

Regulatory changes in the audiovisual media sector



Mr. Vincent Wellens

Partner



Mrs. Sigrid Heirbrant

Associate

Vincent.Wellens@nautadutilh.com Sigrid.Heirbrant@nautadutilh.com

The Act of 26 February 2021 and certain grand ducal regulations have transposed into Luxembourg law the Audiovisual Media Services Directive (2018/1808) (the "Directive").

The new act modifies the Electronic Media Act of 27 July 1992 in multiple respects. Many of the changes affect audiovisual media service (AVMS) providers, which are now subject to, amongst other things, new information and reporting obligations, modified advertising rules, and a quota for the promotion of European works. Second, the new legislation aims to regulate video-sharing platforms and the providers of such platforms (VSP providers). The act entered into force on 12 March 2021 and is immediately applicable. The first new reporting deadline for AVMS providers is 30 September 2022. In addition, the act is supplemented by two new grand ducal regulations: (i) the grand ducal regulation of 26 February 2021 modifying the rules on commercial communications and the promotion of European works and (ii) the grand ducal regulation of 3 March 2021 modifying the annual fee to be paid by AVMS providers and extending the scope of application of the payment obligation.

What are the key features of the new act and the changes relevant for AVMS providers?

Jurisdiction rules and the country-of-origin principle

The jurisdiction rules and the criteria used to determine whether an AVMS provider falls under Luxembourg jurisdiction remain the same. The country-of-origin principle is a major benefit of the Directive for AVMS providers established outside the EU (including UK-based AVMS providers such as BBC, SKY, etc.), as it allows such providers using satellite uplink facilities in Luxembourg to submit a notification to the Luxembourg authorities.

Information and reporting obligations

AVMS providers must comply with new information and reporting obligations.

First, they must inform the minister responsible for media in the event of any changes liable to affect Luxembourg jurisdiction pursuant to the criteria set out in the Electronic Media Act. The ministry will maintain a register of AVMS providers (and VSP providers) subject to Luxembourg jurisdiction mentioning the criteria on which jurisdiction is based.

Second, the Independent Luxembourg Broadcasting Authority (ALIA) has the right to request from AVMS providers "all necessary information", without this being further defined, by a set deadline and subject to a penalty ranging from €200 to €2000 per day of delay in providing the requested information. Finally, AVMS providers must submit to ALIA by 30 September 2022, and every three years thereafter, an action plan to ensure the continuous and progressive accessibility of their services to people with disabilities. In this respect, the law requires that public communications and announcements in the event of natural disasters be accessible to people with disabilities.

Content and advertising limitations (and flexibility)

Audiovisual media services may not (a) incite violence or hatred against persons based on any of the grounds for discrimination referred to in Article 21 of the Charter of Fundamental Rights of the European Union or (b) result in public provocation to commit a terrorist offence.

The advertising rules have been modified, including by the grand ducal regulation of 5 April 2001, and now include, amongst other things, a ban on advertising electronic cigarettes and refill containers. While product placement was in principle prohibited unless an exception applied by grand ducal regulation, it is now generally allowed except in news and current affairs, consumer affairs, religious and children's programmes. However, the audience must be clearly informed of the existence of product placement at the beginning and end of the programme and after each break.

The rules to protect minors from harmful content have been extended to all audiovisual media services whereas previously they only applied to television services. The act specifies furthermore that personal data of minors collected or generated in this context cannot be processed for commercial purposes, e.g. direct marketing, profiling and behaviourally targeted advertising. The same rule applies to VSPS providers.

Specific derogations from the rule that audiovisual media services cannot be overlaid for commercial purposes or modified without the express consent of the providers are also introduced. The following are now allowed without the prior consent of the AVMS provider: banners activated or authorised by recipients of a service for private use; user interface controls necessary for the operation of equipment or for navigation between programmes, i.e. volume indicators, search functions, navigation menus and channel listings; warnings; information of

general public interest; subtitles; and commercial communication banners provided by the media service provider itself.

Promotion of European works in on-demand services

Providers of on-demand audiovisual media services must devote at least 30% of their catalogues to European works and ensure the prominence of these works. For the promotion of European works in Luxembourg, ALIA is now the competent authority rather than the Services des média et des communications.

Annual fee

Pursuant to a grand ducal regulation of 3 March 2021, the annual fee to be paid to ALIA by AVMS providers is a fixed fee of €2000 as from this year.

Furthermore, AVMS providers that do not have their establishment in an EEA member state but use an uplink to a satellite located on the territory of the Grand Duchy of Luxembourg or, without an uplink to a satellite located on the territory of an EEA member state, use satellite capacity under Luxembourg jurisdiction must also pay the annual fee, unless the audiovisual media services provided are exclusively intended for one or more countries outside the EEA and are not received directly or indirectly by the public in one or more EEA member states.

What are the rules for video-sharing platform providers?

Video-sharing platform services

Video-sharing platform services are, in short, services for which the principle purpose or essential function is to provide programmes and/or user-generated videos, over which the platform provider does not have editorial responsibility, through electronic communication networks (e.g. YouTube and certain social media channels). Such services fall under Luxembourg jurisdiction and thus are subject to the new rules when (i) the provider is established in Luxembourg in accordance with the Act of 2 September 2011 regulating access to the professions of craftsperson, trader, industrialist and certain liberal professions or (ii) the provider is not established in Luxembourg but has a parent undertaking or subsidiary established in Luxembourg or is part of a group and another undertaking of that group is established in Luxembourg.

Notification obligation

Any VSP provider deemed to fall under Luxembourg jurisdiction must notify the competent minister of its intention to provide a video-sharing platform service no later than twenty days before the service is scheduled to start. In this way, the provider commits to providing ALIA with free, unencrypted access to its service and with any information required to enable it to monitor the service.

General protective measures

Although VSP providers often benefit from the exemption from liability for online intermediaries within the meaning of Articles 60 to 63 the E-Commerce Act of 14 August 2000 as amended (a mere conduit, caching and hosting activities), they are responsible for taking appropriate measures to comply with the rules introduced by the new act. It should also be noted that, in December 2020, the European Commission released a Proposal for a Digital Services Act, which would provide new rules for intermediary services, hosting services and online platforms, including annual transparency reporting obligations, content moderation tools and flagging systems.

According to the new act, VSP providers must protect minors from content, including advertising, that could impair their physical, mental or moral development and protect the general public from content, including advertising, that contains an incitement to hatred or violence or the dissemination of which constitutes an activity that is a criminal offence under EU law, namely public provocation to commit a terrorist offence and offences relating to child pornography, racism and xenophobia.

Measures relating to commercial communications

In principle, VSP providers must comply with the same advertising rules as AVMS providers (e.g., protection of minors, ban on advertising of cigarettes and certain medications and medical treatments, etc.). For commercial communications that are not marketed, sold or arranged by VSP providers but rather, for example, by users generating and uploading content and advertising, providers must at least take the appropriate measures to ensure compliance with the aforementioned rules.

Platform providers must also clearly inform users where programmes and user-generated videos contain audiovisual commercial communications, which, for the sake of clarity, include sponsorships and product placement.

Examples and proportionality of appropriate measures

When determining which measures to implement, platform providers may take into account the nature of the content, the harm it may cause, the characteristics of the category of persons protected as well as the rights and legitimate interests at stake, including those of the platform

provider, the users that created or uploaded the content as well as the general public interest. Such measures should be practicable and proportionate, taking into account the size of the platform and the nature of the service provided and not lead to ex ante control or upload filtering of content.

The act clarifies that such measures could consist, for example, of including in the platform terms and conditions of use general protective requirements and measures in relation to commercial communications, a feature for users to declare whether their videos contain advertising, a reporting/flagging system for platforms, age verification controls, content rating systems, parental controls, etc.

Sanctions

The new act does not modify the sanctions provided for by the Electronic Media Act of 27 July 1991 but renders them applicable to (i) violations of the rules intended to protect minors from harmful content, which now apply to all audiovisual media services, and (ii) violations of the obligation for VSP providers to take appropriate measures in connection with content and advertising on their platforms.

Conclusion and outlook

The Luxembourg legislature opted to transpose the Directive and nothing but the Directive, meaning the new act does not go beyond the rules provided for by the Directive, as opposed to the situation in other countries where AVMS providers can face additional (language or local content) requirements. In this way, Luxembourg remains an interesting location for the centralisation of broadcasting activities in the EU, especially in the post-Brexit context.

Furthermore, for satellite broadcasting, if the signal is introduced in Luxembourg in an uninterrupted chain of communication leading to the satellite and down to the earth, copyright levies need only be cleared in Luxembourg, thus not in any other EU country.