EBU

OPERATING EUROVISION AND EURORADIO

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EBU Discussion Paper
on the Implementation of Art. 7b AVMSD

PROTECTION OF CONTENT INTEGRITY

The EBU has long advocated the introduction of legal safeguards for the protection of content integrity and very much welcomes the new provision in the revised Audiovisual Media Service Directive (AVMSD).

As this is new and largely unexplored territory and there is only very limited regulatory experience at the Member States level so far, we would like to contribute to the implementation process by flagging certain relevant questions and by making a number of concrete recommendations.

The purpose of this discussion paper is to help ensure the effective implementation of Art. 7b AVMSD while also addressing some related issues that are outside the scope of the Directive, but which Member States may wish to address at the same time.

1. Scope of application

1.1 Protected services (beneficiaries)

➢ *What services and operators should be protected?*

The **protected services** are defined in the revised Directive as **audiovisual media services**. The protection thus covers both linear and non-linear services.

However, one may wonder whether accessory or **complementary services** and **metadata** are covered by this notion. The mention of "teletext services" in Arts. 16(1) and 17 AVMSD allows for the conclusion that *at a minimum* those complementary services that are transmitted as part of the broadcasting signal should be covered. This could cover most – but not necessarily all – of the accessibility services regulated in Art. 7 AVMSD and, in particular, sub-titles. However, a more up-to-date and technologically neutral approach would be to include all metadata and complementary services by the media service provider, irrespective of the mode of transmission. This would also be in line with the updated "must-carry" rules in Art. 114 EECC, which now explicitly includes "related complementary services, in particular accessibility services to enable appropriate access for end-users with disabilities and data supporting connected television services and EPGs" (see also under section 2.4.2 below).

➔ Recommendation 1: Protection of the integrity of content should also be extended to the service-related **metadata and complementary services** provided by the media service provider.

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Moreover, *a priori* there is nothing that would prevent Member States from granting equivalent protection for **radio services**. In fact, many Member States apply the same or similar rules in a number of fields to both radio and television services, and the protection of the integrity of content would seem to be a legitimate public policy objective for radio as well. Likewise, the problems with commercial overlays on radio streaming services by aggregators would seem to justify such an extension.

➔ Recommendation 2: Even if this goes beyond the mere transposition of the Directive (which does not cover radio), **equivalent rules should be introduced to protect the integrity of radio services**.

1.2 Addressees

➢ *What services and operators would be obliged to respect content integrity?*

The Directive does not specify the **addressees** of the provision, i.e. those actors that are under an **obligation to respect the integrity** of audiovisual media services. Depending on the interpretation of the provision, Member States may have several **options** for determining the addressees of the national rules implementing Art. 7b AVMSD:

a) The rules are addressed to <u>all third parties</u> (without specification or limitation). This option would provide the most comprehensive protection. It would grant protection to media service providers to an extent similar to the granting of an absolute right *erga omnes*;

b) The addressees are <u>defined in a broad sense</u>, e.g. to all third parties involved in, or having the power to influence, the distribution of audiovisual media services or the display of these services on consumer devices. This option would require a new and complex definition of a particular category of third parties, merely for the purpose of this provision;

c) The addressees are more narrowly defined, for example by <u>listing categories of providers</u>**,** such as:
   - Providers of electronic communication networks or services (used for the transmission of audiovisual media services);
   - Providers of internet access services;
   - Providers of online platforms and content aggregators, including VSP providers;
   - Other online intermediaries;
   - Manufacturers of connected TV (or other consumer electronics) devices.

   This option would refer to categories that are either already defined in EU law or commonly understood. However, even if the list is long, the drawback of an exhaustive list would be the potential creation of loopholes in the event of new and unforeseen means of distribution or display, or with the arrival of new players.

Only option a) – or possibly option b) - allows for the provision to develop its full effects, and nothing in the provision suggests that Member States could or should limit the provision's scope to particular categories of providers.

➔ Recommendation 3: National rules should be addressed to **all third parties without specification or limitation**. As a possible complement, national rules may provide for a non-exhaustive list (e.g. in a recital) to illustrate the intended scope.

- *Example - Germany: Under the Inter-State Media Treaty (Medienstaatsvertrag), as agreed by the Minister-Presidents of the Länder on 5 December 2019, here referred to as "MedienStV",*[1]
  - *the protection of content integrity would not only cover audiovisual media services but also radio and radio-like on-demand services as well as HbbTV signalling;*
  - *the obligation to respect content integrity would apply to all providers of "media platforms" and "user interfaces".*[2]

  The definitions of both terms are highly complex.[3] *The term "media platform" requires an integrated offer ("zusammengefasstes Gesamtangebot") of broadcasting and/or broadcasting-like services, media apps etc. and must thus be distinguished from mere "intermediaries" such as search engines. The term "user interface" is defined as an interface that provides an overview of the offer of one or several such media platforms and allows for direct selection of/access to services, programmes or apps; it includes interfaces linked to user devices (e.g. connected TV sets).*

- *Example - Belgium/Flanders: The Flemish Decree of 19.07.13, which already then introduced rules on content/signal integrity, protects linear television programmes and is addressed to all "distributors of services" ("distributeurs de services") transmitting such programmes/channels.*

1.3 Territorial scope

➢ *Which country has jurisdiction?*

The implementation of the new provisions raises questions regarding the territorial scope with respect to the circle of **beneficiaries**, whose services are granted protection, and as concerns the circle of **addressees**, who come under the obligation to respect content integrity.

1.3.1 Beneficiaries' place of establishment

It would certainly not be compatible with the **non-discrimination principle** under the Treaty (Art. 18 TFEU) and the purpose of the Directive if Member States were to limit the protection to only audiovisual media services from providers under their jurisdiction. **As a minimum, protection would need to be extended to audiovisual media services from providers established in other EU/EEA Member States**.

As the protection of content integrity not only serves the interests of media service providers but also those of the audience, it would seem also appropriate to extend the protection to all services made available to end-users in the EU, irrespective of the country of origin.

[1] The text will enter into force once it has been ratified by the Parliaments of all the German Länder, expected by September 2020. The provisional text is available at https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/ModStV_MStV_und_JMStV_2019-12-05_MPK.pdf.
[2] See § 80 *MedienStV (footnote 1)*.
[3] See § 2 (2) nos. 14 and 115 *MedienStV (footnote 1)*.

➔ Recommendation 4: Protection should be extended to **audiovisual media services from media service providers established in another EU/EEA Member State** or even to all audiovisual media services irrespective of their origin.

1.3.2 Addressees' place of establishment

The situation becomes more complex in cases where the interference with content integrity comes from a third party established abroad.

Under all of the options outlined in section 1.2 above, there is a strong likelihood that some of the relevant third parties are established either in another Member State or outside the EU/EEA. This results from the fact that providers of online platforms and manufacturers of consumer devices are often active on a global or pan-European scale.

➢ *What if the addressee is established outside the EU/EEA?*

When the third party is established **outside the EU/EEA**, Member States are in principle free to impose their own rules, provided there is a relevant link to their country (e.g. if the third party offers services to consumers or business users in their country).

Apart from the question of avoiding conflicts of jurisdiction among Member States, there is also the issue of how to ensure **effective enforcement** if relevant third parties are established outside the EU/EEA. Similar concerns have been addressed in Art. 28a (2) AVMSD as regards enforcement and jurisdiction over VSP providers.[4] Enforcement of the rules is certainly facilitated if at least a parent or subsidiary company or another undertaking of the same group is established in the Member State concerned. Although the jurisdiction

[4]Article 28a AVMSD provides:
"1. For the purposes of this Directive, a video-sharing platform provider established on the territory of a Member State within the meaning of Article 3(1) of Directive 2000/31/EC shall be under the jurisdiction of that Member State.
2. A video-sharing platform provider which is not established on the territory of a Member State pursuant to paragraph 1 shall be deemed to be established on the territory of a Member State for the purposes of this Directive if that video-sharing platform provider:
(a) has a parent undertaking or a subsidiary undertaking that is established on the territory of that Member State; or
(b) is part of a group and another undertaking of that group is established on the territory of that Member State.
For the purposes of this Article:
(a) "parent undertaking" means an undertaking which controls one or more subsidiary undertakings;
(b) "subsidiary undertaking" means an undertaking controlled by a parent undertaking, including any subsidiary undertaking of an ultimate parent undertaking;
(c) "group" means a parent undertaking, all its subsidiary undertakings and all other undertakings having economic and legal organisational links to them.
3. For the purposes of applying paragraph 2, where the parent undertaking, the subsidiary undertaking or the other undertakings of the group are each established in different Member States, the video-sharing platform provider shall be deemed to be established in the Member State where its parent undertaking is established or, in the absence of such an establishment, in the Member State where its subsidiary undertaking is established or, in the absence of such an establishment, in the Member State where the other undertaking of the group is established.
4. For the purposes of applying paragraph 3, where there are several subsidiary undertakings and each of them is established in a different Member State, the video-sharing platform provider shall be deemed to be established in the Member State where one of the subsidiary undertakings first began its activity, provided that it maintains a stable and effective link with the economy of that Member State.
Where there are several other undertakings which are part of the group and each of them is established in a different Member State, the video-sharing platform provider shall be deemed to be established in the Member State where one of these undertakings first began its activity, provided that it maintains a stable and effective link with the economy of that Member State. […]"

rules of Art. 28 AVMSD are only applicable to VSP providers, they may inspire Member States as regards other addressees in the context of Art. 7b AVMSD. At the same time, to prevent gaps in protection, Member States have an interest in applying their own rules to **all services targeting consumers in their country**.

> ➔ Recommendation 5: **Different jurisdiction criteria** may be applied depending on whether the third parties to whom the content integrity rules are addressed are **established in another Member State or outside the EU/EEA**. In the case of addressees established outside the EU/EEA, all Member States may intervene, but increased responsibility should fall on those Member States in which a parent company, a subsidiary, or another undertaking of the same group is established.

- *What if the addressee is established in another Member State?*

If the third party is **established in another EU/EEA Member State**, and in view of the above-mentioned principle that Member States should extend the protection to all audiovisual media services from providers established in the EU/EEA, one could argue that Member States should mutually trust each other and should not impose their own content integrity rules on third parties established in another Member State. On the other hand, as there is a risk that some Member States may define the scope of addressees in a narrower way (see section 1.2 above), certain third parties established in those countries may not have to respect any content integrity rules at all.

To the extent that addressees provide information society services, which is the case for many on-line platforms, the rules of the **e-Commerce Directive** need be considered. This Directive establishes the principle that information society services should be supervised at the source of the activity, that the competent authorities should provide protection not only for their own citizens but for all citizens in the European Union, and that information society services should "in principle" be subject to the law of the Member State in which the provider is established (Art. 3 of Directive 2000/31/EC in connection with Recital 22). This **country-of-origin principle** applies to all questions that fall within the "coordinated field" as defined in Art. 2(h) Directive 2000/31/EC, which includes "requirements regarding the quality or content of the service".

It may be argued that rules protecting content integrity fall within the coordinated field of the e-Commerce Directive, even if they have been harmonized in another EU instrument, i.e. the AVMSD. Art. 4(7) AVMSD allows for parallel application of both Directives as long as there is no conflict between the provisions whereas, in case of conflict, the AVMSD would prevail. This could allow providers of on-line platforms to invoke the country-of-origin principle. Member States imposing their content integrity rules on providers of information society services established in other Member States would then have to rely either on the derogations in Art. 3(4) or on Art. 1(6) Directive 2000/31/EC, which stipulates that the Directive does not affect measures taken at Union or national level, in compliance with European Union law, "to promote cultural and linguistic diversity and to ensure the defence of pluralism".

The purpose of Art. 7b AVMSD is clearly expressed in Recital 26, i.e. "to protect the editorial responsibility of media service providers and the audiovisual value chain". This measure is thus linked to the investment in audiovisual content and the protection of the audiovisual ecosystem in the Member States, whose functioning is a precondition for both cultural diversity and media pluralism.

➔ Recommendation 6: In the absence of harmonized jurisdiction criteria other than for providers of audiovisual media services and VSPs, **the personal and territorial scope** of Member States' provisions on content integrity should be coordinated with a view to avoiding not only gaps of protection but also conflicts of jurisdiction within the EU/EEA.

- *Example - Germany: The MedienStV will apply to media platforms and user interfaces "which are destined for use in Germany". This criterion would be fulfilled if they direct their offer to users in Germany, notably by using the German language, or earn a significant part of their re-financing in Germany.*[5]

2. Regulatory details and exceptions

2.1 Protection against modifications and overlays

- *What is prohibited?*

Art. 7b AVMSD together with Recital 26 AVMSD prohibits, unless the media service provider has given its explicit consent, any:

- **Modifications** of audiovisual media services (in particular, transmission in a shortened form, alterations and interruptions);
- **Overlays for commercial purposes**.

The **"scaling" down, "shrinking" or "framing"** of the display of audiovisual media services or, in other words, the splitting of the screen, in particular to allow for the display of commercial communications or other editorial content alongside the audiovisual media service, is not explicitly mentioned in the provision. This raises the question as to whether this is covered by the notion of "modification" or "alteration".

The explicit clarification in Recital 26 AVMSD that "data compression techniques which reduce the size of a data file and other techniques to adapt a service to the distribution means, such as resolution and coding, without any modification of the content, should not be covered" supports an argument *a contrario* for other forms of scaling. Consequently, any scaling that does not serve to merely adapt a service to the means of distribution, including the screen size of a consumer device, to the benefit of the user and/or to allow for a more efficient use of transmission capacity, should be considered as a prohibited modification of the service.

The nature of scaling is of course that it may be of varying intensity. Removing a small band on the bottom of a big screen is not the same as shrinking a picture to such an extent that the details or even the main action (e.g. the ball in a match) are no longer visible. However, this is not an argument for a blanket exclusion of scaling from the scope of protection. Where considered justified, Member States may still allow for *exceptions* for minor forms of alteration which do not affect the authenticity of the content or the quality of the viewing environment (see section 2.2 below).

[5] See § 1 (8) *MedienStV* (footnote 1).

While it may be interesting to compare the scope of protection under Art. 7b AVMSD with the existing protection under intellectual property rules (IPR), the protection afforded under the AVMSD should be independent and in no way be affected by current or future case law on the so-called "inline linking", "framing" or "embedding" of copyright-protected content.[6]

Similarly, the terms "modification" or "alteration" should be understood to include the **"disaggregation"** of audiovisual media services and programmes by third parties. This would cover, for example, cases where third parties split a linear channel into individual programmes or where they extract individual news items from a news programme.

➔ Recommendation 7: For the sake of clarity and in line with the mandate to define the regulatory details in Art. 7b AVMSD, "**scaling**" (including "**framing**") should be **explicitly prohibited**, unless it is used as a technique to adapt a service for distribution means as mentioned in Recital 26 AVMSD.

- *Example - Germany: Under the MedienStV, the following will be prohibited without the media service provider's consent:*
  - *Changes to the content as well as technical modifications;*
  - *Overlays with commercial communications, audiovisual content, or related recommendations/information;*
  - *Scaling down of the picture to allow for the display of commercial communications, audiovisual content, or related recommendations/information.*[7]

- *Example - Belgium/Flanders: The Flemish Decree that introduced rules on content/signal integrity in 2013 requires "distributors of services" to (re-)transmit linear television programmes/channels without interruption, without modifications and in their entirety, at the moment of their first transmission, i.e. simultaneously ("sans coupures, sans modifications et intégralement, au moment de leur émission").*

2.2 Exceptions

➢ *What exceptions may be defined?*

Art. 7b AVMSD mandates Member States to specify the regulatory details, including *exceptions*. When providing for such exceptions, Member States must **balance** "**the legitimate interests of users**" **with** "**the legitimate interests of the media service providers** that originally provided the audiovisual media services".

2.2.1 Users' interests

Recital 26 AVMSD recommends that "Member States should ensure that **overlays solely initiated or authorised by the recipient of the service for private use**, such as overlays resulting from services for individual communications, do not require the consent of the media service provider".

[6] See, for example, the decision of the Court of Justice of the European Union in Case C-348/13, *BestWater International* of 21 October 2014 on the question whether a website operator may integrate a copyright protected videoclip, which was publicly available on another website, into his own website by way of embedding or framing.

[7] See § 80(1) *MedienStV* (footnote 1). It will also prohibit the inclusion in packages and similar marketing activities, see below under 2.4.1.

This touches upon probably the most sensitive point of the new provision, i.e. how to reconcile **users' autonomy** to personalise the screen and to control the display with the media service providers' legitimate interests (e.g. to prevent users' attention from being distracted by third parties, or the value of their content from being exploited for other commercial purposes).

During the legislative process, we suggested reconciling these interests:
- By recognizing **users' autonomy to customise and personalise the way they consume audiovisual content** (for example, when using picture-in-picture functionalities or changing the size or position of the picture-in-picture, captions or subtitles); and,
- By specifying that the users' personal freedom **cannot justify alteration of content by third parties for their own purposes**, in particular if these involve commercial communications.

It does not prejudice the users' autonomy to customise and personalise the screen if users are prevented from transferring the control over their screen to third parties who use this power to interfere with the content provided by media service providers. In these cases, the consent given by users - in particular, if given in a general way, for example, by accepting third parties' terms and conditions - should not be sufficient to allow for an exception.

➔ Recommendation 8: Exceptions should not be extended to cases where **users give third parties a 'carte blanche' to interfere** with audiovisual media services through modifications or overlays, as this would **open the door for abuse and would undermine the purpose of the provision** (i.e. to protect the authenticity of editorially controlled content, the editorial responsibility of the media service provider and the audiovisual value chain).

In the 2011 EBU paper "*Principles for Internet Connected and Hybrid Television in Europe*", through which the EBU launched its campaign to protect content integrity in the connected TV and online environment, it was put forth that no alterations, "overlays" or "scaling" of broadcasters' programmes and services should be allowed "without the broadcaster's consent *or an active decision by the viewer*".

The issue with overlays or alterations "authorised" by the user for private use may to some extent be resolved by distinguishing between "general" consent and prior consent given on a "case-by-case" basis.

➔ Recommendation 9: Where the modifications or overlays are not initiated or authorised by the user on a case-by-case basis, i.e. at the moment when they happen, but rather *in advance,* in particular by authorizing third parties to intervene, this should only be allowed – if at all – **in narrowly defined cases and where it is justified by an overriding interest of the user.**

In those cases where users can authorise third parties to interfere with the transmission or display of audiovisual media services through modifications or overlays, a number of **minimum requirements should be defined for the validity of such authorisations**, so as to ensure that users have taken an active decision in full awareness of the consequences. For example, national law could specify that any such authorisation must not only be *explicit*, as already required under Art. 7b AVMSD, but also specific and freely given and based on an informed decision. Giving such authorisation should never be a pre-condition for using third-

party services. Users must also be in a position to easily revoke the authorisation at any moment, and they must not suffer any detriment from refusing or withdrawing their consent.[8]

➔ Recommendation 10: Minimum requirements should be defined for the **validity of authorisations** of third parties by users.

2.2.2 Control elements of user interfaces

Recital 26 AVMSD also suggests exempting "control elements of any user interface necessary for the operation of the device or programme navigation, such as volume bars, search functions, navigation menus or lists of channels".

While this exception seems reasonable, given the necessity test required, care has to be taken that it is not being (ab)used for other purposes, for example by inserting commercial communications or the promotion of other programmes in the navigation menu (see picture below).

2.2.3 Other legitimate overlays

Similarly, Recital 26 AVMSD suggests exempting "legitimate overlays" like "warning information, general public interest information, subtitles or commercial communications overlays provided by the media service provider". This formulation seems to target two separate categories:

[8] The legal requirements for consent under the General Data Protection Regulation could serve as a source of inspiration here, see Art. 7 in connection with Recitals 32 and 43 of Regulation (EU) 2016/679.

- Overlays for non-commercial purposes in the public interest, such as emergency warnings/messages (issued for example by civil protection or police authorities); and,
- Features offered by the media service provider itself, such as subtitles or commercial communications.

It may be argued that no explicit exception is needed for these cases since Art. 7b AVMSD merely prohibits overlays for commercial purposes and does not prohibit overlays or modifications, which are authorised or *a fortiori* initiated by the media service provider.

National examples for exceptions (covering all the cases outlined in sections 2.2.1 – 2.2.3 above):

❖ *Example - Germany: Under the MedienStV, the following will be exempted from the prohibitions:*
- *Technical changes for the efficient use of capacity with protection of the agreed or otherwise customary quality standards; and,*
- *Overlays/scaling down for the use of individual communications services and overlays/scaling down initiated by the user on a case-by-case basis ("durch den Nutzer im Einzelfall veranlasst"); however, these exceptions do not apply for the purpose of advertising (but may apply to recommendations/information on audiovisual/audio content).*[9]

2.3 Role of national regulatory authorities

Given that defining exceptions is quite a granular task, which may be influenced by rapidly evolving technology and user habits, one may wonder whether it is for the legislator to define any detailed exceptions in legislation or whether it would make more sense for the national legislator to **delegate this task to the national regulatory authorities for the audiovisual sector**.

➔ Recommendation 11: Independent national regulatory authorities may be entrusted with the task of laying down more **detailed guidelines or regulations, including clearly defined exceptions where appropriate**, with an obligation to carefully balance the legitimate interests of users and those of media service providers.

National regulatory authorities will have the crucial task of ensuring respect of the content integrity principle by third parties. To fulfil this task, they need to be entrusted with adequate resources and enforcement powers. While the possibilities for the authorities to monitor compliance with the content integrity provisions may be limited, they should be under a duty to investigate and prosecute possible infringement cases if they receive relevant information or complaints.

In case of infringements, authorities should be in a position to impose effective sanctions, and in particular fines, which should be high enough to deter potential infringers, also in view of financial gains from the infringement (e.g. from the overlay of commercial

[9] See § 80(2) *MedienStV* (footnote 1). Contrary to the *first* draft Inter-State Media Treaty, the *final version* no longer includes a broader exception for the benefit of recommendations/information if *generally authorised by the user ("opt-in") provided that the user can easily revoke the authorisation at any time.* This change obviously responds to concerns that a general opt-in solution would increase the risk of abuses.

communications). In cross-border cases, it should be possible to rely on the cooperation and coordination amongst national regulatory authorities in Europe.

➔ Recommendation 12: Independent national regulatory authorities should be entrusted with adequate resources and **enforcements powers** to ensure respect of the content integrity provision, including the possibility to impose **fines** on third parties.

2.4 Related issues

There are a number of issues that – although not directly addressed in Art. 7b AVMSD and **outside the scope of harmonisation** – concern the relationship between broadcasters and distributors/networks/platforms and which Member States may wish to address in the context of the transposition and implementation of the Directive's new provision on content integrity.

For any *additional* rules which impose obligations or restrictions on providers of online platforms it is important to take into account that these may require **prior notification to the European Commission under Directive (EU) 2015/1535**.[10] Non-respect of this notification requirement will lead to the inapplicability of the rules. In practice, online platforms normally fulfil all the criteria in order to qualify as an information society service, and Directive (EU) 2015/1535 requires that any new national rules specifically aimed at information society services be notified to the European Commission. The aim of this is to ensure that the Commission and the other Member States are informed of the proposal and to enable them to consider at an early stage the potential implications for the operation of the internal market.[11]

2.4.1 Packaging, disaggregation, marketing, monetisation and functionalities added by third parties

Apart from overlays for commercial purposes that are explicitly forbidden by the new provision, there are a number of other practices by which distributors may extract economic value or other advantages from the content provided by audiovisual media service providers and where media service providers have a legitimate interest to either prevent such practices or at least be able to participate in the revenue (e.g. through licensing agreements). Aside from the media service providers' need to refinance their investments in programming, they also need to be able to determine the context (programming, advertising etc.) in which their services are made available to users. This is particularly important for programmes and services that are free from advertising or that target specific user groups (e.g. children).

Examples of such practices by third parties may include:

- The *packaging*, *bundling* or *marketing* of services/content from different media service providers;
- The *disaggregation* of the programme offer of a media service provider, e.g. by segmenting the offer into separate categories where programmes from different providers are all mixed together - but without any modification to the individual programmes/services (which is already prohibited by Art. 7b AVMSD, see section 2.1 above);

[10] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

[11] See the Advocate General's Opinion in Case C-299/17 *VG Media v Google* of 13 December 2018.

- The *monetisation* of audiovisual media services and programmes other than through commercial overlays (e.g. through the collection of user data, advertising on the EPG, pre-roll advertising, advertising during channel-switching, etc.). In the latter two examples, it may also be worth considering whether such practices could qualify as an "interruption" prohibited by Art. 7b AVMSD (although one may argue that it is not so much the programme service as such that is interrupted, but rather the process of users accessing it);
- The provision of *extra functionalities* for viewers, such as catch-up TV, network personal video recorders (PVR), and "replay", "pause" or "start-over" functions; and,
- The provision of *ad-blocking* software, which serves to filter out advertising inserted by media service providers.[12] This may also be considered as a form of monetisation of content by third parties. Moreover, it undermines the audiovisual value chain by diminishing the remuneration of media service providers and/or creators.

In some cases, media service providers' IPR and neighbouring rights may be invoked to prevent such practices, unless the media service provider grants a licence. In others, however, it may be desirable to resolve such issues through national media law.

> ❖ *Example - Germany: The MedienStV will prohibit providers of media platforms or user interfaces from including audiovisual media services or radio services in packaged offers or from marketing them in any other form, whether for remuneration or for free, without the consent of the media service provider.*[13]

> ❖ *Example - Belgium/Flanders: The Flemish Decree of July 2013 protects exclusively Flemish television broadcasters against functionalities added by distributors to a broadcaster's linear signal without the broadcaster's prior approval, in particular as regards catch-up TV/network PVR. Broadcasters and distributors have to negotiate such functionalities in good faith and any remuneration received by broadcasters has to be reinvested in European audiovisual productions in the Flemish language. If no agreement can be reached, the parties may refer the matter for conciliation to the Flemish regulator.*

2.4.2 Ensuring the correct functioning of service-related features

As suggested under section 1.1 above, service-related metadata and complementary services, such as accessibility services and data supporting connected TV services and EPGs, which includes content descriptors, HbbTV signaling, etc., should be included in the protection of audiovisual media services, irrespective of whether they are part of the programme signal or not.

However, such protection will not necessarily guarantee the correct functioning of these features throughout the distribution chain, as this may also require measures to ensure

[12] Several attempts in Germany to stop practices by adblocking software providers through the courts, based on national rules on unfair commercial practices, have failed to date; see for example, the decision of 19 April 2018 by the Federal High Court of Justice (BGH case I ZR 154/16): http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2018&Sort=3&nr=82856&pos=0&anz=78.

[13] See § 80(1)(c) *MedienStV* (footnote 1).

technical **interoperability**. Therefore, there may still be a need for additional measures to be taken at the national level.

As far as accessibility services provided by media service providers are concerned (see Art. 7 AVMSD), the new EU Accessibility Act should help to improve the situation by imposing corresponding requirements on "services providing access to audiovisual media services" and "consumer terminal equipment with interactive computing capability used for accessing audiovisual media services".[14]

2.4.3 Safeguards against circumvention of requirements for audiovisual media services

There is a danger that restrictions on audiovisual media services - for example, safeguards to protect consumers and in particular minors - may be circumvented by overlays or similar practices. For example, children's programmes or public service channels that do not include advertising may be "overlaid" or "framed" with advertising. It could also be that forms of commercial communications prohibited on audiovisual media services could find their way on the screen through such overlays or similar practices. Another example would be the insertion of content or communications harmful to minors during audiovisual programmes watched by children.

Anti-circumvention clauses could help prevent such practices, and this even when broadcasters have given their consent to third-party interferences. Such extension would seem particularly relevant in cases where those responsible for the overlays fall outside the AVMSD scope, for example because they are not providing audiovisual media services.

- *Example - Germany: The MedienStV foresees, in the case of "overlays" or the "scaling" of audiovisual media services for commercial communications (which is only permissible in exceptional cases, see point 2.2.3 above), to apply to the latter the same restrictions that apply to the audiovisual media service in question (e.g. advertising bans in certain programmes/channels).*[15]

➔ Recommendation 13: The transposition and implementation of Art. 7b AVMSD may be a good **opportunity to address the related issues** described above.

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[14] See Annex I, Section III, Point 2(o)(iv) and Section IV, Point (b)(ii) of the EUAA.
[15] See § 80(3) *MedienStV* (footnote 1).

EXCERPTS FROM THE 2018 REVISED AUDIOVISUAL MEDIA SERVICES DIRECTIVE

Recital 26

"(26) In order to protect the editorial responsibility of media service providers and the audiovisual value chain, it is essential to be able to guarantee the integrity of programmes and audiovisual media services supplied by media service providers. Programmes and audiovisual media services should not be transmitted in a shortened form, altered or interrupted, or overlaid for commercial purposes, without the explicit consent of the media service provider. Member States should ensure that overlays solely initiated or authorised by the recipient of the service for private use, such as overlays resulting from services for individual communications, do not require the consent of the media service provider. Control elements of any user interface necessary for the operation of the device or programme navigation, such as volume bars, search functions, navigation menus or lists of channels, should not be covered. Legitimate overlays, such as warning information, general public interest information, subtitles or commercial communications overlays provided by the media service provider, should also not be covered. Without prejudice to Article 3(3) of Regulation (EU) 2015/2120 of the European Parliament and of the Council[16], data compression techniques which reduce the size of a data file and other techniques to adapt a service to the distribution means, such as resolution and coding, without any modification of the content, should not be covered either. Measures to protect the integrity of programmes and audiovisual media services should be imposed where they are necessary to meet general interest objectives clearly defined by Member States in accordance with Union law. Such measures should impose proportionate obligations on undertakings in the interest of legitimate public policy considerations."

Article 7b

"Member States shall take appropriate and proportionate measures to ensure that audiovisual media services provided by media service providers are not, without the explicit consent of those providers, overlaid for commercial purposes or modified.

For the purposes of this Article, Member States shall specify the regulatory details, including exceptions, notably in relation to safeguarding the legitimate interests of users while taking into account the legitimate interests of the media service providers that originally provided the audiovisual media services."

[16] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L 310, 26.11.2015, p. 1).