



© Getty Images for Unsplash

Consultation on the Audiovisual Media Services Directive

COM(2018) 1808

Executive Summary

The AVMSD establishes a uniform legal framework at European level for audiovisual media services, including television broadcasts, on-demand services and video-sharing platforms. The aim is to create a free and pluralistic media environment and to protect users from illegal and harmful content.

The European Commission has launched a consultation on the AVMSD in connection with the assessment and review required under Article 33 of the AVMSD to determine whether any amendments or adjustments are necessary. AK has participated in the consultation and highlighted the need for adjustments in certain areas.

AK's key demands for the Directive's required review

- Extend the scope of the AVMSD to cover new distribution technologies and new market players
- Clearly define the roles of influencers and coaches
- Labelling and disclosure requirements for influencers and coaches
- EU-wide register of influencers
- Introduce a qualification requirement for the health and finance sectors
- General obligation to filter out manifestly unlawful or misleading advertising
- Establish clear rules on advertising and marketing targeted directly at or featuring children and young people
- Establish a WHO Nutrient Profile for food advertising
- Establish stricter marketing rules for food supplements (particularly online)
- Designate a single authority per Member State to handle complaints

AK's position

Expand and clarify the scope of application

→ Adapting to new technological developments

At present, online services must be predominantly audiovisual to fall within the scope of the AVMSD. In this age of media convergence, AK does not consider this to be a modern approach, let alone a forward-looking one.

The 'principal purpose of the service' criterion in Article 1(1)(a) of the AVMSD's definition of 'audiovisual media service' fails to capture some current practices, including WhatsApp channels used by companies mainly to distribute videos. Users cannot post content on these channels; they can only react with emojis. On Spotify, too, alongside music, there are now users such as gamers who upload pure video content. Although the platform is considered a music service, it also hosts podcasts, whose definition has expanded to include both audio and video content.

With regard to the criterion of 'television programmes,' which is defined in Article 1(1)(e) of the AVMSD and is cited as one of the forms of audiovisual media service, it should be noted that, according to point (e), this is currently to be regarded as a self-contained unit. This may create a regulatory gap for live streams, such as those on Twitch, where the content is broadcast continuously and does not constitute a self-contained unit. It is unclear whether this constitutes an on-demand audiovisual media service within the meaning of Article 1(1)(a) in conjunction with Article 1(1)(g) of the AVMSD, meaning that this type of service falls within the scope of the Directive.

→ Clarification of the interaction with other regulatory frameworks

The scope of the AVMSD should be adapted not only in light of new technological developments. The interaction with other regulatory frameworks should also be clarified. The E-Commerce Directive, the Digital Services Act (DSA), the Unfair Commercial Practices Directive (UCPD) and other provisions may also apply within the scope of the AVMSD.

Ideally, all these provisions will complement one another, leaving no regulatory gaps. However, this appears difficult, if not impossible, to achieve. Regulations should, as far as possible, be mutually reinforcing; where uncertainty exists, relevant provisions should be applied in parallel whenever practicable in consumers' interests. This is the only way to ensure that the relevant authorities can swiftly tackle and prevent unlawful practices or offers from every possible angle.

Creating a regulatory framework for influencers and coaches

→ Definition of influencer and coach

Only what is clearly defined can be effectively regulated. A legal definition of influencer and coach, whose activities should fall within the scope of the AVMSD, is therefore necessary. It must be guided by the objective – namely, influencing others for one's own benefit or for the benefit of others, whether through paid advertising or other benefits. Scope should not determine whether the objectives are met, but it should be considered when setting penalties for breaches of this policy or other legal requirements, such as the DSA, GDPR, GPSD, ECD or copyright law.

From a consumer perspective, both terms should be subject to a rebuttable presumption that, in cases of doubt, the person concerned is deemed to be an influencer or coach. When establishing a new definition for influencers, it is also important to bear in mind that platforms sometimes function as intermediaries for influencers, for example via the TikTok Creator Marketplace or the YouTube Partner Programme. It should be clarified here who bears editorial responsibility.

→ Disclosure and labelling requirements for influencers and coaches

Influencers and coaches should be subject to statutory disclosure and labelling requirements, which should ideally be standardised so that the disclosed or labelled information is easily identifiable (see Article 6(a) of the E-Commerce Directive). For example,

disclosures should clearly, concisely and prominently identify the third party or parties being promoted, any benefits or remuneration received for promotional activities on their behalf, the sources of posted information, and the factual basis for that information, with the latter points being particularly relevant to influencers. Such disclosure or labelling is also helpful for assessing the applicability of the UCP Directive.

In the event of a breach or a failure to disclose, or in cases of doubt, relaxed standards of proof or rebuttable presumptions should be established to enable or facilitate the application of the provisions to be laid down by law.

→ **Certificate of Competence for influencers and fitfluencers**

Influencers in the influencer industry generally function as private individuals and become taxable sole traders only once they reach a certain income threshold, while online coaches, trainers and consultants focus on delivering services wholly or partly online in exchange for payment or other consideration from their followers. As a rule, these services are linked to the sale, brokerage or promotion of products and services (whether their own or provided by others). Hence, coaches are also influencers. The same rules must apply to them online as they do offline. If a Certificate of Competence is required offline for a specific activity, the same requirement should apply online to ensure fair competition. In Austria, this applies to the finance, health and nutrition sectors. To ensure that consumers can make informed decisions, influencers should be required to provide information on their qualifications, ideally via publicly accessible forms on video-sharing platforms.

→ **EU-wide public register for influencers**

In the interests of transparency, AK proposes an EU-wide influencer register providing free access to basic information on influencers and coaches, including at least their name, address, sector, contact details, Certificate of Competence and date of initial registration.

→ **Joint and several liability across the entire value chain**

To cover any claims made by consumers, joint and several liability across the entire value chain should be standardised. Hence, liability should not only apply to influencers or coaches themselves, but also to the platform that enables the influencers' or coaches' presence or activities, any manufacturers of advertised products, and the agencies associated with the influencers or coaches. Accordingly, the risk mitigation obligation under Article 35 of the Digital Services Act (DSA) should not apply only to very large online platforms; all platforms should be required to

minimise harmful influencer or coaching content as far as possible.

→ **Social media use only after turning 14**

To protect children under the age of 14, they should not have access to social media platforms. Below this age threshold, it is difficult for children to avoid or recognize addictive mechanisms, cyberbullying, or misinformation present on these platforms.

Platform operators should therefore be required to implement an age restriction, which makes access to the platform only possible after a person has reached the age of 14. To this end, only the confirmation of having reached the minimum age should be transmitted to the platform; personal data should not be shared. Biometric methods or methods for age verification based on behavioral analysis are therefore not an option.

General obligation to filter manifestly unlawful advertising

For consumers, the harm is the same whether aggressive, intrusive or deceptive advertising appears on a video platform, website or social media. The purpose of protection remains the same regardless of the service: online service, media or website providers should take measures to ensure that users are not exposed to illegal advertising in the first place (such as filtering out advertising content that acts as a gateway for cybercrime practices, e.g. advertising for fake shops).

Establishing clear rules on advertising and marketing aimed at children and young people

Clear legal rules are needed for advertising and marketing aimed at children and young people that promote 'unhealthy' or 'dangerous' products, behaviours or services, whether on traditional television, streaming services or video platforms, including through influencers. This is urgently required to ensure consistent enforcement and equivalent protection for minors throughout the EU and across all audiovisual content. Current co-regulatory arrangements in both sectors have produced uneven enforcement and remain cumbersome, opaque and slow.

When users report inappropriate advertising to video platforms, these reports often go unheeded. The self-regulatory bodies, for their part, are fragmented (covering advertising, influencers and the protection of minors) and do not operate in a consistent manner;

in some cases, their processes lack transparency and are always assessed on a case-by-case basis. Similar adverts remain unaffected by any action taken by the self-regulatory bodies and continue to be broadcast or remain online. The system consumes resources, often expects complainants to have knowledge they may lack, and, as numerous studies have shown, is ultimately ineffective (see, for example, [BEUC report on food marketing to children](#) or [BEUC press release on unhealthy food advertising to children](#) or [vzbv report on ineffective voluntary commitments for children's food marketing](#) or [reposit.haw-hamburg.de](#)).

→ **Challenging “unhealthy” food advertising and protecting children and young people online**

Clear, uniform rules are urgently needed on which food and drink products should not be advertised to minors. The guidelines must be clear and practical, focusing on health protection for food and on safeguarding children and young people in relation to other products and services, such as caffeine sticks, nicotine pouches, teeth whitening and cosmetic procedures.

Numerous tests and studies in recent years have shown that, across all investigations, more than two-thirds of food advertising in audiovisual media relates to **HFSS products**, despite voluntary commitments to the contrary by the food and advertising industries. HFSS products are foods or drinks that are high in fat, sugar and/or salt. This applies to television advertising as well as advertising on video platforms or product recommendations or placements by influencers or online coaches. This applies just as much to television advertising as it does to advertising on video platforms or product recommendations and placements by influencers or online coaches..

→ **Single point of contact for complaints**

Member States should establish a single point of contact for complaints, regardless of the product or service being advertised.

→ **Make nutrition profiles mandatory in food advertising: implement the WHO recommendation**

Nutrient profiles for food and drink can effectively guide advertising and marketing aimed at children and young people, improve the dietary environment for adolescents and strengthen their health literacy. Advertising for fruit, vegetables, unsweetened drinks and healthy snacks should remain permitted, while advertising should not encourage the consumption of sweets, soft drinks or fast food, whether directly or indirectly. The WHO Europe nutrient profiles, which have been in use for years in several countries for self-regulation or official monitoring (in some cases adapted to the national food market), are used to

regulate food advertising aimed at minors ([New WHO Guidelines to Protect Children from Unhealthy Food Marketing](#)). Advertising regulation is also one of the WHO's ‘best buys’ for preventing cardiovascular diseases, the leading cause of premature death in the EU, which place a heavy burden on healthcare systems and cause significant individual suffering. WHO nutrient profiles are evidence-based, practical and easy to understand. They set maximum levels for fat, sugar and salt for various food groups. Products exceeding these limits are prohibited from being advertised to minors. Nutrient profiles should not only apply to advertising slots during and around children's programmes but should also take into account the actual viewing and consumption habits of children and young people. Advertising for HFSS products should therefore be banned across all audiovisual media when children and young people are likely to use them.

Self-regulation by the food and advertising industries in many EU countries has proven largely ineffective, as shown by the findings of the ‘EU Pledge’ (see links above) and other evaluations. Continuing with this model of control would be even less effective in addressing current and future challenges.

Clear, binding nutrient-profile rules, official monitoring and swift enforcement will make the system future-proof, simplify the rules and ensure fair competition for audiovisual media services, advertisers, producers and consumers across the EU.

→ **Dietary supplements online: operating largely as a wild west market**

We also find the uncritical promotion of dietary supplements on social media concerning, particularly in the fitness and beauty sectors, which are very popular among young people. Often, supplements that are ineffective or even dangerous are marketed in circumvention of the requirements of the EU Health Claims Regulation (see, for example, here: [ScienceDirect: Influencers as Sources of Health Information](#) and here [Healthfluencer and social-media](#) and here [DocCheck: Dietary Supplements – the Lies of Influencers](#)) are promoted/recommended by fitness and beauty influencers, usually at higher prices than comparable products in high street shops. It is also common for advertisers to unlawfully claim or imply that a normal diet cannot provide all necessary nutrients and that food supplements are therefore essential or needed to achieve certain goals or prevent disease (see the prohibition in Article 7 of the EU Food Supplements Directive [EUR-Lex: Directive 2002/46/EC on food supplements](#)). Doctors, dietitians and other healthcare professionals may not advertise products using health claims. Advertising relating to

specific diseases is generally prohibited. However, online compliance with these rules remains very low, particularly among those without medical training.

Influencers and coaches who recommend supplements should therefore hold a recognised qualification in nutrition and/or health to ensure a minimum quality standard. A person's Certificate of Competence providing health and nutritional advice in connection with a product (or service) should therefore be clearly stated alongside the relevant

content. We consider the same to be necessary for financial and investment advice (see above for further details). EU food supplement law also requires labels to state that supplements do not replace a balanced diet and that the recommended daily intake must not be exceeded. These warnings should also be mandatory in all advertising, comparable to the required statement in advertisements for over-the-counter medicines: "For information on effects and side effects, see the package leaflet or consult your doctor or pharmacist."

Contact Us!

In Vienna:

Jasmin Reininger

T +43 (1) 501 65 12801

jasmin.reininger@akwien.at

Petra Lehner

T +43 (1) 501 65 12723

petra.lehner@akwien.at

Austrian Federal Chamber of Labour

Prinz-Eugen-Straße 20-22

1040 Wien, Österreich

T +43 (0) 1 501 65-0

www.arbeiterkammer.at

In Brussels:

Alice Wagner

T +32 (2) 230 62 54

alice.wagner@akeuropa.eu

AK EUROPA

Permanent Representation of Austria to the EU

Avenue de Cortenbergh 4-10

1040 Brussels, Belgium

T +32 (0) 2 230 62 54

About Us

The Austrian Federal Chamber of Labour (AK) is by law representing the interests of about 4 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the 1991 established AK EUROPA Office in Brussels are the representation of AK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant Information from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.