

AVMS DIRECTIVE: TO IMPLEMENT OR NOT TO IMPLEMENT? THAT IS THE QUESTION

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Legal Briefings - By **Hayley Brady, Consultant; Claire Wiseman, Senior Associate and PSL and Caitlin Eaton, Trainee**

There is no doubt that the likelihood of a “no-deal” Brexit continues to grow. Against this backdrop, the UK Government has issued a [Consultation Document](#) setting out its proposed approach to implementing legislative amendments to the EU’s Audiovisual Media Services Directive (“**AVMSD**”) into domestic law to modernise the framework for a digital age.

Despite the continuing uncertainty around the UK’s departure from the EU, the consultation lays the foundations for the UK to align national law with the updated AVMSD, at least in part, regardless of whether the UK is legally obliged to do so.

In the meantime, audiovisual media service providers therefore ought to be considering contingency plans on how best to implement the new legislative requirements into any existing compliance programme.

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THE STORY SO FAR

As set out in our previous [blog post](#), legislative amendments to the AVMSD were published in the EU Official Journal and entered into force on 19 December 2018 following lengthy negotiations. EU member states were given 21 months to transpose it into national legislation (by 19 September 2020). The reform seeks to modernise the AVMSD to reflect “market consumption and technological changes”, largely arising from convergence between television, internet services and the increase in on-demand content consumption.

The most significant change under the revised directive is designed to level the playing field for all audiovisual media services: traditional linear services, video-on-demand and, for the first time, video-sharing platforms. Other key changes include provisions that aim to strengthen the Country Origin principle; protect minors and combat hate speech and provocation in audiovisual content; promote the production and distribution of European works; and allow more flexibility in respect of television advertising.

IMPLEMENTATION HEADACHE?

Despite there being just under 15 months until the implementation deadline, a number of EU member states have already suggested this is a challenging timeframe. Member states have also adopted different strategies to the transposition; with some having launched comprehensive initial stakeholder consultations first (as in the UK), and others already planning to amend existing national law or introduce broader national laws that go beyond the scope of just the implementation requirements.

Perhaps the most challenging, and controversial, areas for implementation relate to the scope of “video-sharing platforms” subject to the updated AVMSD, as well as provisions around the new Article 13 requirements to ensure that on-demand audiovisual media service providers secure at least a 30% share of European works in their catalogues and prominence of those works. Where member states require media service providers under their jurisdiction to contribute financially to the production of European works, they may also require media service providers **targeting audiences in their territories, but established in other member states** to make such financial contributions. Some stakeholders have argued that this seems to cut across the Country of Origin principle, a thread that runs through the AVMSD, making implementation even more challenging.

There are, however, certain exemptions to the European works requirements for media service providers with “low turnover” or a “low audience”. Member states are also entitled to waive these requirements where they would be “impracticable or unjustified” due to the nature or theme of the audiovisual services.

To ease the implementation burden the European Commission is required under the AVMSD to provide guidelines on parts of the definition of “video-sharing platforms”, as well as calculating European work shares and low turnover and a low audience. These are expected to be released later this year and whilst only guidelines, they will no doubt provide much needed assistance to those member state legislators already struggling with the implementation burden.

THE UK: TO IMPLEMENT OR NOT TO IMPLEMENT? THAT IS THE QUESTION

Against the backdrop of these implementation challenges, the UK has a further unique challenge to contend with given its impending departure from the UK; **the extent to which it is legally obliged to implement the amendments broadly depends on whether the UK was to leave the EU with or without a “deal”** - currently an unknown.

- **Deal**: The draft Withdrawal Agreement agreed with EU negotiators in November 2018 includes a transition period through to 31 December 2020 (i.e. after the AVMSD implementation deadline), during which EU law will continue to apply in and to the UK. Whilst the Withdrawal Agreement has been rejected three times by UK Parliament, any subsequent agreement with EU negotiators is also likely to include a similar transition period. If a withdrawal agreement is finalised and approved before the UK leaves the EU, the **UK Government will still be required to implement the amendments to the AVMSD into national law within the same timeframe** as other EU member states.
- **“No-deal”**: The Government’s “no-deal” Brexit technical note on broadcasting and video-on-demand confirms that if the UK leaves the EU with “no-deal” (i.e. no withdrawal agreement and no transition period), the AVMSD will no longer apply to the UK. The **UK Government would therefore have autonomy to determine the extent to which it implements the revised AVMSD into national law**. Although in doing so, the Government is likely to “focus on ensuring the ability to trade as freely as possible with the EU and supporting the continued growth of the UK’s broadcasting sector” as mentioned in its Brexit White Paper in 2017.

AN OPPORTUNITY TO CHERRY PICK?

Whilst the Consultation Document acknowledges this potential uncertainty, it nonetheless sets out a proposed approach to incorporating the AVMSD into domestic law and invites stakeholders to respond to the proposal by 22 August 2019. There is also a recognition that if there is “no-deal”, and the UK Government is entitled to determine whether to align domestically with the AVMSD, then *“Further analytical work will be required to identify these areas and the best way forward, and this consultation would help inform that work.”* Further changes to broadcasting legislation arising from the UK’s withdrawal from the EU are expressly stated to be excluded from the remit of the consultation.

Whatever the outcome of Brexit, it therefore **seems likely that the UK Government will implement the updates to the AVMSD, at least in part**. This seems sensible; to align with a modern legislative framework that is more in line with our digital age, but could also help provide for consistency of regulatory requirements for media service providers operating across an EU footprint (including the UK). **It does not, however, preclude the ability for the UK to “cherry pick” more UK-centric amendments in a “no-deal” scenario or over time following a departure from the EU** – particularly around the more challenging or controversial areas referred to above - although this may turn on the outcome of stakeholder responses to the consultation. So watch this space.

Either way, one thing is for sure, the expanded scope of the updated AVMSD may well prove to be a steep learning curve for those service providers that will fall under the ambit of the directive for the first time, and who should still be considering how best to implement the legislative requirements into any existing compliance programmes.

For further analysis of the impact of Brexit on the audiovisual media services industry please refer to our related article [“From Paris with love: The latest Brexit twist for audiovisual media services industry”](#).

[Brexit hub](#)

KEY CONTACTS

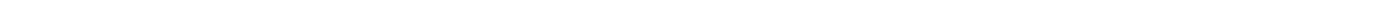
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