Position Paper

AVMS proposal

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Bitkom represents more than 2,300 companies in the digital sector, including 1,600 direct members. With more than 700,000 employees, our members generate a domestic turnover of 140 billion Euros a year, exporting high-tech goods and services worth another 50 billion Euros. Comprising 1,000 small and medium-sized businesses as well as 300 start-ups and nearly all global players, Bitkom' members offer a wide range of software technologies, IT-services, and telecommunications or internet services. They produce hardware and consumer electronics or operate in the sectors of digital media and the network industry. 78 percent of the companies' head-quarters are located in Germany, additional 9 percent in Europe and 8 percent in the USA. 4 percent come from Asia, most of which from Japan. Bitkom promotes the digital transformation of the German economy and supports an innovative economic policy by focusing the modernization of the education sector and a future-oriented network policy.

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Bitkom welcomes the review of the Audiovisual Media Services Directive (AVMSD). The proposal represents a step into the right direction.

1. More flexibility for advertising rules

Bitkom explicitly welcomes the more flexible advertising stipulations chosen in the proposal. As regards the specific provisions in the area of advertising rules we have the following comments:

a. Product placement

Bitkom welcomes the fact that product placement is now generally permitted, a shift away from a prohibition with exceptions. This relaxation of advertisement rules allows European and German broadcasters to generate additional income. It allows them to refinance their significant investments in content – also and in particular with European cultural imprint – and to catch up with US players. In our view, production support and prices for product placement of lower value will be more than ever permissible. Besides the increased discretion described above there will also be increased legal certainty since terms such as "programmes of light entertainment" and

the prohibition of "undue prominence of a product" have proven to be too unspecific in the past due to the large room for interpretation.

Against this background the shift from "children's programme" to "programmes with a significant children's audience" is to be seen critical. The actual viewers' share, to which the criterion of "significant children's audience" would have to be applied, cannot be seriously and reliably assessed ex ante. Furthermore, this would mean including programme formats which are not primarily addressed to children, which would thus mean an extension of the prohibition. This is why Bitkom supports maintaining the term of children's programme as currently anchored in the Directive.

b. Sponsorship

At the national level the form of sponsor references has led to debates with supervisory authorities. Therefore, we welcome the clarification that sponsor references may also contain promotional references without directly encouraging purchases.

c. Cross promotion

The proposed changes regarding cross promotion are to be welcomed. However, in order to achieve future-proof rules in addition the promotion of apps, online offers or own services should be allowed without counting them towards the advertisement time.

d. Product specific advertisement rules

In principle the Commission proposal is to be welcomed in so far as it explicitly recognizes the instrument of self-regulation in the advertisement space. Regarding advertisement for food and beverages it does however include in parts unspecific and very broad terms. Here, too, "programmes with significant children's audience" are mentioned. As described above, in our view, this would lead to more legal uncertainty compared to the current term of children's programmes, which is why we prefer the latter.

In addition, the Commission proposal introduces the term of "minors" regarding the proposed codes of conducts, which should effectively reduce the impact of audio-visual commercial communication in the food space. This term would extend the focus far beyond children. It would practically lead to putting the spotlight on advertisement of sweets in programmes targeted to 16 year olds. Certainly, this is not intended from a media policy point of view and neither from a minor protection one.

2. Protection of minors

In the area of protection of minors we welcome the reinforced use of co- and self-regulation concepts. The existing system of co- and self-regulation in Germany has proven to be successful. International cooperations of businesses,

NGOs and public entities are able to ensure compliance with consumer and minors' protection standards in an effective and practicable way. Good examples are MIRACLE[1], IARC[2] and the ICT Coalition[3]. In the long run, the system for protection of minors in a digital media world should increasingly rely on international models. The approaches adopted by the sector appear promising in this regard.

3. Protection of minors and protection against harmful content: Obligations for video-on-demand-services

Video-on-Demand-Services in Germany already adhere to the highest standards when it comes to the protection of minors. The requirements set by the AVMSD proposal therefore should not pose problems in the implementation.

4. Protection of minors and protection against harmful content: Obligations for video-sharing-services

Bitkom in principle welcomes the approach of graduated regulation targets and instruments adapted to the format of audio-visual media and the degree of choice, organization and means of control on the side of the providers. This corresponds to the strengthening of co- and self-regulation mechanisms.

It remains to be seen, how exactly the obligations for video-sharing-services with regard to the protection of minors and the handling of harmful content (e.g. terrorist propaganda, inhuman or glorifying violence videos) will be designed and how strictly they will be interpreted. The recently published code of conduct on hate speech jointly developed by leading international IT companies together with the Commission as well as other models established by the ICT and new media-industry (e.g. the above-mentioned ICT Coalition), are the right approach to follow. When it comes to obligations regarding harmful content, it should be ensured that the principle of "notice and take down" provided for in the E-Commerce Directive remains untouched. Where technical means are required to restrict minors from accessing harmful content, age settings and classifications should be chosen that are based on international and European standards.

5. Recognition processes of co- and self-regulation

Bitkom expressly welcomes the reinforced use of co- and self-regulation concepts in the proposal. Properly implemented, co- and self-regulation are the right way for efficient and practical implementation of the AVMSD's requirements. However, for European-wide codes of conduct the proposal only provides for notification to the European Commission, which in turn can request an opinion from the European Regulators Group for Audiovisual Media Services (ERGA). This is the approach used in the old EU Data Protection Directive, which had not worked there and which therefore had been further developed in the recently adopted General Data Protection Regulation. Bitkom pleads for taking account of experiences gathered in the data protection and protection of minors field and to insert it in the AVMSD. In order for co- and self-regulation to work and to achieve the set goals, experience tells the following conditions need to be met:

[1] MIRACLE stands for „Machine-readable and Interoperable Age Classification Labels in Europe".
[2] IARC stands for „International Age Rating Coalition".
[3] Full name: „ICT Coalition for Children Online".

- A clear legal provision is necessary stating that codes of conduct can be used in order to concretise the applicable law and that the requirements do not need to go beyond applicable laws.

- An official recognition process is necessary giving companies reassurance as to whether voluntary measures are in accordance with applicable laws. The oversight authority in charge could grant such recognition. In case of relevance for several member states there needs to be a simple option for European-wide recognition. A voluntary notification and opinion are insufficient. Furthermore, the German system of recognised self-control systems has proven to be successful in the area of protection of minors in media. Here, the self-control entity itself is recognized. The latter in turn does not need to be certified separately anymore for each of its rule books or basis for decision-making. In cases where no recognised self-control entities exist, an organisation should also be able to have recognised an individual code of conduct. Of course, a directive, in contrast to a regulation, cannot define a complete process. However, it can provide for a framework to be implemented by the member states. In addition, it can create structures at the European level ensuring European-wide recognition.

- Recognition needs to have legal effect, in particular in the form of simpler proof of compliance or a presumption of compliance in favour of the voluntarily committed companies. Here, too, the proposal could at least provide for member states to create incentives for participation.

6. The 20 % quota for European works on video-on-demand platforms

Bitkom is critical of the proposed obligation for video-on-demand platforms (VOD platforms) to feature a minimum of 20 % European works in their catalogues. From the outset, significant, substantiated doubts have been raised about fixed quotas. Whether they are necessary and proportionate in the sense of ensuring programme freedom for broadcasters, in particular whether they are legal at all from a constitutional rights point of view, is disputed. Due to digitization, media diversity is greater than ever before. The main reason for this is the fact that technical barriers to market access have practically become irrelevant in the online world. Producers and distributers can directly address consumers and are no longer dependent on broadcasters' intermediating services. European films and series are popular with viewers, there is demand for them, which is why they are produced and featured in catalogues. In Bitkom's opinion, such a provision is not necessary as the market already caters for supporting European works.

It is unclear why regulation is needed despite the market producing the desired outcome. Furthermore, it would be very time-consuming, costly and nearly impossible for VOD platforms to continuously verify whether their constantly changing catalogue features at any time 20 % European works in line with the criteria set out in the proposal. The definition of European works is a complex one, partially also based on often opaque financing structures of the works. Metadata as part of the licenses generally does not contain information on whether a work is European or not. The time and effort required to determine the origin of a work as defined as well as the costs would be disproportionately high, especially for VOD services.

There is a risk that rather than conducting costly verifications of their catalogues, VOD platforms might acquire additional European works to be on the safe side. These European works would thus not be selected on the basis of quality, success with viewers etc. Obviously, such a practice would fulfil the legal obligations. However, it would not promote European works. A 20 % share of European works in the catalogues of providers does not automatically lead to viewers actually watching these. What Europe needs is a more targeted support for high-quality films and series with audience appeal. The VOD providers represented by Bitkom frequently make significant investments in European works themselves. Many creatives like to work with them exactly because these VOD platforms afford them a high level of artistic freedom in the creation of their works. The quota might also represent an inappropriate intervention in the editorial freedom, which is why Bitkom opposes the introduction of fixed quotas for European works for VOD providers.

As to the situation in Germany, a recently published study (Wiedemann, 2015[4]) shows that there is a significant overproduction of cinema films (documentaries and feature films). The mandatory quota for European works in VOD catalogues might exacerbate this trend of overproduction – linked to which the negative consequences for the successful exploitation in other forms like cinema or TV. The quota would threaten the coherence of the various European and national efforts for the promotion of works.

7. Obligation for video-on-demand platforms regarding prominence of European works

Users nowadays have the choice between various navigation, search and recommendation systems for audio-visual works from Europe, which are often also provided and marketed independent of platforms or operators or as meta systems. This brings about significantly increased chances for a better noticeability of these productions. A legal obligation going beyond this showing these works separately is therefore neither necessary nor helpful. It is a significant intervention both in the users' autonomy and in the operator's freedom.

8. Financial promotion of European works

The proposal allows member states to oblige VOD operators to contribute to the promotion of European works by either direct financing or contributions to support funds. According to this, member states may impose these financial levies on operators targeting audiences in that member state, even on those based in another member state. This provision appears open to interpretation. One may conclude that it is possible to impose these levies for every single national market of a member state, the audience of which is targeted by the provider. The proposal specifies that financial obligations paid in other member states should be taken into account. However this does not exclude parallel financial obligations in several member states. This could lead to a significant burden for video-on-demand-service operators in case an operator is active with tailored offers in several member states.

We are critical of the requirements on financial promotion of European works. In Bitkom's opinion, more harmonisation would be desirable in the area of financial promotion of European works. We oppose to cementing the

[4] Study published in German: https://www.bitkom.org/Bitkom/Publikationen/Eine-Evaluierung-der-Filmfoerderung-im-Rahmen-des-Filmfoerderungsgesetzes-FFG.html

current fragmentation as it is done in the proposal. Generally it should be possible to offer European services without having to adapt to and comply with 28 or potentially 27 different legal frameworks. However, the opposite is the case in the proposal.

9. Optional introduction of discoverability obligations at national level

Recital 38 of the proposal states that member states are free to impose requirements going beyond the AVMSD with regard to access and discoverability of content of public interest with particular relevance for opinion formation and cultural diversity. Although member states would have to take account of various preconditions, namely clearly substantiating the need for regulating such separate requirements for discoverability and access as well as refraining from disproportionate obligations. Further, regulation should only be introduced in this area if market forces do not achieve the desired goal. However, despite these guidelines, member states enjoy certain discretion when assessing the need for regulation, which is likely to be interpreted positively by member states in favour.

Bitkom generally welcomes the Commission strongly underlining the preconditions only under which the introduction of such obligations would be proportionate. However, based on experiences in EU member states with the (highly diverging) application of Art. 31 in the Universal Service Directive (e.g. any type of linear offer of public broadcaster, teleshopping etc.), there are significant doubts as to which degree these preconditions are taken into account and whether this risks in several ways creating a new un-level playing field – between various groups of companies which are imposed upon such obligations, between various providers whose services are to benefit from such measures and between the application of these rules in different member states.

For Germany – seen the results of the final report of the Federal and States Commission (Bund-Länder-Kommission) on media convergence – we expect there will be such obligations although experts (among others the state media authorities in charge ofr media diversity protection in private television and the application of platform regulation) have underlined numerous times that there is no reliable, concrete concept to define what is public interest content and that there may be fundamental rights and constitutional law hurdles for such a classification. Bitkom therefore is critical of the option to introduce discoverability obligations at national level as hinted at in recital 38.

We oppose for several reasons the introduction of so-called discoverability stipulations both at national as well as at EU level. Proponents of such rules argue that viewers are losing overview in nowadays converging media age and that an increasing complexity risks to overburden the individual. However, this ignores that users today have various, easy to use instruments at their disposal to easily and reliably find content relevant to them. Plurality of opinion is both reinforced by the market entry of new providers and by the availability of new and various ways and means of transmission, platforms and navigation systems. Within their media time budget users can use the different media in a more self-determined way than in the days of analogue TV. Content providers add to this with diversified programmes and time-shifted on-demand services. New online offers and new receiving equipment increase choice for viewers. The growing number of options for media consumption thus leads to an increase in diversity and more self-determination in the use of audio-visual media. Privileges for some providers with regard to discoverability are, in Bitkom's view, therefore neither necessary nor appropriate. We therefore are critical of Recital 38.

10. Transfer of accessibility requirements to the proposed European Accessibility Act

Bitkom is critical of the removal of accessibility regulations from the AVMSD. The relevant obligations protecting the rights of people with disabilities have so far been included in the AVMSD. These have now been integrated in the European Commission's proposal of 2 December 2015 for a European Disability Act (EEA), which sets horizontal accessibility requirements for certain products and services at the EU level in order to facilitate societal participation of people with disabilities. In Bitkom's view the EEA in its current form is unclear. Different sectors fall within the scope of the same rules, which should actually be treated differently due to their differing requirements. Therefore, a sector specific regulation is to be preferred over a general Directive. In Bitkom's view, AVMSD has proven to be successful for the audio-visual media sector. Ever since its adoption providers have constantly extended their barrier-free offers.

The EEA in contrast mandates technological approaches and, due to its notification requirements, does not lead to more innovation for barrier-free media offers. The general CE labelling requirements are reduced to a mere check-the-box exercise, which, however, does not say anything about the individual degree and type of disability. A deletion of the accessibility obligations from the AVMSD risks leading to a regulatory deficit between the time of application of the new Directive and the application of the EEA. The entry into force of provision in the EEA is not expected anytime soon.