such as the protection of minors and the enhanced transparency of commercial communication. Also bearing in mind that VSPs have come under the scope of the AVMSD and will have to implement codes of conduct ensuring transparency and safeguarding other public values, self and co-regulatory instruments will keep their relevance and significance.

Furthermore, NRAs take into consideration national media literacy initiatives for both vloggers and the users of vloggers' channels. There seems to be a consensus among NRAs that the regulation of vlogger channels must follow a risk-based and proportionate approach. This should be accompanied and complemented by media literacy instruments contributing to the empowerment of users.



## **Annex – National examples**

### **1 Austria**

In 2017, KommAustria commissioned a study on the economic and societal impact of vloggers in Austria. The study came, amongst other findings, to the conclusion that the 100 top channels were subscribed by more than 28 million users and single videos of those offers had been viewed by 7 billion users. In economic terms, this meant an overall value of up to 7 million Euros before taxes. Given the rather small- to medium-size structured market of the Austrian television industry, it became evident at this point that it was necessary to consider, on the grounds that these services were in direct competition with traditional broadcasting services for advertising revenues (either as individual services or as part of multi-channel networks), that certain vloggers may fall into the material scope of the AVMSD. In addition, also the design of certain vloggers offers increasingly converged with formats typical for television. It thus became clear that some vlogger services had become entertainment offers in their own right, thereby partly substituting traditional catch-up and audiovisual services. Consequently, KommAustria browsed the SocialBlade listing for Austria and analysed the top 300 vloggers in view of their potential conformity with the criteria of the AVMSD. As a result, a very small part was found to meet the criteria for (OD) AVMS.

In a major review of broadcasting legislation in 2010, Austria had literally transposed the criteria of the 2007 AVMSD, as is described in the general part of the present guidance. This also applied to the statutory obligations of OD AVMS, or, in the case of linear services (vloggers providing live streaming are considered as online television programmes), to AVMS.

In view of the registration obligations for cable operators and online audiovisual services, namely 14 days in advance of the start of the service and the statutory obligations applying to (OD) AVMS, KommAustria started a major information campaign, which specifically targeted the services found via Social Blade. The offer encompassed online information offers, dedicated folders, events in locations frequented by vloggers and/or their marketers and the possibility to seek advice of the regulator either by phone or via email, whether the service potentially constituted an AVMS. In addition, KommAustria offered guidance, which vlogger formats correspond to TV-formats and thus fulfil the TV-like criterion. Even following the deletion of this criterion by the revision of the AVMSD, this assessment remains a useful tool, as it still offers some guidance on whether the service, in general terms, may be considered as an entertainment offer.

According to the regulatory practice in Austria, vloggers are qualified as (OD) AVMS also in not predominantly video-based social media services, if and when they dispose of a dedicated section whose principle purpose is the provision of videos, except if videos are aggregated solely by algorithms. It should also be mentioned that gamers are currently not regarded as OD AVMS services, given their material difference in substance to other audiovisual entertainment offers.



In a nutshell, KommAustria applies a high standard in terms of whether a vlogger can be regarded as a (OD) AVMS, especially whether the services potentially has a mass media character.

Also, a legal tool which was implemented as a consequence of the New Media Online case, ECJ C-347/14 (which was originally a decision by KommAustria qualifying the video section of an online service as an OD AVMS), namely the possibility to file a request to the regulator on whether the service constitutes an (OD) AVMS, proved to be successful. Since then, this possibility was sensed by 68 vloggers and constitutes a very practical tool to quickly clarify the legal status of vloggers. This is important - not only in view of the legal obligations ensuing from the status of being an (OD) AVMS - but also given the legal automatism in Austria, that the qualification of a person providing a service (in terms of Art. 57 of the EU Treaty) also entails membership in the Chamber of Commerce and the payment of social security contributions.

It should further be mentioned that all decisions by KommAustria must be published, whereby further guidance to other providers is offered.

The new audiovisual legislation following the review of the AVMSD in 2018 brought by, other than the necessary changes incurred by Directive (EU) 2018/1808 (definition of an OD AVMS and relating obligations), some changes which eased, both for the regulator and the vlogger, administration and enforcement of the relevant provisions. As mentioned above, vloggers qualifying as OD AVMSD have to notify their service to the regulator. Prior the entry into force of the new audiovisual regulatory framework on January 1st, 2021, this obligation applied at the latest two weeks in advance of the start of the service, which obviously created difficulties in view of the need to materially assess the design of the service. As of 2021, the relevant obligation requires a notification two months following the start of the service.

In its review of the audiovisual legislation following the review of the Directive, the Austrian legislator, with a view to specifically narrow the application of the provisions of the Directive, introduced an exemption of certain types of services from the general definition of OD AVMS. The provision reads as follows:

*“Exemption of the definition [of an OD AVMS]*

*§ 2a. (1) Even if it is designated in a dissociable section of content created and offered by the provider, the provision of audiovisual content shall not be qualified as an on-demand service as defined in § 2 item, if such content is provided in particular by schools, universities and other research and educational institutions for the purposes of teaching, preparing academic papers or continuing education, including the provision from an archive;*

*2. museums, theatres and other artistic or cultural institutions for the purposes of presenting their cultural offers, including their provision from an archive; the same shall*





*apply to presenting pieces of the creative work of legal and natural persons who are active in the arts and culture;*

*3. corporate bodies under public law for purposes of information and of presenting their tasks performed within the scope of their public-law powers or as part of private-law arrangements, and political parties for the purpose of describing their activities;*

*4. undertakings for the purpose of presenting the goods produced or distributed by them or the services offered by them;*

*5. associations for the purposes of self-promotion and of presenting the activities they perform in accordance with their purpose as an association; or*

*6. natural persons for the purpose of presenting their private life, such as, in particular, in connection with their leisure activities or hobbies, without providing any information that is likely to influence the formation of public opinion.*

*(2) Content offered as referred to in paragraph 1 shall not be qualified as an on-demand service as defined in this Federal Act only if the provision of audiovisual content is not marketed or exploited either independently or by adding or inserting audiovisual commercial communication and is not financially supported by means of other regular subsidies.”*

This amendment facilitated the exemption of certain offers from the notion of a service as defined by Art. 57 TFEU and the case-law of the ECJ, especially but not limited to services offered by public entities and cultural institutions. This has contributed to a legal certainty. However, the delineation occasionally still poses challenges in regards of the assessment whether a vlogger offer can still be regarded as a hobby, mostly in these cases where marginal and irregular revenue is incurred, especially by way of the partnership programmes offered by the VSP.

Furthermore, with a view to the uphold the up-to-dateness of the list of services (which is to be published on statutory grounds), the regulator has now the possibility to update the list if and when he considers that a given offer no longer constitutes an AVMS or finished its operation.

In regard of the statutory obligations applying to (OD) AVMS and subsequently to (some) vloggers, the Austrian legislator has also provided for an exemption in regard of accessibility obligations, provided that a certain threshold, namely a turnover of 500.000 Euro, has not been exceeded in the preceding year by the AVMS.

## **2 Belgium**

The Government of the French-speaking community of Belgium endorsed in the explanatory memorandum of its decree transposing Directive (EU) 2018/1808 the





interpretation according to which channels hosted on VSPs are AVMS under the responsibility of the vloggers who created and uploaded them.

On 12 December 2019, the Belgian CSA (CSA.Be) confirmed this analysis in an official Advice to the Government of the French-speaking Belgian community recommending the following: “It is recommended that the regulator’s jurisdiction over channels active in PPVs, a significant proportion of which, given their audiences, their degree of monetization and professionalization, and their capacity to influence the public (particularly with regard to a young audience), should be considered as AVMS exercising editorial responsibility. The Licensing and Control Authority of the CSA.Be must nevertheless ensure, on a case-by-case basis, that the criteria constituting an audiovisual media service are met”.

To support this analysis, the aforementioned advice referred to recital 3 of the 2018 Directive as the latter acknowledges that channels created and offered on a video-sharing platform by vloggers can constitute audiovisual media services and consequently are under the editorial responsibility of a provider when it says that: “As such, channels or any other audiovisual services under the editorial responsibility of a provider can constitute audiovisual media services in themselves, even if they are offered on a video-sharing platform which is characterised by the absence of editorial responsibility. In such cases, it will fall to the providers with editorial responsibility to comply with Directive 2010/13/EU”. As an example, in the explanatory memorandum of its decree transposing Directive (EU) 2018/1808, the Government of the French-speaking community of Belgium endorsed this interpretation according to which channels hosted on VSPs are OD AVMS under the responsibility of the vloggers who created and uploaded them.

According to the latest RMB estimates, 1.3 million Belgians watch online videos every day and almost half of this consumption is provided on YouTube.<sup>35</sup> This penetration rate is largely due to young audiences<sup>36</sup> seduced by the creative freedom and interaction possibilities of the platform. While the average Belgian devotes 9% of his daily viewing time to video sharing platforms and 5% to audiovisual on social networks, these proportions rise to 21% and 9% respectively for 18-24 year olds.<sup>37</sup>

According to the CSA-Be monitoring in March 2019, the 30 most popular French-speaking Belgian channels (on YouTube) had 21.6 million subscribers and 3.35 billion views. As illustrated by the figures below, these data have increased dramatically over the last 4 years. Another indicator of this trend is that the threshold for entering the “FWB top30” has doubled between 2017 and 2019, from 92,000 to 196,000 subscribers.

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<sup>35</sup> RMB, *MediaXperience*, 2016.

<sup>36</sup> Observatoire européen de l’audiovisuel, *Yearbook 2018-2019*, p.68.

<sup>37</sup> IP, *Mediaspecs Video Observers*, 2019, p.2.

Fig1 - TOP 30 chains in French-speaking Belgian Community (WBF) - cumulative subscribers

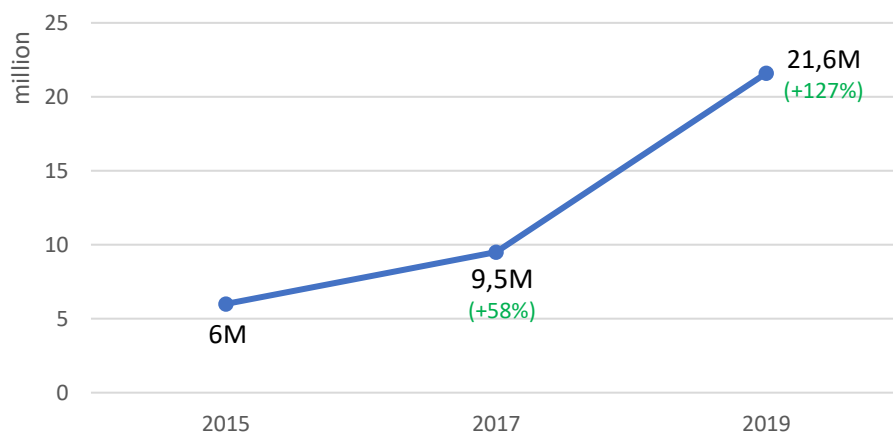
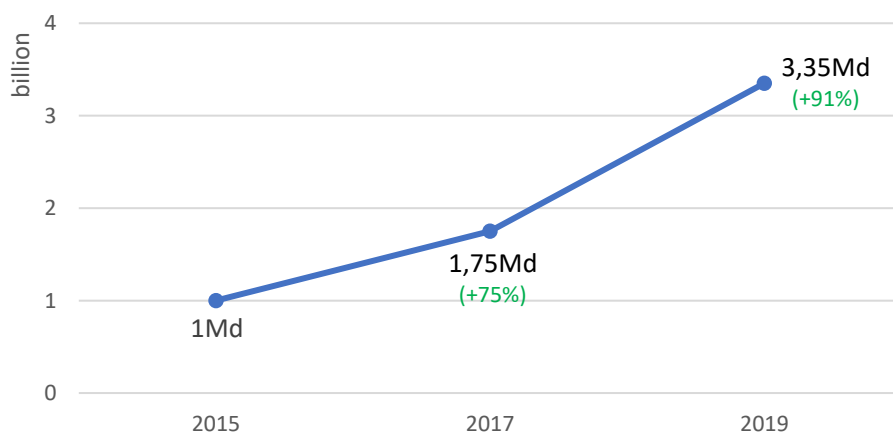
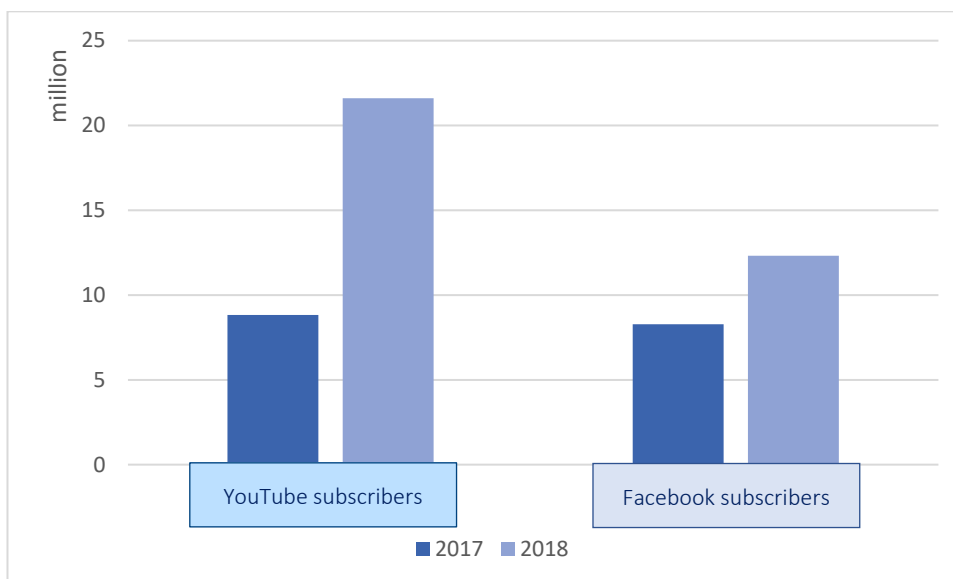


Fig2 - TOP 30 chains in the French-speaking Belgian Community (WBF) - cumulative views



26 Youtubers from the "top30 WBF" are also active on Facebook. Their pages offer multi-media content (photos, texts) but also a significant proportion of audiovisual content, some of which is also available on the Facebook Watch video service.

Between 2018 and 2019, the evolution of Facebook subscribers of the "top30 WBF" also follows an ascending curve: +48%. This is another indication that video publishing is a powerful incentive for membership on social networks and that audiovisual influencers are cross-platform in nature.



As regards the classification criteria for vloggers as OD AVMS, CSA-Be's position includes the following assessments:

#### Presence of an economic activity

The CSA.Be identifies an economic activity since YouTube shares its advertising revenue with channels from a defined number of views or subscribers corresponding to the monetisation threshold defined by the VSP. In some cases, the channels' revenues also extended to the revenues received from certain brands in return for the promotion of their products (product placement). In addition, services funded by donations, crowdfunding, membership fees, or which depend on subsidies, are also considered to be "offered" to the public in exchange for a consideration. Considering the large audiences that some vloggers' services are reaching, the CSA.Be services consider that they constitute a new form of competition on the audiovisual market, especially as they capture advertising investments previously reserved for traditional television stations.

#### Editorial responsibility

In several cases, professional vloggers will be organising the appearance of these videos through using additional editorial tools proposed by the VSP, including the creation of playlists to structure the offer of programs. The use of these editorial tools is demonstrating how the VSP hosting the channels is encouraging the editorialization of catalogues. Full use of such possibilities can be interpreted as a sign that vloggers are endorsing their editorial responsibility. However, the extent to which a vlogger is using - or not - the advanced features should not be seen as a determining factor for deciding whether the vloggers can be assimilated to AVMS or not. Many of them generate millions of views and attract a large share of advertising revenues without necessarily using these advanced features. In this case, vloggers are only uploading their videos which appear then in chronological order.



In a nutshell, vloggers could be only uploading videos and still be identified as OD AVMS provided that other criteria are met. It is recommended to recognise that when uploading videos, vloggers are actually selecting at least the videos that they are willing to make available for the public as programmes on their channels. From this angle, the editorial decisions' features could be considered as met and the vlogger would be exercising editorial responsibility.

#### Type of content

As described in Article 1 of the AVMSD, any content, which aims at informing, entertaining or educating the public, or any audiovisual commercial communication can be covered.

#### Potential mass media character

What matters in this context is to establish that the channel is broadcasting from a platform intended to be received by a significant proportion of the population. For instance, the penetration rate of YouTube alone demonstrates that this criterion is met.

### 3 Denmark

In Denmark the Ministry of Culture has stated in the comments to the new radio- and television broadcasting act, that it does not believe - as a general rule - that many Danish vloggers will be characterized as OD AVMS<sup>38</sup>. A guidance<sup>39</sup> for the sector is provided for which services must be registered with the Authority.

### 4 Germany

In Germany, provisions on vloggers were adjusted during an overhaul of the Broadcasting State Treaty (Rundfunkstaatsvertrag – RStV), which then was re-named and amended to become Interstate Media Treaty (Medienstaatvertrag - MStV). Beforehand, vloggers offering live streams have not been asked by the media authorities to get a broadcasting-license as the provisions then would have obliged them to. Moreover, and more relevantly, the objective of the laws to regulate vloggers was to establish a legal basis regarding online-media produced and distributed by vloggers. Within the revised State Treaty, the Landesmedienanstalten have been given a statutory power to clarify some provisions of the Treaty. During the process of drafting the advertisement statute (Werbesatzung – WerbeS), the Association for Influencer Marketing was heard on the new provisions.

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<sup>38</sup> [https://www.ft.dk/ripdf/samling/20191/lovforslag/l108/20191\\_l108\\_som\\_fremsat.pdf](https://www.ft.dk/ripdf/samling/20191/lovforslag/l108/20191_l108_som_fremsat.pdf); market shares: <https://mediernesudvikling.kum.dk/2020/kort-nyt/influencer-bureauer-2019/>

<sup>39</sup> <https://slks.dk/omraader/medier/tv/internet-on-demand-mv/on-demand/>



In the Landesmedienanstalten's yearly event "#Watchdog", the sector was informed about changes of regulation and on current developments. Influencer, agencies etc. are present at these events as speakers as well as in the audience.

In German law, there is no explicit legal definition of vloggers. The German approach relies on a definition of the content produced. The way an audiovisual communication is distributed is determinant for the provisions a provider has to follow. Thus, providers referred to as vloggers may qualify as AVMS-providers based on the content they provide and the distribution of this content. Given this legal approach, the regulation of vloggers falls under the same legal basis as traditional forms of media and traditional media service providers .

Possible legal definitions of content produced by vloggers:

As outlined above, vloggers are defined as audiovisual media service providers based on the programme they make. Therefore, vloggers programmes can take different shapes and fall under different definitions:

Vloggers could be identified as "broadcasting-like telemedia" according to § 2 para. 2 no. 13 MStV. The criteria "broadcasting-like" is understood widely. Thus, formats or broadcasts are included that could also well be aired via traditional broadcasting. This may be continued content in a daily vlog or Lets Plays related to a concrete video game. In the interpretation of the German Media Authorities, YouTube-channels and comparable content are mostly considered and regulated accordingly. The notion of broadcasting-like telemedia transposes the Directives' respective concept of on-demand services into the German law.

Vloggers may qualify as traditional AVMS providers under § 2 para. 2 no. 17 i.c.w. no. 2 MStV if they provide chronologically ordered content following a broadcasting-plan. Such a broadcasting-plan is defined as a chronological and content-related determination of broadcasts, which is determined by the provider and not changeable by the audience.

Moreover, under § 2 para. 6 i.c.w. para. 7 and 9 Telemedia Act, vloggers can be qualified as AVMS providers if they provide commercial audiovisual communications. Commercial audiovisual communications is defined as any visual content that is accompanying or part of any broadcast for a fee or a similar benefit including self-referencing and is aiming to promote any product or service. This includes product placements and sponsoring.

Legal provisions applying to vloggers and oversight:

Likely, vloggers will be categorized as broadcasting-like telemedia according to § 2 para. 2 no. 13 MStV. Such services have to meet obligations on advertisements and sponsoring under § 74 MStV and the provisions for telemedia on the protection of minors under the JMStV.



If a vlogger provides live-streams regularly, he/she may fall under an authorisation requirement under § 52 MStV. This is the case if the broadcasts meet the criteria for being characterized as a broadcasting-service and the cash de minimis exemption and the exemption for programmes with a limited influence on the personal and societal opinion-building as laid out in § 54 MStV does not apply. The vlogger then is obliged to comply with the provisions on advertisement and sponsoring as well as programme principles. Moreover, he/she has to act according to the broadcasting-related provisions concerning the protection of minors as laid out in the State Treaty for the Protection of Minors (JMStV).

If vloggers offer a service, that is to be classified as a broadcasting-service, they may have to ask for a broadcasting-license. Otherwise, there is an obligation to register. The provisions and exemptions as outlined above apply accordingly.

Usually, when it comes to violations of advertisement obligations (e.g. violations of the obligation to label advertisements as such), the competent federal media authority sends out an information letter making the vlogger aware of his/her violation and asking for correction. Mostly, the media authority attaches a so-called labelling-matrix giving an overview on the way certain content is to be labeled and it has to be done according to the rules applying. If the vlogger makes the adjustments requested, there are no further sanctions. If, however, no adjustment is made or violations occur repeatedly, a formal procedure is triggered.

## 5 Netherlands

Section 1.1 of the Dutch Media Act 2008 describes an “on-demand media service” as “a media service consisting of the provision of media services on-demand that can be procured at a time selected by the viewer”.

The Dutch NRA, the CvdM has elaborated already 10 years ago in policy guidelines (Policy Rules on the Classification of Commercial On-Demand Media Services 2011)<sup>40</sup>, some characteristics of the definition of an on-demand media service. These guidelines are currently under review as part of an internal on-going project focussing on the situation of vloggers, or “uploaders” in the terminology chosen by the CvdM.

The current policy guidelines do not focus on the “TV-likeness” of an on-demand service and use the term “video” instead of “programme”. With regard to the “principal purpose” criterion, the CvdM takes into account the functionality and presentation of a service and its prominence in the case of hybrid services (the CvdM classifies e.g. a stand-alone video service of a newspaper or a magazine as an on-demand audiovisual media service if it meets all criteria of the definition). Furthermore, the policy guidelines indicate that audiovisual services offered by private persons will not be considered as an economic service unless they are offered for payment or are of a clear commercial nature. If

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<sup>40</sup> Beleidsregels classificatie commerciële mediadiensten op aanvraag 2011 - BWBR0030512 (overheid.nl), <https://wetten.overheid.nl/BWBR0030512/2011-11-01>



multiple providers carry out effective control over the choice of video content and its organisation, the CvdM considers that the selection of the programmes is the most decisive criterion to identify who exercises the editorial responsibility. Nevertheless, the main provisions of the policy guidelines are currently under revision and most likely will be altered.

In the opinion of the CvdM vloggers, channels on VSPs such as YouTube, and similar media services could be considered as an on-demand media service, provided they meet all the criteria of the definition. For the assessment all specific circumstances of the case will be taken into account to test whether the criteria such as economic service and mass media character are met. Until now, not any vlogger has registered as an on-demand media service with the CvdM. Instead of supervision formally based on the Media Act, the CvdM has encouraged self-regulation amongst vloggers which resulted in a Social Code<sup>41</sup>. This Social Code demonstrated to be a serious incentive for vloggers to offer audiences more transparency on product placement and other commercial communication in videos. But apart from self-regulation initiatives it is also time for principle-based supervision as far as vloggers are concerned. In that respect the CvdM also feels supported by the latest revision of the AVMS Directive, and in particular recital 3 and the deletion of the TV like reference. The fact that the CvdM had identified “a safe online media offer” as one of the key priorities for its strategy in the upcoming years also justifies a stronger focus on formal regulation of vloggers and protection of their young audiences.

The legal provisions of the national Implementation bill transposing the latest AVMS Directive in the Dutch Media Act 2008 contain no direct references to vloggers, social influencers or YouTube channels. Nevertheless, in the Explanatory Note of the bill an explicit reference is made to channels active on video platforms:

“Video platform services are services that provide programs and user-generated videos to the general public without any editorial responsibility for them. However, the provider of the video platform service determines the organization of the platform, for example by means of automatic means or algorithms, in particular by displaying, tagging and ranking. These services have become increasingly important in the viewing behaviour of mainly young people in recent years. The fact that a platform is referred to as a video platform service does not yet provide an opinion about the services that are active on that platform. For example, it is possible that certain channels are active on a video platform service that can be qualified as an on-demand media service. These on-demand media services must comply with the rules applicable to them from the Media Act 2008 (Media Act). They remain editorially responsible for their media offering, even if it is distributed via a video platform service.”<sup>42</sup>

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<sup>41</sup> <https://www.bva.nl/artikelen/2017/openbaar/bva-richtlijnen-door-youtubers-mooie-praktijkvertaling-van-reclamecode-social-media>

<sup>42</sup> Memorie van Toelichting, Kamerstuk 35361 nr. 3, <https://zoek.officielebekendmakingen.nl/kst-35361-3.html>



The Minister of Education, Culture and Science during the debates in the Parliament was rather explicit about the status of social influencers. During a discussion about the admissibility of product placement in online services targeting minors the Minister stated:

“Product placement is therefore not permitted for children's programmes, news, current affairs, consumer programmes and religious programmes. That is also the answer to Mr Van der Molen's question; these restrictions also apply to these YouTube channels that are aimed at the Netherlands. This is not a relaxation but a reformulation, precisely because the old formulation has many exceptions; it wasn't allowed, but there were a lot of exceptions. Now it has been formulated in a slightly different way to make it very clear and insightful. So if you target the children category as an influencer, certain things are simply forbidden.” Later on in the debate he stated once more he has no doubts about whether vloggers and influencers can qualify as on-demand media services. “When it comes to what vloggers and those influencers do, it's also about the YouTube channels. You know that if this law is passed, they will be subject to stricter regulations, that not just anything is possible and that there are even restrictions, especially when it comes to children.”<sup>43</sup>

Furthermore, in his letter of 8 May 2020 to the Chair of the Second Chamber of Parliament the Minister wrote: “The implementation of the revised audiovisual media services directive will ensure that channels on video platform services such as YouTube can also be classified as video-on-demand services. In concrete terms, this also means that providers of, for example, YouTube channels must also comply with the rules regarding sponsorship and product placement from the Media Act. The Media Act prescribes, among other things, that it must always be clear when a video is sponsored or when product placement is involved. The Media Authority monitors these provisions and can impose a fine if these provisions are not complied with.”<sup>44</sup>

A few months ago the CvdM has launched an internal project group, composed of experts of various departments of the authority, which is specially dedicated to the qualification of YouTube channels, vlogger channels and similar services. Actually, the central notion that the CvdM has decided to use is “uploaders”. The CvdM considers this a more neutral (platform-independent) concept which captures better similar services offered on other online (video sharing) platforms than YouTube. As part of its “Uploaders project” also the CvdM’s current policy guideline dealing with commercial on-demand media services will be revised.

According to the system of the Media Act 2008, all uploaders that qualify as an commercial on-demand media service have to comply with all requirements of the Media Act. The CvdM’s internal project currently explores whether it is possible to impose certain thresholds to reduce administrative burdens for especially smaller players

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<sup>43</sup> Verslag van een wetgevingsoverleg, gehouden op 26 mei 2020, over Media, Kamerstuk 35361 nr. 24, <https://www.tweedekamer.nl/kamerstukken/detail?id=2019Z25676&did=2020D23384>

<sup>44</sup> Verslag van een wetgevingsoverleg, gehouden op 26 mei 2020, over Media, Kamerstuk 35361 nr. 24, <https://www.tweedekamer.nl/kamerstukken/detail?id=2019Z25676&did=2020D23384>





Audience oriented thresholds such as a minimum number of subscribers, followers or views are taken into account to exclude certain uploaders from the CvdM's supervision. The CvdM considers to determine that services (channels) which exceed certain thresholds (like a minimum of 100,000 followers or subscribers on one individual platform) would be considered as a mass media service. From a practical perspective the number of followers or subscribers seems to be a more useful indicator than views. The number of subscribers or followers is usually visible from the frontend of a platform. The same goes for views but then you might need to calculate and compare all views on different platforms which could be a more challenging exercise. Also, the CvdM considers to use the registration in the trade register of the Chamber of Commerce of an uploader as an indicator to assess whether the uploader's activity constitutes an economic service and therefore meets an important definition criterion.

Furthermore, the CvdM considers to apply thresholds such as a minimum of actual videos uploaded (for instance a few per month) on a platform. As a consequence, parties who have not uploaded any new videos over the last year could fall out of scope of the CvdM's supervision. Another approach would be to use it solely as an (internal) instrument for prioritisation of the supervision activities.

The practical applications of audience oriented thresholds and/or other de-minimis rules including their pros and cons have been explored and consulted with experts and stakeholders. Prior to the possible application of thresholds it's also important to have better insight in audience reach, market share and similar data of uploaders. The CvdM is exploring if it should retrieve data from online statistics service providers such as Statista (<https://www.statista.com/>), GospelStats (<https://www.gospelstats.com/>) and SocialBlade (<https://socialblade.com/>). Their data could offer further insight into who are the biggest market parties acting as "uploaders" on VSPs and other online platforms.

Last but not least, when shaping its new policies regarding uploaders, the CvdM aims to take into consideration as much as possible guidance that could be provided by ERGA. With the aim of safeguarding a level playing field and adequate protection in the online domain it is crucial that countries do not deviate too much when it comes to determining the addresses and scope of regulation and supervision.

## 6 Norway

In Norway, there is no specific legal definition of vloggers. Vloggers "as such" are not regulated, but some of them considered to be OD AVMS according to the definition in the AVMSD<sup>45</sup>.

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<sup>45</sup> <https://www.medietilsynet.no/globalassets/engelsk/180418-act-relating-to-broadcasting-and-audiovisual-on-demand-services.pdf>



There must also be an economic activity in order for the vlogger to be an OD AVMS, which is considered to be the case where the vlogger generates revenues from commercial content. Furthermore, the vlogger must exercise editorial responsibility both in the sense that it must be the vlogger who decides which videos that are uploaded to the channel, and also it must be the vlogger that organizes the videos in a catalogue. Organisation through algorithms only is not considered to be enough to have editorial responsibility.

In Norway the main obligation imposed on vloggers from the NMA is the duty to label commercial content such as advertising, product placement and sponsorships. Also general regulation on commercial content will apply, such as a ban on advertisements directed towards children, a ban on advertisements for tobacco products and alcoholic beverages, regulations on when product placement may be used, rules on undue prominence etc. The legal basis for such an obligation is the Norwegian Broadcasting Act Section 3-3, which imposes obligations on all audiovisual media services. Section 3-3 states:

“Section 3-3. Ban on surreptitious advertising and other forms of surreptitious marketing

No forms of surreptitious advertising or other forms of surreptitious marketing are allowed on television or audiovisual on-demand services.

With surreptitious marketing means a verbal or visual presentation in programmes of a manufacturer's or service provider's goods, services, name, trademark or activity if the presentation is intentionally for advertising purposes and the audience may be misled with regard to the nature of the presentation. Such a presentation is considered intentional, in particular if it takes place in return for payment or similar remuneration.

Marketing using subliminal techniques is prohibited.

This provision applies insofar as it is applicable for radio.”

#### Age classification

The NMA according to The act relating to the protection on minors from harmful audiovisual programs have considered vloggers providers of „audiovisual programs“ in the sense, that obligations on age classification apply to them. The NMA has therefore arranged courses for agencies representing vloggers introducing them to guidelines on age classification of audiovisual programmes.

There are obligations on accessibility in general for VODs in Norway, cf. the Broadcasting Regulations section 2-1a which states:

Section 2-1a. Proportion of European programmes in audiovisual on-demand services:



Providers of audiovisual on-demand services must promote the production of and access to European works when practicable and with appropriate means.

Providers of audiovisual on-demand services must keep statistics showing the proportion of European works in their programme catalogues. The statistics, together with an account of how the provider has promoted the production of and access to European works, must be submitted to the Norwegian Media Authority by 1 April 2015 and then by 1 April every fourth year.

For vloggers not considered as OD AVMS, the “Marketing Control Act” applies.

To be considered to be an OD AVMS, the vlogger must achieve revenues from commercial content (economic activity criteria). The need for a threshold in order to exclude small and non-professional vloggers from the scope (and to identify who are in competition with traditional linear TV) has been discussed. This would probably be more crucial after transposing the Directive 2018/1808 (EU), which imposes more obligations on OD AVMS such as quotas for European Works, accessibility obligations and a duty to register.

The NMA has also issued a guide for YouTubers on how to label commercial content<sup>46</sup>. This work has been done in close collaboration with the Consumer Authority, to ensure that guidelines for labeling commercial content are as similar as possible whether you are a vlogger or a blogger (The Marketing Control Act enforced by the Consumer Authority applies to bloggers and to vloggers not considered as OD AVMS).

The Webpage [www.blogg.no](http://www.blogg.no) lists the top bloggers in Norway, based on the total number of page views. The number of page views is provided by Google Analytics. Many of these bloggers are also vloggers.

The NMA has worked closely with the vloggers and the agencies representing vloggers (such as Nordic Screens, United Screens and Splay) when introducing the regulation. In general the vloggers welcomed the new rules, and they are willing to comply with the obligation to label. The NMA has chosen a soft approach to supervision, focusing on information, training and dialogue.

## 7 Spain

The current Audiovisual Spanish Law does not include any definition about these players. Nevertheless, in October 2020, CNMC launched a “Public consultation on the application of audiovisual regulation to media service providers supported on video-sharing platforms”. In this consultation, CNMC proposed to define these creator as: “audiovisual

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<sup>46</sup> <https://www.medietilsynet.no/globalassets/engelsk/engelsk-youtube-veileder.pdf>



media service providers supported on video-sharing platforms”. The results of that exercise are still in process.

From CNMC’s perspective these agents have, as any other provider, to fulfil cumulatively the criteria set in the AVMSD, in order to identify them as audiovisual media service providers. The main differentiation of these players is that they provide their services through a VSP.

CNMC has requested the introduction of a new definition of “audiovisual media service provider over VSP” in its “Report to the Ministry regarding the Draft Audiovisual Law that has to transpose de AVMSD 2018”. Meanwhile, CNMC believes that it is possible to undertake some case-by-case analysis in order to identify these agents as AVMS providers. In doing so, it has to be considered all the criteria paying special attention to those vloggers, which clearly develop an economic activity and has a clear impact on audience. The introduction of new definition in the new audiovisual framework in order to identify vloggers as AVMS providers would contribute to rise transparency and legal certainty of the sector.

Nevertheless, in the consultation paper the CNMC considers that the current framework allows NRAs to identify vloggers as AVMS providers, if they fulfil the criteria set out in the AVMSD.

CNMC believes, as it is set out in its Report to the Ministry regarding the Draft Audiovisual Law, with a view to transposition of Directive 2018/1808 (EU), that in this moment it could be appropriate to establish a minimum set of obligations that deals with the main goals of the Audiovisual legislation (for instance, protection of minors and protection of consumers) and, in a second phase, it could be analysed by the pros and cons to introduce a wider set of obligations. The idea is to introduce a forward-looking approach in order to regulate these agents.

Finally, in September 2021, CNMC conducted a survey to gather the views of several ERGA colleagues concerning their approach towards vloggers and the application of the AVMS Directive. 16 NRAs provided their responses to the questionnaire.

According to the answers, most of the regulators consider that vloggers’ services can be qualified as audiovisual media services if they meet the legal requirements under the AVMS Directive. In any case, the analysis must be carried out on a case-by-case basis.

There are several NRAs that are currently regulating vloggers given that they qualify as audiovisual media. Those regulators regulating vloggers have opted for a soft-touch regulatory approach. Other set of regulators are preparing for the potential regulation and supervision of vloggers’ services.

As to the criteria to qualify vloggers, no specific thresholds, for instance, to assess whether there is an economic service, have been developed. Nevertheless, certain NRAs consider it might be useful to explore them in a further step.