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Legislation for Video-Sharing Platforms on the European Audiovisual Market. The Polish Transposition of Audio-Visual Media Services Directive

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Abstract: The progressing convergence of television and Internet services has caused a dynamic development of the audiovisual market. The decision to regulate the subject matter of video-sharing platforms (VSPs) in the amended Audiovisual Media Services Directive (AVMSD) was dictated by recognition that such platforms compete for the same viewers and incomes as other audiovisual media services. Coordination of legislation on the European level led to the necessity to introduce amendments to Polish law. The main purpose of this article is to present selected provisions of AVMSD and Poland's Broadcasting Act concerning VSPs as an area of media policy, which previously had fallen outside the scope of institutional intervention and regulatory restrictions relating to the traditional media market. The central question that author attempted to resolve was whether measures used in relation to VSP providers are legitimate, necessary and proportional. The study explains the definition of video delivery services which is fundamental from the point of view of imposing some obligations on these types of services.

Keywords: audiovisual media service, video-sharing platforms (VSPs), VSP provider, user-generated video, jurisdictional regime.

INTRODUCTION

The traditional model of the audio-visual market with the strict division into broadcaster and recipient is shifting towards a market of video-sharing platforms (VSPs). Users, who create, share and comment on digitalized content become active participants of the media market (Badźmirowska-Masłowska, 2020, p. 439). The European Union (EU) has noticed the significance of platforms as a medium of exchanging information and shaping user opinions. The EU intended via Directive (EU) 2018/1808 amending the Directive 2010/13/EU Audiovisual Media Services Directive (AVMSD) to ensure equilibrium between access to online contents, guarantees of competitiveness and recipients' protection (Klaflkowska-Waśniowska, 2018, p. 10).

Implementation of the Directive 2018 generated a wave of strong emotions in the public space of the Polish Internet. Websites of the Polish regulator of the electronic media market, the Krajowa Rada Radiofonii i Telewizji (KRRiT—the National Broadcasting Council) reminded users of their obligations under the Directive (KRRiT, 2022). Users publishing video materials on VSPs like *YouTube*, *TikTok*, *Twitch* and *Facebook* that profited from the service, e.g., under appropriate agreements with advertisers or representatives of the VSP was obliged to have an entry on the list of users maintained by the Chairman of KRRiT. The discussion was also joined by Poland's Ombudsman, in whose opinion any difficult-to-comply-with obligations imposed on content creators might constitute violations of both the freedom of speech and that of artistic creation that the Constitution of the Republic of Poland and other normative acts guarantee (RPO, 2022). The combination of declarations by the authorities and negative comments by confused VSP users (Dąbrowska-Cydzik, 2022) provided the stimulus to write this article, using the legal-dogmatic method, to discover whether Poland's new legislative framework is simply incomprehensible or excessively detailed. This article provided an analysis of VSPs to prescribe specific legal criteria, which determine whether a service meets the definition of a VSP and whether it falls within Poland's jurisdiction. Defining video delivery services is fundamental from the point of view of imposing certain obligations on this type of service, which this article discusses. These considerations form a contribution to further research on the regulatory regime's validity and an attempt at its evaluation. The central question that the author sought to resolve is whether measures used in relation to VSP providers are legitimate, necessary and proportional.

THEORETICAL BACKGROUND

The amendment on 11 August 2021 of Poland's Broadcasting Act (URTV) introduced VSPs into Polish law. It was dictated by the need to legally implement the norms of the AVMSD, which EU member states were obliged to transpose by 19 September 2020. However, most EU countries found implementation of the new specifications a difficult challenge, both from the point of view of legislation and adjustment of the system. Indeed, the Polish legislator did not meet the implementation deadline (Matlak, 2022a, p. 40). The provisions governing VSPs are included in the dictionary of terms of Art. 4 items 22a-22d and Chapter 6b of the URTV (both added by the 2021 amendment). The provisions allow the AVMSD to preserve its legal framework and to ease of its implementation by the addressees of the discussed norms (Explanatory Memorandum, 2021, p. 2). Also, the AVMSD addresses the activities of VSP providers to a limited degree, in selected Recitals and in the added Chapter IXA, containing the provisions of Art. 28(a), regarding establishment of jurisdiction, and Art. 28(b) regarding the contents shared on the platforms. The method of regulating VSP activities adopted by Polish legislator corresponds to the general European tendencies in this area, shown in *Mapping of national rules applicable to video-sharing platforms* by European Audiovisual Observatory (EAO, 2022). As VSP regulation operates under minimum harmonization regime, every member state may legislate for measures that are more detailed or stricter than those in the AVMSD (Duda-Staworko, 2022, p. 37).

The national authority in charge of the regulation of VSPs remains generally in the hands of public authorities which is entrusted with regulation of audiovisual media services (EAO, 2022, p. 37).

There are two key pre-requisites when considering VSPS—definitions of providers and users and the legal criteria. The first concerns the term 'video-sharing platform services' (VSPS) and the way the 2018 amendments to the AVMSD defines both VSPS providers and users. Under Art.1 (1) (aa) VSP is: a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU), where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programs, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC; and the organization of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.

The Polish wording of the definition is almost identical as in another European countries (EAO, 2022, p. 11; Niewęglowski, 2021, p. 177), as Art. 4 item 22(a) of the URTV defines a VSPS as being: provided by electronic means, as a part of economic activity conducted in that area, if the principal purpose or essential functionality of that service or a dissociable section thereof is provision to the general public, for informational, entertaining or educating purposes, of programs, user-generated videos or other contents for which the video-sharing platform provider does not have editorial responsibility but the organization of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.

VSPs may be rendered by video sharing providers, that is, under Art.1(1) letter (da) of AVMSD natural or legal persons. Polish definition in Art. 4, item 22c URTV adds commercial partnership providing VSP (EAO, 2022, p. 15; Explanatory Memorandum, 2021, p. 31; Duda-Staworko, 2022, p. 40).

A part of the definition of the VSP service is also the concept of the user's provision of the video. In AVMSD a user-generated video means a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user.

The analysis of the provision of URTV (Article 4, item 22b) suggests that the Polish definition is transposed verbatim (EAO, 2022, pp. 14–15).

There is no definitions and therefore no limitation who can be a user by the AVMSD (Woods, 2018, p. 9) whereas Article 4, item 22d URTV gives a legal definition and defines them as a natural person, legal person or organizational unit referred to in Art. 331§1 of the Civil Code, using a VSP, in particular, by holding an account on the video-sharing platform, posting or receiving, through the platform, programs, videos or other contents generated by the user or by other users (Duda-Staworko, 2022, p. 40).

The definitions cited above highlight the model of VSPs operation. The next stage explores the jurisdictional criteria. According to AVMSD rules the country-of-origin principle, each Member State is supposed to ensure that all audiovisual media services rendered by the providers of services situated within the State's jurisdiction meet the requirements set forth in AVMSD, and under Art. 28b of the amending Directive an analogous solution was introduced with regard to VSPs. Under Recital 44 of AVMSD, providers are consequently subject to the provisions on the internal market set out in that Directive if they are established in a Member State.

It is appropriate to ensure that the same rules also apply to VSP providers which are not established in a Member State, in so far as those providers have either a parent undertaking or a subsidiary undertaking which is established in a Member State or where those providers are part of a group, and another

undertaking of that group is established in a Member State. A group means parent entity, any subsidiary entities and any other entities having economic or legal and organizational ties with the foregoing (Cole, 2018, p. 42; Cavaliere, 2021, p. 10). Under Art. 1a (5) URTV, a VSP provider is deemed to be established in Poland if the provider has their seat in the Republic of Poland. An exception was introduced to that rule under Art. 1a(6) URTV which states that a VSP provider is also deemed to be established in Poland if the provider does not have a seat here but has, in that territory, a parent entity, a branch, agency or subsidiary entity, unless the provider is seated in another Member State of the European Union. The same provision also mentions a parent entity, branch, agency or another subsidiary entity in the territory of another Member State of the European Union established prior to the establishment of the parent entity in Poland, provided that their relations with the economy of that Member State are actual and permanent (Chałubińska-Jentkiewicz & Nowikowska, 2022, p. 87; Explanatory Memorandum, 2021, pp. 33–35).

The European Commission should be notified about providers subject to jurisdiction of Member States. For that purpose, they shall prepare and update lists of VSP providers seated in their territory or deemed to be seated in their territory and shall indicate one of the criteria discussed above as the basis of jurisdiction. The obligations following from that fact, imposed on VSP providers, are discussed in a further part of the considerations.

METHODOLOGY

DEFINITIONS AND SCOPE

The regulation of VSPs in the AVMSD is a new element of EU media regulatory framework. The definition of VSP contains several elements pointed below. The EC is aware that it is not easy for either an entrepreneur or a regulator to qualify as a platform within the context of VSP services and thus the non-binding Guidelines on the Directive's transposition, in relation to the VSP definition were published (European Commission, 2020).

Video sharing platform service means a service as defined by Articles 56 and 57 of TFEU. Under Recital 6, the definition of a VSP service should not cover non-economic activities, such as the provision of audiovisual content on private websites and non-commercial communities of interest. Where a dissociable section of a service constitutes a video-sharing platform service for the purposes of Directive, only that section should be covered by that Directive, and only as regards programs and user-generated videos (Konarski, 2020, p. 149; Woods 2018, p. 3). Also, the URTV shall not apply to services provided electronically,

allowing content to be shared by their users (social networking sites), provided that their principal function is not the provision of user-created audiovisual or video programs.

The AVMSD definition introduces alternative criteria to recognize VSP – principal purpose of the service or of a dissociable section thereof or an essential functionality of the service. Under the Guidelines – in reliance of the definition referred to in Article 1 (1) (aa) of the Directive – VSP services may be identified based on three criteria. These are services in which the principal purpose is to provide either or both programs and user-generated videos to the general public. These services of broader scope have a dissociable section whose principal purpose is to provide either or both programs and user-generated videos to the general public. The essential functionality of these services is to provide both these content types to the general public (Kukliš, 2020a, p. 98; Weinand, 2018, p. 280).

Many problems are posed by the determination if the functionality is essential. In the definition of VSP, the concept of service appears, defined in Art. 1 of the Directive as services (also user-generated) whose scope, form and positioning in relation to other competitive entities, and the nature of the of their posted contents (informational, educational, entertaining) demonstrate that the activity is not auxiliary to another essentially different activity. In the Guidelines, the European Commission laid down certain indicators national authorities should consider when determining the “essential function” criterion. These are: the relationship between the audiovisual contents and the core activity; the quantitative and qualitative (understood as the contents’ use and their scope) significance of the audiovisual contents within the service, monetizing of the audiovisual contents or generating incomes with the contents, as well as the availability of tools intended to increase the visibility or attractiveness of the audiovisual contents (Matlak, 2022b, p. 716).

Audiovisual contents may be considered as constituting a “small part” of the service-related activities if, based on quantitative (for example, the small number of videos) and qualitative (no contribution to the allure, functionality or market success of the service) criteria, they seem to play an insignificant role in the general service-related activity (European Commission, 2020).

There are no details in the Polish legislation on how to interpret “principal purpose” and “dissociable section” (EAO, 2022, p. 359). Also, no definition of “essential functionality” is specified in the adopted legislation. It stipulates that consideration shall be taken of the relationship between the audiovisual content and the principal economic activity or activities provided by the service, the quantitative and qualitative importance of the audiovisual content for that service. Furthermore, the means by which the audiovisual content generates revenue and the availability within the service of tools designed to increase the visibility or the attractiveness of the audiovisual content are important (EOA, 2022, p. 359).

Types of content of VSP by AVMSD definition are programmes and user-generated videos which are defined terms. “Program” 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, including feature-length films, video clips, sports events, situation comedies, documentaries, children’s programs, and original drama (Matlak, 2022b, p. 717).

The definition from AVMSD on “user-generated video” at first glance looks clear enough (Woods, 2018, p. 9). Video clips embedded in the editorial content of electronic versions of newspapers and magazines and animated images such as GIFs should not be covered by the Directive. In the Polish definition there is also “provision of other contents” means any contents other than programs or user-generated videos, that is, for instance, commercial communications or billboard communications, such as information from non-governmental organizations not having a commercial status (Explanatory Memorandum 2021, p. 32; Duda-Staworko, 2022, p. 40).

The definition of VSP requires that the provider determines the organization of the content and gives a non-exhaustive list of the means, which may be employed to do so: by automatic means or algorithms in particular by displaying, tagging and sequencing (Woods, 2018, p. 4; von Drunen, 2020, p. 174).

Another central point of the implementation of the discussed amendments is the regime of liability for the contents posted on a video-sharing platform. The significant share of the contents available in the services of a video-sharing platform are not subject to editorial responsibility of the platform’s provider, however, such providers, as a rule, decide about the organization of contents, that is programs, user-generated videos, and commercial audiovisual communications. A VSP provider does not verify the contents prior to their publication, however, under Recital 47 and the provisions of Art. 28b of Directive 2018/1808, the provider is obliged to follow certain restrictions intended to protect fundamental values in the interest of the society.

The definition of VSPs from AMSDV and URTV also specifies that the service should provide audiovisual content to inform, entertain or educate (Woods, 2018, p. 4; Duda-Staworko, 2022, p. 41).

The “as a part of economic activity” prerequisite from the Polish definition of VSP implies activities conducted on one’s own behalf, in an organized and continuous manner, with the intention to generate income from the sharing of contents, whereby it is irrelevant if the income has been generated. For example, if a user publishes periodically on their account on the platform and generates specific income – among the published contents there are advertisements, fees are charged for viewing (e.g. pay-per-view), sponsorship agreements are concluded, then it should be concluded that the user conducts economic activity. On the other hand, the user does not conduct economic

activity in case of one-off, accidental, incidental non-profit activities. Activities unregistered because of a low-income level are not considered economic activities, which is decided by the provisions of Art. 5 of the Entrepreneurs Law Act. Practical clarifications were also offered by KRRiT, which specified that if a user is an amateur, hobbyist and does not generate income from the user's audiovisual products – the activity does not generate any income – the user does not have to follow the obligation of entry in the list maintained by KRRiT (Niedbalski, 2022; Duda-Staworko, 2022, p. 39). The evaluation if a given user meets the prerequisite of “conducting business activity” should always be evaluated *in concreto*.

The EU definition refers to services provided through electronic communications networks in the understanding of Art. 2 letter (a) of the Directive 2002/21/EC. Services rendered by platform providers are considered to be information society services in the understanding of the Directive 2000/31/EC. “Provision of services by electronic means”, in the light of URTV provisions, should be understood as: A (distant) provision of a service without the parties' simultaneous presence, by transfer of data upon individual request of the customer, transmitted and received through electronic processing devices, including digital compression and storage of data, which is entirely sent, received or transmitted through a telecommunications network. As a sidenote, it can be added that providers of such services, under the Act of 18 July 2002, were obliged to provide the customer with specific information on the service provider, and to prepare terms and conditions of the services within the scope specified by the Act, and only to such extent, prior to entry into force of the URTV amendment, platforms were subject to legal regulations.

The definition of VSP requires editorial responsibility. AVMSD introduces a new definition of it, by specifying that these are decisions taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of the audiovisual media service (Explanatory Memorandum, 2021, p. 33; Piech, 2019, p. 252). The prerequisite of incurring by an entity of editorial responsibility for programmes included in the catalogue means that the entity decides what audiovisual contents are to be provided through the video-sharing platform. Editorial responsibility is incurred by a person deciding about what contents and in what way are to be publicly made accessible to the recipients. VSP provider only distributes audiovisual contents posted by users, rendering its services by positioning the contents, organizing and proposing them, for reception by users (Kukliš, 2020a, p. 99). As a rule, the party making contents available through a VSP will incur the editorial responsibility since that party makes the final decision about what audiovisual contents are to be provided (assigned to the channel or account held by that party). Under Recital 48, a significant share of the content provided on video-sharing platform

services is not under the editorial responsibility of the video-sharing platform provider – is of vital importance for the interpretation of the measures (Kukliš, 2020a, p. 100). Broadcasters are objectively responsible for every single piece of content appearing on their broadcasts while VSP are responsible for its systematic treatment. Measures must not lead to ex-ante control tools or upload-filtering practices that would conflict with the E-Commerce Directive. Articles 12–14 of the ECD limit liability for information society services in three cases: mere conduit (art.12), caching (art.13) and hosting (art.14). All VSPs fall under the liability regime concerning hosting providers which – according to article 14 ECD – is an information society service consisting of the storage of information provided by a recipient of the service (van Drunen, 2020, p. 177). Such a service is not liable for the information stored by the user, provided that the provider does not have actual knowledge of illegal activity or information. Also, as regards claims for damages, service is not aware of facts or circumstances from which the illegal activity or information is apparent or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information (Cabrera Blázquez et al., 2018, p. 19). The limitation of liability does not apply when the user of the service acts under the authority or the control of the provider.

The Digital Service Act (DSA) due for adoption in February 2024 will replace the ECD and specifically articles 12, 13 and 14. Broughton Micova and Kukliš (2023, p. 92) make the interesting distinction between the DSA as *lex generalis* and the AVMSD as *lex specialis*.

OBLIGATIONS OF VSP PROVIDERS – URTV ANALYSIS

The VSP regime seems justified by the growing popularity and universality of Internet video platforms. Already in the provision of Art. 1 URTV, it is provided that the tasks of radio and television are fulfilled by providing media services, distributing television programs, and providing video-sharing platforms. The provisions of URTV envisage as well that reception (...) of contents published in VSP intended by their providers for general reception is open, subject to the conditions laid down in legal provisions. Under the provision of Art. 471 URTV, imposition on a VSP provider of an obligation or prohibition to publish any specific programme, user-generated video or another content on the video-sharing platform may take place only under statutory law. This provision is intended to guarantee independence to VSP providers, just as to broadcasters and VOD providers. As a rule, providers usually do not post contents although, technically speaking, they are able to do so. However, they may not be obliged to undertake such activities without an express statutory basis (Chałubińska-Jentkiewicz, 2022, p. 535).

Operation of a VSP requires its notification for the list maintained by KRRiT in an electronic system. Such notification is purely formal, it is processed by means of a decision and the provisions of URTV do not envisage a possibility to refuse an entry. An omission to notify does not result in a prohibition to conduct activities in operating a video-sharing platform but only in a possibility of imposition of a financial penalty by KRRiT (Matlak, 2022a, p. 51; Explanatory Memorandum 2021, p. 37). Notification should contain basic information about the VSP provider, as specified in the Regulation of 21 October 2021. Such notification should indicate the video-sharing platform provider, the provider's seat, or place of residence, mailing address, including email address, permitting efficient and quick contact, as well as the tax identification number (NIP) and the REGON identification number. It should also specify the video-sharing platform, and the countries in which viewing of the video-sharing platform is possible. This solution follows AVMSD, as the national regulatory authority will determine the requirements (EAO, 2022, p. 43).

Until November 2022 (KRRiT, 2023, p. 40), the above-mentioned list included 16 video-sharing platforms: BanBye, Cda.pl; Demotywatory.pl, Hrabi.tv, Joemonster.org, Jbzd.pl, Kawusia.pl, Hopaj.pl; Kwejk.pl, Mklr.pl, Sadistic.pl; Wgrane.pl; Wiocha.pl, Vider.info, Vider.love, Zaq2.pl. The notification obligation for the list has not yet been complied with by several platforms that should be subject to the Polish regulator as per the jurisdiction criteria and operation model suggesting that the criteria have been met of the definition of a video-sharing platform under Art.1a (5–6) and art. 4 item 22a of the Broadcasting Act.

Bearing in mind media convergence and changes in the use of media, a growing number of countries simplify their licensing systems, by limiting them only to certain linear services or introducing simplified licenses, whereas other non-linear services are either subject to registration/notification or operate in an open system of market access (Kubiak&Myrda, 2020, p. 155). The structural changes in the regulatory environment move from the traditional media/regulator dichotomy to a media/user/regulator triangle (Kukliš 2020b, p. 24; Broughton Micova & Kukliš, 2023, p. 77).

In the context of information, the purpose of the provision of Art. 47(m) of the URTV is to ensure to users an easy, direct, and permanent access to basic information about the video-sharing platform. The basic data involves names, address, as well as contact details, including email address and website address. The necessity of providing this information, which is published on the provider's website is dictated by the need to enable users to exercise their rights under URTV, relating to complaints or resolution of disputes concerning the posted contents (Matlak, 2022a, p. 51; Konarski, 2020, p. 151). KRRiT may specify, by regulation, the method of presenting the above information by the VSP provider. It should consider the integrity of the contents, the method of the

platform's operation and the impact on the interests of users and non-imposition on the providers of excessive burdens and costs relating to the provision of information. So far, however, such provisions have not been adopted (KRRiT, 2023, p. 41).

The new legislation requires transparency of ownership. In EU countries, there is an obligation to notify the regulatory authority about the ownership structure and any modifications imposed on the providers of media services. This information is made public either on the website or in the database of the regulatory authority (KRRiT, 2020, p. 9). Also, a correlation exists between ownership structure and public access to such information and media pluralism (Recommendation of the Committee of Ministers CM/Rec, 2018). The Council of Ministers in this instance instructs the EU member states to implement legislative solutions or other equally effective solutions specifying clearly and precisely the obligations imposed on the media in respect of disclosure of information or transparency. These obligations may involve the name and contact details of the immediate owner or co-owners along with their shareholdings, which may enable them to exert influence on the operation and strategic decision-making of the provider of media services. The KRRiT recommends the owners apply a 5% threshold of shares for the purposes of the disclosure obligations (KRRiT, 2020, p. 10).

Article 47m also ensures recipients can easily access information. The Article stipulates that a VSP provider conducting economic activities in the form of a commercial partnership or company is obliged to ensure to recipients an easy, direct, and permanent access to information about the given names and surnames or names of partners. Polish law obliges VSP providers ensure recipients an easy, direct, and permanent access to a list of all media services, video-sharing platforms and magazines published by the VSP provider. This obligation covers media services, VSPs and daily newspapers or magazines provided or published by entities within the same capital group in the understanding of the Act of 16 February 2007. The above data should be made public in a consistent manner so that users can enjoy the easiest possible access to such information (Explanatory Memorandum, 2021, p. 10). URTV provisions envisage that a video-sharing platform provider is obliged to indicate KRRiT as the authority competent in matters of video-sharing platforms.

As already discussed, a significant share of the contents available in the services of a VSP are not subject to editorial responsibility of the platform's provider, however they must decide about the organization of contents, such as programs, user-generated videos, and commercial audio-visual communications. The VSP provider does not verify the contents prior to their publication, however Recital 47 and the provisions of Art. 28b of AVMSD obligate the provider to follow certain restrictions intended to protect fundamental values in the interest of the society

(Piech, 2019, p. 253; Weinand, 2018, p. 280; Kostovska & Broughton Micova 2023, p. 93; Duda-Staworko, 2022, p. 38).

Article 47o(1) URTV, implementing Article 28b(a) of Directive 2018/1808, forbids publishing of programs, user-generated videos or other contents on VSPs that threatening the proper physical, mental or moral development of minors, especially any comprising pornographic materials or contents unjustifiably exposing violence, without adequate technical safeguards (Weinand, 2018, p. 291; Matlak, 2022a, p. 52). A user posting contents on the platform is obliged to follow the content qualification principles under Art. 47p URTV and the principles of the Regulation of 13 April 2022.

The provision of Article 47o(2) URTV, implementing Article 28b (b) of the amended Directive, prohibits the posting of content containing incitement to violence or hatred against a group of people on grounds referred to in Article 21 of the Charter of Fundamental Rights. These features are i.e., sex, race, skin color, ethnic or social origin, genetic characteristics, language, religion or belief, political opinion or any other opinion, nationality, membership of a national minority, wealth, birth, disability, age or sexual orientation (Jaskiernia, 2021, p. 886; Matlak, 2022a, p. 52; Rozgonyi, 2020, p. 86).

The European legislator prohibits, under Art. 28b letter (c) of the amending Directive, contents whose dissemination constitutes an offence under the European Union Law, which is reflected in Art. 47o (3) URTV (Galewska, 2021, p. 125; Grzesiok-Horosz, 2023, p. 69). That is contents that might facilitate commission of a terrorist offence, pornographic materials involving a minor, contents inciting to insult a group of population or a specific person on grounds of their nationality, ethnic, racial, religious, or non-denominational status.

All VSPs are obliged to establish and operate transparent, easy to use and effective procedures for the handling and resolution of users' complaints. The obligations securing the interests of contents' recipients, in both the EU's AVMSD and Poland's URTV, may have a technical or systemic nature. Technical means verification of age or the parental control system governing the access to contents harmful to minors. Systemic nature means efficient procedures of the receipt and verification of user complaints (Kukliš, 2020b, p. 13; Duda-Staworko, 2022, p. 38).

Although the norms of URTV impose obligations on a VSP provider under statutory provisions, which will be further specified by KRRiT's Regulations, most the delegated legislation is optional.

Polish VSP providers who may be covered by statutory obligations did not receive from KRRiT any in-depth analysis of the legal provisions they are obliged to follow in their activities. The British regulator of the audiovisual and telecommunications market prepared many informations (Ofcom, 2021) while the Polish regulator gave only *ad hoc* clarifications.

VSP providers are encouraged to go with self-regulatory legislation, such as codes of good practice set with the intent of the Unfair Commercial Practices Act (23 August 2007). It shall clearly define the objectives and provide for regular, transparent, and independent methods of evaluating their achievement and lay down arrangements for the effective enforcement of their provisions, including sanctions for non-compliance.

DISCUSSION AND CONCLUSION

Forming a regulatory environment that provides a framework for the media in the 21st century is difficult. Key issues involve the parameters for submitting audio-visual content to abide by the regulations governing the hardware infrastructure, including the essential issue of market regulation. There is now the novel reverse situation, in which the regulation of the hardware infrastructure is subordinated to that of software, i.e. digital contents (Chałubińska-Jentkiewicz & Nowikowska, 2022, p. 87). The amendment to the Broadcasting Act, implementing Directive 2018/1808 as discussed in this article, was prepared using the novel type of regulation.

The principles of operation on the European audiovisual market should be reflected in legislation introducing a reasonably uniform Europe-wide standard for VSP providers, which should be convenient to users and ensure real protection of their rights. The regulatory framework and the measures used in relation to VSP providers should be legitimate, necessary, and proportional.

The legislative framework discussed in this text is legitimate in as much as legislator is trying to keep up with technological developments. To achieve this, Polish legislation is attempting to level the disproportionate requirements set for analogue broadcasters (radio and TV), which each have less viewers and listeners than the users of digital media.

The legislator realizes the difficulties that might be involved in defining VSPs. Moreover, the number of potential entrepreneurs covered by the regulatory regime and their location, important for the establishment of jurisdiction, may impede efficient identification of service providers within a short period after the implementation of the AVMSD (KRRiT, 2020 p. 38). Application of the country-of-origin principle ensures the notification obligation covers VSP providers based in Poland. Such solution is supposed to ensure clarity as to the provision of which Member State shall apply. The quite casuistic establishment of jurisdiction is justified by both the complexity of this juridically new topic and the cross-border contexts. The rules provided in the AVMSD should prevent any evasion by VSPs through the multi-layered registration of both EU and non-EU enterprises. However, evaluations of the Polish regulatory framework

must bear in mind that the range of entities covered is quite narrow due to the principles of establishing jurisdiction.

The creation of digital videos to be displayed on VSPs implies the need to comply with the reasonable obligations laid down in the provisions of both EU and national law. Such obligations are not excessive.

Nevertheless, the new regulatory framework for VSPs does impose certain obligations and greater responsibility in the context of monitoring posted contents. However, these obligations are justified by the need to adjust the ecosystem of audiovisual media to the challenges of the digital era. The VSP providers have much less influence on the contents of disseminated audiovisual materials than a traditional provider of media services, so it was legitimate for the EU legislator for VSPs to provide for a slightly different regulatory regime with less requirements and of lesser severity. The disclosure obligations are intended to assist the contents' recipients in obtaining easy access to the information enabling identification of the service and the party responsible for the service, and to ensure transparency of activities on the Internet. The voiced concern that the introduction of the obligation to register on a national VSP list implies censorship of the Internet is nullified, as the requirement neither restricts the freedom to carry out economic activity nor depends on any approval by a public authority. The amendment of the Polish Act introducing the regulatory framework governing VSPs is an implementation of a Europe-wide obligation and not a "whim" of the KRRiT—the Polish regulator.

The answer to the question if the regulatory regime discussed in this article is proportional poses some difficulties. What started as television broadcasting without frontiers over thirty years ago, today includes audiovisual media services and VSP services. The regime seems to be intended to prevent the threats coming from large platforms. There are additional logistic, technical, legal and financial burdens relating to such large platforms, which might not capture the specificity of the model and contents posted on a complex and professionalized YouTube channel or a private Instagram or TikTok profile comprising a series of very short video reports. Apparently, such disproportions have been noticed by the Polish regulator, which decided that the execution of the provisions introduced in the Polish legal system and addressed to platforms of lesser, national range should proceed by using "soft law" instruments, such as calls or notifications. Only in the event of repeated violations, upon carrying out precise analyses of the offered services, KRRiT would be able to exercise a number of administrative powers delegated to the authority under URTV. The main challenges seem to relate to cross-border platforms, on which videos posted by users constitute a whole or a large dissociable section of the service, as their impact on the society, through moderation of contents, algorithmic processes or placement of advertisements is highly significant. To work out an effective supervision model over the

execution by such providers of the obligations under the implemented Directive, national regulatory authorities enhance their cooperation within the European Regulators Group for Audiovisual Media Services and develop instruments for the exchange of information and mutual assistance. Digital Services Act may guarantee a safer digital space where the fundamental rights of users are protected.

The regulatory regime of VSPs is necessary as it establishes a more level playing field for all actors in the audiovisual landscape in Europe and ensures cultural diversity and the increasing level of user protection. However, these are innovative and unchecked provisions, on both the national and international level, and their practical operation must be brought by practice. Nevertheless, the new regulatory regime governing VSPs is necessary to the extent it expands the conceptual scope of audiovisual media and adjusts the ecosystem to the challenges of the digital era, in which video-sharing platforms have a prominent place as they are a significant medium for the exchange of information, for entertainment and education.

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EUROPEAN UNION

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