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**Accessibility of Audiovisual Media Services for Persons with
Disabilities in the European Union: Lights and Shadows of the
Audiovisual Media Services Directive**

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Accessibility of Audiovisual Media Services for Persons with Disabilities in the European Union: Lights and Shadows of the Audiovisual Media Services Directive

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Abstract

Compliance with the comprehensive obligations included in the United Nations Convention of the Rights of Persons with Disabilities (CRPD), alongside increasing attention to accessibility of goods and services in the EU, supported the inclusion of more stringent accessibility provisions in the 2018 revised Audiovisual Media Services Directive (AVMSD). The current text of the AVMSD represents a step forward in aligning with the obligations provided in the CRPD. However, from a disability perspective, the text of this Directive still presents ‘light and shadows’. The AVMSD leaves a range of grey areas that may de facto lead to uneven access across the EU. This article explores the extent to which the AVMSD fulfils the obligations of the CRPD, in particular with regard to Articles 21 and 30 CRPD. The article first introduces the CRPD and the extent to which it promotes access to audiovisual media services. It then describes the AVMSD, its key concepts, its history, and its structure. Two sections focus on the accessibility provisions of the AVMSD and on their consistency with the CRPD. After an overview of national implementation measures of the AVMSD, the final section provides some concluding remarks which highlight that, although the 2018 revision of the AVMSD represents a significant step forward, issues persist concerning the application of accessibility measures to all kinds of disabilities, the definition of progressive and continuous process, the means to achieve accessibility, and exemptions and differentiated obligations.

Key-words

Audiovisual Media Services Directive – Accessibility – Disability – United Nations Convention on the Rights of Persons with Disabilities

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SUMMARY: 1. Introduction. – 2. The Convention on the Rights of Persons with Disabilities and Accessibility of Audiovisual Media Services. – 3. Audiovisual media services in EU law: A chronological account. – 4. Accessibility for persons with disabilities in the AVMSD. – 5. Reading the AVMSD through the disability lens. - 6. National implementations. – 7. Conclusion.

1. Introduction

Accessibility of audiovisual media services, i.e. services providing programmes aimed to inform, entertain, or educate the general public by means of electronic communications networks under the editorial responsibility of a media service provider, has become a key concern in the European Union (EU) in the last decades. This tallies with a shift towards universalist, user-centred, and proactive approaches to accessibility.¹ A renewed commitment to accessibility of audiovisual media services has also been prompted by a range of concurring legal and societal factors in a context dominated by the quick advancement in digital technologies (in particular, video-sharing platforms) and, more generally, by the surge of the digital economy.²

The main legal trigger has undoubtedly been the ratification of the United Nations Convention on the Right of Persons with Disabilities (CRPD)³ by the EU,⁴ alongside its Member States. As it will be discussed below, the CRPD includes accessibility among its general principles, and conceives it of as a ‘precondition for persons with disabilities to live independently and participate fully and equally in society’.⁵ The CRPD approaches accessibility ‘in all its complexity’,⁶ and accessibility obligations are included throughout the text of the Convention. While it does not specifically

¹ Gian Maria Greco, “Fostering Unity in Diversity: The Social Value of European Research on Media Accessibility,” *Euroscientist*, May 13, 2019, <https://www.researchgate.net/deref/https%3A%2F%2Fwww.euroscientist.com%2Ffostering-unity-in-diversity-the-social-value-of-european-research-on-media-accessibility%2F>. See also Gian Maria Greco, “The Nature of Accessibility Studies,” *Journal of Audiovisual Translation* 1, no. 1 (November 14, 2018): 205–32, <https://doi.org/10.47476/jat.v1i1.51>.

² Antonios Vlassis, “The review of the Audiovisual Media Services Directive. Many political voices for one digital Europe?,” *Politique européenne* 56, no. 2 (2017): 104, <https://doi.org/10.3917/poeu.056.0102>.

³ United Nations Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106.

⁴ Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2009] OJ L 23/35.

⁵ UN Committee on the Rights of persons with Disabilities, *General Comment on Article 9 of the Convention*, UN Doc. CRPD/C/GC/2 (2014), para 13.

⁶ Committee on the Rights of Persons with Disabilities, “General Comment No. 2, Article 9: Accessibility” (United Nations, May 22, 2014), para. 13, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/033/13/PDF/G1403313.pdf?OpenElement>.

address audiovisual media services, Article 21 CRPD obliges States Parties to adopt ‘appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice’. Further, Article 30 CRPD protects and promotes the right of persons with disabilities to participate in cultural life - encompassing their right to access but also to engage in the creation of cultural goods and services. Notably, Article 30(1) CRPD requires States Parties to ensure *inter alia* that persons with disabilities have access ‘to *television programmes, films, theatre and other cultural activities, in accessible formats*’.

The need to comply with the obligations included in the CRPD, alongside spurring growing attention to accessibility of goods and services in the EU,⁷ supported the inclusion of more stringent accessibility provisions in the 2018 revised Audiovisual Media Services Directive (AVMSD),⁸ compared to its predecessor.⁹ Furthermore, accessibility of audiovisual media services is boosted by the synergy between the AVMSD and other EU legal sources such as the European Accessibility Act (EEA),¹⁰ which covers ‘consumer terminal equipment with interactive computing capability, used for accessing audiovisual media services’,¹¹ albeit only those placed on the market after 28 June 2025.

The current text of the AVMSD represents a step forward in aligning with the capacious obligations provided in the CRPD. However, from a disability perspective, the text of this Directive still presents ‘light and shadows’. Against this background, this article discusses the extent to which the AVMSD ensures access for persons with disabilities, taking into account that audiovisual media ‘is vital in defining the cultural landscape of modern societies’.¹² This article also reflects on the fact that, being a minimum harmonization directive, as already noted by the European Disability

⁷ Delia Ferri, “The Role of the European Union in Ensuring Accessibility of Cultural Goods and Services: All about that ... Internal Market?” (Forthcoming 2023). See also Delia Ferri and Katie Donnellan, ‘The Implementation of the Marrakesh Treaty in the European Union: An Important Piece in the Accessibility Jigsaw?’ (2022) *Legal Issues of Economic Integration*, 49 (3) pp. 269-292.

⁸ Directive 2018/1808/EU of the European Parliament and the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303/69.

⁹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1.

¹⁰ Directive 2019/882/EU of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services [2019] OJ L 151/70.

¹¹ Article 2(1)(d).

¹² European Disability Forum, “Audiovisual Media Services Directive,” December 15, 2020, <https://www.edf-feph.org/audiovisual-media-services-directive/>.

Forum,¹³ the AVMSD leaves a range of grey areas that may *de facto* lead to uneven access across the EU and discusses the implementation at the national level. The section on national implementation measures is based on the database of the European Audiovisual Observatory and its Revised AVMSD Tracking Table,¹⁴ ERGA Reports, reports from EU institutions,¹⁵ and the 2022 Report of Media Pluralism Monitor.¹⁶ While scholarly work on the AVMSD has focused on the relationship between audiovisual media services and cultural diversity¹⁷ and democracy¹⁸, and while there is burgeoning literature on accessibility of goods and services in the EU,¹⁹ as yet, limited attention has been paid to accessibility provisions in the AVMSD, and usually literature has analysed those in combination with other instruments.²⁰ This article aims to fill this gap by discussing the extent to which the AVMSD fulfils the obligations of the CRPD, in particular with regard to Articles 21 and 30 CRPD.

Further to this introduction, the article introduces the CRPD and the extent to which it promotes access to audiovisual media services. It then briefly describes the AVMSD, its key concepts, its history, and its structure. The subsequent sections focus on the provisions on access to audiovisual media services for persons with disabilities under the AVMSD and on their consistency with the CRPD with regard to the definition of persons with disabilities, progressive and continuous process,

¹³ European Disability Forum, “Audiovisual Media Services Directive: Toolkit for Transposition,” November 2019, 14, <https://www.edf-feph.org/publications/accessibility-of-audiovisual-media/>.

¹⁴ Available at <https://www.obs.coe.int/en/web/observatoire/avmsd-tracking> (last access 12 October 2022). All translations of national implementations indicated below are provided in the AEO website through the above link.

¹⁵ Nora Wukovits, “Transposition of the 2018 Audiovisual Media Services Directive Implementation in Action” (European Parliamentary Research Service (EPRS), October 2022).

¹⁶ Konrad Bleyer-Simon et al., “Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the Year 2021,” Technical Report (Centre for Media Pluralism and Media Freedom (CMPF), Media Pluralism Monitor (MPM), European University Institute, 2022), <http://hdl.handle.net/1814/74712>.

¹⁷ See, for instance, Mira Burri-Nenova, “The New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity,” *Common Market Law Review* 44, no. 6 (2007): 1689–1725; Mira Burri, “Cultural Diversity and the EC Audiovisual Media Services Directive: Beyond the Handsome Rhetoric,” *SSRN Scholarly Paper* (Rochester, NY, March 30, 2009), <https://doi.org/10.2139/ssrn.1370439>; Natali Helberger, ed., “Special Issue: Media Diversity from the User’s Perspective,” *Journal of Information Policy* 1 (2011): 241–377, <https://doi.org/10.5325/jinfopoli.1.2011.0241>; Mira Burri, “The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after Its Entry into Force,” *International Journal of Cultural Property* 20, no. 4 (2013): 357–80; Evangelia Psychogiopoulou, “The Audiovisual Media Services Directive and the Promotion of European Works: Cultural Mainstreaming Revisited,” in *Research Handbook on EU Media Law and Policy*, ed. Pier L. Parcu and Elda Brogi (Cheltenham, UK: Edward Elgar Publishing, 2021), 32–53.

¹⁸ Mirjam Gollmitzer, “Industry versus Democracy: The New Audiovisual Media Services Directive as a Site of Ideological Struggle,” *International Journal of Media & Cultural Politics* 4, no. 3 (2008): 331–48, https://doi.org/10.1386/macp.4.3.331_1.

¹⁹ See Delia Ferri, “The European Accessibility Act and the Shadow of the “Social Market Economy”” (2020) *European Law Review*; Delia Ferri and Katie Donnellan, “The Implementation of the Marrakesh Treaty in the European Union: An Important Piece in the Accessibility Jigsaw?” (2022) *Legal Issues of Economic Integration*, 49 (3) pp. 269–292. See also Stelios Charitakis, *Access Denied: The Role of the European Union in Ensuring Accessibility under the United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2018).

²⁰ Lisa Waddington, “Regulating E-Accessibility and Digital Equality in Europe from a Multilevel Perspective,” in *Building an Inclusive Digital Society for Persons with Disabilities: New Challenges and Future Potentials*, ed. Carola Ricci (Pavia: Pavia University Press, 2019), 3–18.

and means to achieve accessibility. After an overview of national implementation measures, the concluding section discusses lights and shadows of the AVMSD in light of the CPRD.

2. The Convention on the Rights of Persons with Disabilities and Accessibility of Audiovisual Media Services

The CRPD was adopted on 13 December 2006 by the UN General Assembly. It is underpinned by the social²¹ or social contextual²² model of disability, which focuses on the interaction between the individual's impairment and societal as well as environmental barriers.²³ In particular, Article 1(2) CRPD states that '[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. This broad conceptualisation of disability should also be interpreted in light of the Preamble, which affirms that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

The CRPD is also considered a blueprint in the evolution of disability rights at the international level given that it embeds the human rights model of disability.²⁴ Degener argues that this model emphasises the human dignity of persons with disabilities, and 'encompasses both sets of human rights, civil and political as well as economic, social and cultural rights'.²⁵ The human rights model is rooted in the general principles provided for in Article 3 CRPD. Alongside dignity, autonomy, non-discrimination and equality, and participation, this provision mentions accessibility as a general principle. According to the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), it is 'no coincidence that accessibility is one of the principles on which the [CRPD] is based'. Accessibility is in fact 'a vital precondition for the effective and equal enjoyment of civil, political, economic, social and cultural rights by persons with disabilities', and an enabler of independent living. Further it can be seen as a 'pragmatic translation of the principle of equality',²⁶

²¹ Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Abingdon: Routledge, 2014).

²² Andrea Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Cambridge: Intersentia, 2015).

²³ Andrea Broderick and Delia Ferri, *International and European Disability Law and Policy: Text, Cases and Materials* (Cambridge: Cambridge University Press, 2019), 3.

²⁴ Theresia Degener, "A New Human Rights Model of Disability," in *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, ed. Valentina Della Fina, Rachele Cera, and Giuseppe Palmisano (Cham: Springer, 2017), 41–59

²⁵ *Ibid.*, 44.

²⁶ Delia Ferri, "The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EU/EC: A Constitutional Perspective," in *European Yearbook of Disability Law*, ed. Lisa Waddington and Gerard Quinn, vol. 2

or as Broderick puts it, ‘accessibility obligations in the Convention are intrinsically linked to other norms, namely the rights to equality/non-discrimination and reasonable accommodation’.²⁷

The CRPD embraces a broad understanding of accessibility, including physical accessibility, economic accessibility (i.e., affordability), and accessibility of information,²⁸ and it addresses accessibility ‘in all its complexity’.²⁹ Article 9(1) CRPD requires States Parties to the Convention to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

Article 9(2) CRPD sets forth a wide range of detailed obligations. It requires States Parties to develop accessibility standards. Article 9(2)(b) and 9(2)(d) CRPD make clear that States Parties must ensure that private entities provide for accessible buildings, services, and facilities. In its General Comment No. 2, the CRPD Committee confirms that, ‘[a]s long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise’.³⁰

The CRPD Committee recognises that the implementation of Article 9 is subject to the doctrine of progressive realisation.³¹ However, the Committee has not yet clarified the nature of CRPD accessibility obligations. In its General Comment No. 2, the CRPD Committee states that lack of accessibility should be considered discriminatory ‘where the service or facility was established after relevant accessibility standards were introduced’, or ‘where access could have been granted to the facility or service (when it came into existence) through reasonable accommodation’.³² As Lawson observed ‘more considered and more explicit discussion of progressive realisation would both help to provide clarity about the implementation of article 9 and also to position article 9 more securely on well-worked ground provided by other treaty bodies – particularly the Committee on Economic Social and Cultural Rights (CESR)’.³³ The CRPD Committee, however, did provide indications on how to ensure gradual implementation, by indicating that State Parties must adopt, promulgate, and

(Antwerp: Intersentia, 2010), 54.

²⁷ Andrea Broderick, “Of Rights and Obligations: The Birth of Accessibility,” *The International Journal of Human Rights* 24, no. 4 (April 20, 2020): 396, <https://doi.org/10.1080/13642987.2019.1634556>. Andrea Broderick (2020) Of rights and obligations: the birth of accessibility, *The International Journal of Human Rights*, 24:4, 393-413.

²⁸ See Broderick and Ferri, *International and European Disability Law and Policy*, 131–58.

²⁹ CRPD Committee, General Comment No. 2, para. 13.

³⁰ CRPD Committee, General Comment No. 2, para. 13.

³¹ CRPD Committee, *General Comment No. 6 on equality and non-discrimination*, 26 April 2018, UN Doc. CRPD/C/GC/6, para. 42.

³² CRPD Committee, General Comment No. 2, para. 31.

³³ Anna Lawson, “Article 9: Accessibility,” in *The Convention on the Rights of Persons with Disabilities: A Commentary*, ed. Ilias Bantekas, Michael Ashley Stein, and Dimitris Anastasiou (Oxford: Oxford University Press, 2018), 260–61.

monitor accessibility standards.³⁴ State Parties must adopt a suitable legal framework where gaps are identified, monitored, and addressed; where information and communications technologies are included in the definition of accessibility; and where laws and regulation are reviewed and adopted in consultation with persons with disabilities and their organisations as well as relevant stakeholders.³⁵ The UN Committee also suggested that States Parties to the CRPD should adopt action plans and strategies for identifying barriers to accessibility (to be strictly implemented), set time frames with deadlines, and provide human and material resources that are necessary to remove the barriers and to ensure monitoring.³⁶

Accessibility obligations also permeate other articles of the CRPD. Article 21 CRPD focuses on access to information, within the remit of freedom of expression, and provides that State Parties must take appropriate measures to ensure that persons with disabilities may exercise these rights on an equal basis with others and through all forms of communication of their choice, including information and services in accessible formats and technologies that are appropriate for different kinds of disabilities (covering also the mass media), sign language, Braille, augmentative and alternative communication, and ‘all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions’. Such measures must be intended broadly and entail the identification and eliminations of obstacles and barriers that prevent the enjoyment of all the rights.

Notably, the interpretation of ‘information and communications technologies and systems’ for the purpose of Articles 9 and 21 is generally broad and includes ‘a wide range of access technologies, such as radio, television, satellite, mobile phones, fixed lines, computers, network hardware and software’.³⁷

It is also worth recalling Article 30 CRPD. This provision obliges States Parties to recognize the right of persons with disabilities to participate in cultural life, and *inter alia* to ensure access to goods and services. Appropriate measures must ensure that persons with disabilities enjoy, among others, ‘access to *television programmes, films, theatre and other cultural activities, in accessible formats*’.

³⁴ CRPD Committee, General Comment No. 2, para. 28.

³⁵ Ibid.

³⁶ Ibid., para. 33.

³⁷ Ibid., para. 5.

3. Audiovisual media services in EU law: A chronological account

A. The road towards the 2018 AVMSD

Following European Commission's work that gave rise the Community's audiovisual policy in the mid-1980s,³⁸ the Television without Frontiers Directive (TVWF)³⁹ was finally adopted in 1989 and represented the first relevant EU source on audiovisual media services. This Directive, no longer in force, aimed to ensure the free movement of broadcasting services within the internal market while at the same time preserving public interest objectives such as cultural diversity, the right of reply, consumer protection, and the protection of minors. Television broadcasting was defined as the 'initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public'.⁴⁰ Although the TVWF was inspired by, and was to a great extent similar to, the European Convention on Transfrontier Television⁴¹ of the Council of Europe, its focus was to ensure the free movement of broadcasting services within the internal market. The TVWF (and the later AVMSD) was therefore grounded in industrial policy, rather than in cultural policy and freedom of expression.⁴² The TVWF was an internal market instrument based on former Article 47(2) and to Article 55 EC (now Article 53 and Article 62 TFUE), which concerned the harmonisation instruments aimed to ensure free movement of establishment and services.⁴³ Only after the adoption of the TVWF, the audiovisual sector was explicitly mentioned by the Treaty of Maastricht of 1992 under Article 128 within the title IX 'Culture', even though media services had already been fallen within the scope of EU law by virtue of the case law of the Court of Justice (CJEU) related to free movement.⁴⁴

Due to technological advances and a changed environment, the TVWF was amended in 1997⁴⁵ and in 2007.⁴⁶ The latter amendment included references to audiovisual media services and constitutes the basis upon which the AVMSD was codified in 2010. The choice to refer to 'audiovisual media

³⁸ Beginning with the Commission's Green Paper on the Establishment of a Common Market in Broadcasting of 1984: beginning of Community's audiovisual policy.

³⁹ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298/30.

⁴⁰ Article 1(a), TVWF (1989).

⁴¹ Council of Europe, European Convention on Transfrontier Television, Strasbourg, 5.V.1989.

⁴² Sally Broughton Micova, "The Audiovisual Media Services Directive," in *Research Handbook on EU Media Law and Policy*, ed. Pier L. Parcu and Elda Brogi (Cheltenham, UK: Edward Elgar Publishing, 2021), 265.

⁴³ Burri-Nenova, "The New Audiovisual Media Services Directive", 1698.

⁴⁴ Ibid., 1693. Reference is made, in particular, to the case law of the Court of Justice beginning with Case C-155/73 *Giuseppe Sacchi*, EU:C:1974:40.

⁴⁵ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L 202/60.

⁴⁶ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L 332/27.

services' was due to the need to use a broader notion that would cover new technologies. The 2010 Directive defined audiovisual media services under Article 1(1)(a) as

a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph;

This definition contained six essential elements: an audiovisual media service is a service (as defined by the Treaties); provided under editorial responsibility of a media service provider; provided for the principal purpose of programmes (which are moving images with or without sound); that inform, entertain, or educate; by electronic communications networks.⁴⁷

The cultural aims of the 2010 Directive were not dissimilar from those that had been established under the TVWF, in that it characterised itself primarily (albeit not exclusively) as internal market instrument. However, the AVMSD included a reference to the observance of the UNESCO Convention on Cultural Diversity in the preamble (Recital 7), in the attempt to embed a better balance between market and cultural concerns.

B. The 2018 AVMSD

In 2018, the AVMSD was amended by Directive 2018/1808⁴⁸ within the framework of the Digital Single Market Strategy - adopted in 2015 with the aim, among others, to increase access to digital goods and services for consumers and businesses across Europe.⁴⁹ The revised AVMSD is currently composed of twelve chapters respectively focusing on definitions, general provisions for audiovisual media services, provisions applicable to audiovisual media services, provisions concerning exclusive rights and short news reports in television broadcasting, promotion of distribution and production of television programmes, television advertising and teleshopping, right

⁴⁷ Burri-Nenova, "The New Audiovisual Media Services Directive", 1702–3.

⁴⁸ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303/69.

⁴⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Digital Single Market Strategy for Europe', COM/2015/192 final, para. 1.

of reply in television broadcasting, provisions applicable to video-sharing platform services, contact committee, regulatory authorities and bodies of the Member States, and final provisions.

Directive 2018/1808 was primarily aimed to extend the rules on audiovisual media services also to video-sharing platforms and other audiovisual content, on granting flexibility on the restrictions envisaged for TV and on reframing the country-of-origin principle. It also aimed to strengthen the promotion of European works (extending quota obligations to on-demand services), as well as to enhance the protection of children and better address hate speech. It further includes new provisions related to accessibility for persons with disabilities.

One of the most important innovations of the 2018 revision, establishing the foundation for future developments,⁵⁰ concerned the institutionalisation of National Regulatory Authorities and Bodies (NRAs) and the European Regulators Group for Audiovisual Media Services (ERGA). Article 30 AVMSD prescribes that NRAs are bodies that exercise their functions impartially and transparently and in accordance with the objectives of the AVMSD: media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.

The innovations of the 2018 revised AVMSD should now be read in coordination with recently adopted EU legal acts. The European Accessibility Act (EAA), under Recital 11, highlights the ‘need for concerted action to ensure that electronic content, electronic communications services and access to audiovisual media services are fully available to persons with disabilities.’ According to the EAA ‘access to audiovisual media services should mean that the access to audiovisual content is accessible, as well as mechanisms that allow users with disabilities to use their assistive technologies’ (Recital 31), including websites, online applications, set-top box-based applications, downloadable applications, mobile device-based services (covering mobile applications), and related media players as well as connected television services. Besides the EAA, the Web Accessibility Directive developed sector-specific legislation focusing on accessibility of private broadcasters (Recital 23).⁵¹ The recent Digital Services Act (DSA) of October 2022⁵² will be relevant for the AVMSD because ‘not only addresses players in the distribution and value chain of audiovisual content but also has direct overlaps in its catalogue of duties with the AVMSD.’⁵³ In

⁵⁰ M. D. Cole and C. Etteldorf, ‘Research for CULT Committee - The Implementation and Future of the revised Audiovisual Media Services Directive: Policy Recommendations. Concomitant expertise for Implementation report’, European Parliament [November 2022] PE 733.099, 5.

⁵¹ Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L 327/1.

⁵² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

⁵³ Mark D. Cole and Christina Etteldorf, “Research for CULT Committee - The Implementation and Future of the Revised Audiovisual Media Services Directive: Policy Recommendations” (European Parliament, CULT Committee,

this regard, although the DSA envisages a ‘without prejudice’ clause in relation to the AVMSD, this would not necessarily prevent practical conflict cases and establish sufficiently clear rules applicable to different supervisory regimes.⁵⁴ Further, coordination will need to be ensured also with the Digital Markets Act,⁵⁵ the Regulation on Terrorist Content Online⁵⁶, the Regulation Proposal on Child Sexual Abuse Material,⁵⁷ and the proposed Regulation on Political Advertising.⁵⁸ Particularly relevant is the proposed European Media Freedom Act,⁵⁹ which aims to revise the AVMSD for increasing cooperation within the ERGA. ERGA will in fact be transformed into the European Board for Media Services with a broader scope of action and additional tasks.⁶⁰

Future actions concerning media at the EU level are expected to pay special attention to accessibility for persons with disabilities. In 2020, the European Commission in fact stated that it will take into consideration the ‘need for an inclusive European media sector’, specifically mentioning access to content for persons with disabilities and the need of consistency with the CRPD.⁶¹ In 2022, the Commission further declared that digital transformation should ‘notably include elderly people, persons with disabilities, or marginalised, vulnerable or disenfranchised people and those who act on their behalf’.⁶²

4. Accessibility for persons with disabilities in the AVMSD

The TVWF did not contain any reference to the rights of persons with disabilities. By contrast, under the 2010 AVMSD, the right of persons with disabilities to participate and be included in cultural life was expounded in then Recital 46 of its preamble.

The current text of the AVMSD, as revised in 2018, includes different references to persons with disabilities and explicitly mentions the CRPD in the Preamble. Current Recital 22 reads that

November 2022), 9.

⁵⁴ Ibid.

⁵⁵ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1.

⁵⁶ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021], OJ L 172/79.

⁵⁷ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse’ [2022] COM/2022/209 final.

⁵⁸ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising’ [2021], COM/2021/731 final.

⁵⁹ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU’, [2022] COM/2022/457 final.

⁶⁰ Ibid., see Articles 7-16 of the proposed European Media Freedom Act.

⁶¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Europe’s Media in the Digital Decade: An Action Plan to Support Recovery and Transformation’ [2020] COM/2020/784 final, p. 4-5 and footnote 14.

⁶² European Commission, ‘European Declaration on Digital Rights and Principles for the Digital Decade’ [2022] COM/2022/28 final, Chapter II: Solidarity and inclusion.

accessibility of audiovisual media services is ‘an essential requirement in the context of the commitments taken under the [CRPD]’. Along the lines of former Recital 46, this recital also affirms that the ‘right of persons with an impairment and of the elderly to participate and be integrated in the social and cultural life of the Union is linked to the provision of accessible audiovisual media services’. The current text of the AVMSD Preamble further requires Member States ‘without undue delay, [to] ensure that media service providers under their jurisdiction actively seek to make content accessible to persons with disabilities, in particular with a visual or hearing impairment’, although it recognises the progressive nature of accessibility obligations. Recital 23 includes among the means to achieve accessibility of audiovisual media services ‘sign language, subtitling for the deaf and hard of hearing, spoken subtitles, and audio description’. Recital 24 refers to exceptions when it comes to emergency information, which may not be provided in a manner that is accessible to persons with disabilities. However, the recital clarifies that ‘such exceptional cases should not prevent emergency information from being made public through audiovisual media services’.

The scope of the Directive extends to audiovisual media services but ‘does not cover features or services providing access to audiovisual media services, nor does it cover accessibility features of electronic programme guides’.

Article 7 specifically focuses on accessible audiovisual media services for persons with disabilities. The 2010 version of Article 7 AVMSD consisted in only one paragraph and merely envisaged that Member States must ‘*encourage* media service providers under their jurisdiction to ensure that their services are gradually made accessible to *people with a visual or hearing disability*.’ Article 7 of the revised 2018 AVMSD is stricter and more detailed. Namely, Article 7(1) AVMSD provides that Member States must ‘ensure, without undue delay’ that services are made ‘continuously and progressively’ more accessible to persons with disabilities through ‘proportionate measures’. As the European Regulators Group for Audiovisual Media Services (ERGA) underlined, not only the wording ‘ensure, without undue delay’ is firmer and more urgent than ‘encourage’, but the new version also establishes that audiovisual media services must be accessible to persons with any kind of disability and not only to ‘people with a visual or hearing disability’ (although ERGA recognizes that Recital 22 still gives particular emphasis to the latter category).⁶³

Article 7(2) AVMSD requires that media services providers report to the NRAs on their implementation measures and that Member States must report to the Commission by 19 December

⁶³ ERGA Subgroup 3 – Taskforce 1, “Annex 1 to Final Report of Subgroup 3, ‘Changes to the Material Rules for Audiovisual Media Services,’” 2019, 14, https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_SG3_Report_Annex-I_TF1-Paper.pdf.

2022 and every three years thereafter. Furthermore, Article 7(3) provides that Member States must encourage media services providers to develop accessibility action plans, which must be communicated to NRAs. In addition, a single online point of contact must be established by Member States with the power to provide information and to receive complaints about accessibility issues (Article 7(4)). The online point of contact must be easily accessible for persons with disabilities and publicly available. Specific reference is made to accessible emergency information (including public communications and announcement in natural disasters situations) through audiovisual media services (Article 7(5)). In that regard, as mentioned above, Recital 24 recognizes that in some cases it could not be possible to provide emergency information so that it is accessible to persons with disabilities. These are however exceptional cases and should not affect the publication of emergency information through audiovisual media services.

Further provisions of the AVMSD that relate to disability are to be placed in the more general context of preventing and countering discrimination. For instance, Article 9(c)(ii) AVMSD prescribes that Member States must ensure that audiovisual commercial communications by media service providers under their jurisdiction do not ‘include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation’. Article 15(1) AVMSD further reads that, for the purpose of short news reports, Member States have the obligation to guarantee access to events of high interest to the public on a fair, reasonable, and non-discriminatory basis if they are transmitted on an exclusive basis. Furthermore, Article 30 AVMSD ensures that NRAs exercise their functions while considering, among other things, media pluralism, cultural and linguistic diversity, accessibility, and non-discrimination.

5. Reading the AVMSD through the disability lens

A. The Blurred contours of the definition of ‘persons with disabilities’ within the AVMSD

According to Recital 22, ‘the term “persons with disabilities” should be interpreted in light of the nature of the services covered by that Directive, which are audiovisual media services’. The recital further reads that ‘persons with an impairment’ and ‘the elderly’ have the right to participate and be integrated in the social and cultural life as well as that Member States must ensure that media service providers ‘seek to make content accessible to persons with disabilities, in particular with *a visual or hearing impairment*’. Recital 23 refers to subtitling for the deaf and the hard of hearing. While the AVMSD recalls the CRPD, the meaning of persons with disabilities must be understood ‘in light of the nature of the services covered by that Directive, which are audiovisual media services’. A reference to a teleological interpretation of ‘persons with disabilities’ seems to allude to a definition which is narrower than the conceptualisation proffered by the CRPD.

The definitions of disability and of persons with disabilities are a debated issue in EU law. Those definitions have been at the centre of harsh debate within EU equality law, in particular with regard to Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive),⁶⁴ following the attempt of the CJEU to align with the social-contextual understanding of disability. Before the ratification of the CRPD, the Court had ruled on the interpretation of the concept of disability, and, in the case *Chacón Navas*,⁶⁵ adopted a medical oriented definition of disability.⁶⁶ Later case law, although adopting the definition of persons with disabilities contained in the CRPD, often neglected the role of barriers in generating a disability. In a particularly controversial case, *Z. v A Government department*,⁶⁷ the CJEU conflated the meaning of disability with the material scope of the Employment Equality Directive. Focusing on the fact that the Directive is establishing a general framework for countering discrimination with regard to employment and occupation and that the provisions of the Employment Equality Directive apply within those areas,⁶⁸ the CJEU concluded that

the concept of ‘disability’ within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person’s full and effective participation in professional life on an equal basis with other workers.

As Waddington authoritatively observed, while the Court recognised that Ms. Z may have been considered a person with disabilities under the CRPD, her condition did not constitute a disability under the Employment Equality Directive because it did not have any impact on her ability to work.⁶⁹ In doing so the judgment in practice relied upon a medical understanding of disability.⁷⁰ *Z. v A Government department* and the reading of disability in light of the purpose of the Directive and its material scope might prompt the CJEU to rely on the ‘nature of the services covered by the AVMSD’ to narrow the scope of accessibility obligations. It is not entirely clear how the nature of the services could support or mould the meaning of disability. A reference to barriers experienced in accessing audiovisual media services would certainly have been more consistent with the CRPD.

⁶⁴ Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

⁶⁵ Case C-13/05 *Chacón Navas v. Eurest -Colectividades SA*, EU:C:2006:456.

⁶⁶ Case C-13/05 *Chacón Navas v. Eurest -Colectividades SA*, para. 43.

⁶⁷ Case C-363/12 *Z. v A Government department and The Board of management of a community school*, EU:C:2014:159.

⁶⁸ Case C-363/12 *Z. v A Government department and The Board of management of a community school*, para. 64.

⁶⁹ Lisa Waddington, “Saying All the Right Things and Still Getting It Wrong: The Court of Justice’s Definition of Disability and Non-Discrimination Law,” *Maastricht Journal of European and Comparative Law* 22, no. 4 (August 1, 2015): 584–85, <https://doi.org/10.1177/1023263X1502200406>.

⁷⁰ *Ibid.*

However, such a reference to the nature of services coupled with the emphasis placed on sensory disabilities in Recital 22 (i.e., persons with ‘visual and hearing impairment’), although obvious, might once again justify leaving behind persons with intellectual disabilities and the use of easy-to-read language. Arguably, a narrower interpretation of persons with disabilities would also be in contrast with the intent to align with the CRPD (and therefore its broad conceptualisation of persons with disabilities) but also with the current letter of Article 7 AVMSD, from which the reference to ‘people with a visual or hearing disability’ was removed and substituted by that to ‘persons with disabilities’. The partially different wording between Recital 22 and Article 7(1) should be solved by adopting the broader interpretation of the latter, given also that recitals have no legal value, but are interpretative tools that cannot be in conflict with clearly formulated operative articles.⁷¹

Notably, the AVMSD - not differently from other instruments, such as the EAA⁷² - includes the term persons with disabilities alongside other terms (persons with an impairment and elderly). While those additional terms or definitions inevitably blur the CRPD definition, they may be used to expand the protection of the AVMSD.

B. Progressive and continuous process and Member States’ obligations

As noted above, with regard to accessibility requirements, Article 7(1) AVMSD establishes that ‘Member States shall ensure, without undue delay, that services provided by media service providers under their jurisdiction are made *continuously and progressively* more accessible to persons with disabilities through proportionate measures’.⁷³ The same language is used in Recital 22, under which ‘[a]ccessibility requirements should be met through a *progressive and continuous process*, while taking into account the practical and unavoidable constraints that could prevent full accessibility, such as programmes or events broadcast in real time’.

The reference to a continuous and progressive process for making audiovisual media services more accessible for persons with disabilities is in line with the nature of accessibility under the CRPD.

⁷¹ See Tadas Klimas and Jurate Vaiciukaite, “The Law of Recitals in European Community Legislation,” *ILSA Journal of International & Comparative Law* 15, no. 1 (2008): 61–94.

⁷² For example, the European Accessibility Act (EAA) does adopt the definition of persons with disabilities of the CRPD (Recital 3). However, it then distinguishes between persons with disabilities and ‘persons with functional limitations’ (Recital 4), such as elderly persons, pregnant women, and persons travelling with luggage, which are ‘persons who have any physical, mental, intellectual or sensory impairments, age related impairments, or other human body performance related causes, permanent or temporary, which, in interaction with various barriers, result in their reduced access to products and services, leading to a situation that requires those products and services to be adapted to their particular needs’. Interestingly, the Digital Service Act recalls the definition of persons with disabilities of the EAA and not directly the definition of the CRPD. Article 3 (v) in fact reads that “‘persons with disabilities’ means ‘persons with disabilities’ as referred to in Article 3, point (1), of Directive (EU) 2019/882 of the European Parliament and of the Council’.

⁷³ The first version of Article 7 merely provided that Member States should ‘encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability’.

The CRPD Committee recalled that '[b]arriers should be removed in a continuous and systematic way, gradually yet steadily'.⁷⁴ As mentioned above, the CRPD places emphasis on the monitoring of accessibility standards. In that regard, Article 7(2) AVMSD is consistent with the CRPD as it establishes that Member States must ensure that media service providers report on a regular basis to NRAs about their implementation of accessibility measures. National implementations must further be communicated by Member States to the European Commission every three years beginning with the deadline of 19 December 2022.

Other recommendations contained in CRPD Committee's General Comment No. 2 on accessibility are not however properly addressed. While in fact the monitoring is covered by Article 7 AVMSD through reports (which may contribute to identifying, monitoring, and addressing gaps in national legislation), the adoption of action plans is not as strictly envisaged. Member States must merely 'encourage' media service providers to adopt accessibility action plans that must be communicated to NRAs so as to guarantee the continuous and progressive process that aims to make audiovisual media services more accessible. Furthermore, the provisions on accessibility of Article 7 AVMSD do not mention reasonable accommodation, the need to review the national legal framework in consultation with persons with disabilities and their organisations, and necessary human and material resources for removing barriers and for ensuring monitoring.

C. Means to achieve accessibility

Member States must ensure accessibility to audiovisual media services through 'proportionate measures' (Article 7(1) AVMSD). The reference to proportionality interestingly recalls the proportionality test, which is composed in its conventional understanding of three tests: the suitability or appropriateness test, the necessity test, and the proportionality test *stricto sensu*.⁷⁵

Given that accessibility obligations are unconditional, it is unclear what factors the proportionality test should take into account. Understandably, technological limits and costs could be considered,⁷⁶ even though they cannot entail denial of accessibility.

Recital 23 of the AVMSD contains a non-binding and open list of means to achieve accessibility of audiovisual media services, which includes 'sign language, subtitling for the deaf and hard of hearing, spoken subtitles, and audio description'. The recital clarifies that these means 'should' be included but 'need not to be limited to' them. This list however focuses on persons with a visual or

⁷⁴ Committee on the Rights of Persons with Disabilities, 'General Comment No. 2, Article 9: Accessibility', para. 27.

⁷⁵ Tor-Inge Harbo, "The Function of the Proportionality Principle in EU Law," *European Law Journal* 16, no. 2 (2010): 165, <https://doi.org/10.1111/j.1468-0386.2009.00502.x>.

⁷⁶ See below section 6 D.

hearing impairment, again demonstrating a narrow interpretation of disability and neglecting other kinds of barriers.

6. National implementation

In its 2019 Report, ERGA listed potential challenges in the implementation of Article 7 AVMSD.⁷⁷ First of all, considering that Member States have adopted different regulatory and co-/self-regulatory systems, structural differences may determine the way rules are applied and potentially undermine the consistent application of the rules across EU Member States. Second, given that the AVMSD does not establish a minimum percentage of accessible audiovisual content, Member States may adopt different quantitative obligations. Third (and interestingly), according to ERGA, the lack of a definition of persons with disabilities within the AVMSD may contribute to different interpretations and definition in Member States. In a footnote, the Report justifies this conclusion on the fact that Recital 22 AVMSD only states that ‘the term “persons with disabilities” should be interpreted in light of the nature of the services covered by that Directive, which are audiovisual media services’. The footnote adds that NRAs ‘may however *find guidance* in other legislative acts *such as* the Convention on the Rights of Persons with Disabilities.’ Fourth, national implementations may envisage that the obligations apply to all media services providers or that exceptions are based on viewer timeshare, costs, and specific criteria. Different rules could also be established for different media services providers considering technological differences. Fifth, challenges of financial or technical nature may also concern NRAs. Sixth, the establishment of single online points of contact, which must provide information and receive complaints about accessibility issues, may lead Member States to designate different bodies such as NRAs or disability organisations. The designation of the latter could create uncertainties concerning the authority that is responsible. Moreover, different rules could apply with regard to the authorities and organizations that may file complaints. Seventh, providing accessible information in emergency situations may prove technically challenging (as recognized under Recital 24 AVMSD). In order to address all these challenges, ERGA recommended exchange of best practices (for instance, through discussions, cases studies, and ERGA virtual repository DET) so as to facilitate uniform approaches through mutual learning.

Challenges are also highlighted by the 2022 report of Media Pluralism Monitor, which found that although most European countries adopted a regulatory framework or policy to guarantee access to media for persons with disabilities, they generally prove inefficient and are insufficiently

⁷⁷ ERGA Subgroup 3 – Taskforce 1, “Annex 1 to Final Report of Subgroup 3, ‘Changes to the Material Rules for Audiovisual Media Services,’” 16–17.

monitored.⁷⁸ The report therefore recommends that ‘[t]he access to media content for people with disabilities (including subtitling, signing and audio descriptions) should be systematically monitored so as to achieve some clearly defined quotas.’⁷⁹

On the basis of the analysis of accessibility in the framework of the AVMSD, this section focuses on national implementations by EU Member States with the aim of assessing in practice the extent to which the rights of access of persons with disabilities are protected, the measures taken for a progressive and continuous process, the means to achieve accessibility, and exemptions and differentiated obligations.

A. Persons with disabilities

While implementing the AVMSD, many Member States refer to ‘persons with disabilities’, therefore adopting the terminology of Article 7 of the revised AVMSD (Cyprus,⁸⁰ Denmark,⁸¹ Finland,⁸² Germany,⁸³ Greece,⁸⁴ Hungary,⁸⁵ Latvia,⁸⁶ Luxembourg,⁸⁷ and Malta⁸⁸). Nevertheless, while some Member States use different wording such as ‘persons with special needs’⁸⁹ and ‘persons in need of support’,⁹⁰ others only mention ‘people with visual and/or hearing disabilities and people with mental disabilities’ (Austria)⁹¹; ‘persons with visual and hearing disabilities’ (Bulgaria,⁹² Lithuania,⁹³ and Poland⁹⁴); ‘deaf and hearing-impaired audiences’/‘audiences with

⁷⁸ Bleyer-Simon et al., “Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the Year 2021,” 102. With regard to the report, ‘people with disabilities are defined as those who are blind, partially sighted, deaf or hard of hearing’ (ibid., 101).

⁷⁹ Ibid., 159.

⁸⁰ The Cyprus Broadcasting Corporation Act - Consolidated 9 December 2021 - Art. 18C (1), (2) and (3); Law on Radio and Television Organisations - Consolidated 23 December 2021 - Art. 30B (1) and (2).

⁸¹ The Radio and Television Broadcasting Act - consolidated 4 September 2020 - Art. § 48. (2)

⁸² Act of Åland (2011: 95) on radio and television broadcasting – Consolidated 1st January 2021 - Art. 13 (1).

⁸³ Act on the Broadcasting Corporation under Federal Law Deutsche Welle - consolidated 19 November 2020 - Art. 7a (1).

⁸⁴ Law 4779 of 20 February 2021 - Art. 10 1.

⁸⁵ Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 23 June 2021 - Art. 39. § (1) - (2) - (2a); 66. § (4) point c; 83. § (1) point f; 184. § (1) point c) point cc).

⁸⁶ Electronic Mass Media Law - Art. 24.1 (1).

⁸⁷ Amended Electronic Media Act of 27 July 1991 - as last amended by the Act of 26 February 2021 - Art. 35 2) point c).

⁸⁸ Broadcasting Act 350 – Consolidated 7 December 2020 - Art. 16JB (1).

⁸⁹ [PT] Law 27/2007, of 30th July - Television and Audiovisual On-Demand Services Law – Consolidated 19 November 2020 - Art. 34-A 1.

⁹⁰ German community - Decree 1 March 2021 - Decree. on Media Services and Cinema Screenings - Art. 21 §1 1st paragraph.

⁹¹ Federal Act on the Austrian Broadcasting Corporation (ORF-G) - consolidated 1st January 2021 - Art. § 5. 2;] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 30b. 2.

⁹² Radio and Television Act - Art. 8a (1).

⁹³ Law amending Article 5 of Law No I-1571 on Lithuanian national radio and television – 7 May 2021 - Art. 5 10. ‘Persons with disabilities’ is however used in Law on the provision of information to the public of the Republic of Lithuania - Consolidated 12 May 2022 - Art. 34 2.

⁹⁴ [PL] Act of 22 March 2018 amending the Broadcasting Act - Art. 2 and 4.

sensory loss’/‘persons with sensory impairments’,⁹⁵ and ‘persons with visual or hearing impairments’⁹⁶ (Belgium); and ‘people with a hearing impairment’ (Netherlands)⁹⁷. By restricting the definition of persons with disabilities in the context of audiovisual media services, these countries have not yet adopted implementations that are consistent with the broad definition of persons with disabilities envisaged in the revised 2018 AVMSD and the CRPD. In fact, only limited categories of barriers are taken into account.

Some Member States adopted additional categories. For instance, Croatian legislation envisages accessible audiovisual media services for ‘children with developmental disabilities and persons with disabilities’,⁹⁸ highlighting the purpose to provide specific focus and measures for children with developmental disabilities, even if they could be included in the notion of persons with disabilities. Particularly interesting is the broad definition provided by Hungarian legislation, which lists among the objectives of public media service ‘to satisfy the media service related special needs of underprivileged groups who are at a great disadvantage due to their age, physical, mental or psychological state or social circumstances, as well as of people with disabilities.’⁹⁹ This formulation may blur the definition of persons with disabilities as envisaged in the CRPD but *de facto* covers the interaction between individuals’ impairments and societal and environmental barriers.

B. Progressive and continuous process

The 2021 ERGA Report ‘New rules on accessibility (Article 7.1)’ conducted a survey of 26 NRAs with the aim to facilitate a common understanding on proportionate measures.¹⁰⁰ The questionnaire contained questions about (gradually increasing) quantitative and qualitative obligations both for broadcasts and for on-demand services. 17 NRAs responded that gradual quantitative increase is taking place in their country and that the most common techniques for broadcasts are subtitling,¹⁰¹ audio description,¹⁰² and sign language.¹⁰³ Gradual quantitative obligations for on-demand services

⁹⁵ French community - Fifth RTBF Management Contract 2019-2022 - Art. 32 and 40; French community - Decree on audiovisual media services and video-sharing services - 4 February 2021 - Art. 4.1-1.

⁹⁶ Brussels-capital region - Law of 5 May 2017 on audiovisual media services in the bilingual Brussels-Capital Region - as amended by Law 21 July 2021 - Art. 12 §1 first paragraph.

⁹⁷ 2008 Media Decree - Art. 15. Although legislation specifies that public media services should be accessible to all, measures are envisaged only for people with a hearing impairment.

⁹⁸ The Electronic Media Act - Consolidated 22 October 2021 - Art. 18 (1).

⁹⁹ Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 23 June 2021 - Art. 83§ (1).

¹⁰⁰ ERGA, Subgroup 1, Workstream 2, “New Rules on Accessibility (Article 7.1) - A Common Understanding of ‘proportionate Measures’,” 2021, <https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Article-7-accessibility.pdf>.

¹⁰¹ Belgium (French Community), Czech Republic, Finland, France, Ireland, Italy, Netherlands, Poland, Portugal, Turkey, Slovakia, and Sweden.

¹⁰² Belgium (French Community), Czech Republic, Ireland, Italy, Portugal, Turkey, Slovakia, and Sweden.

are instead envisaged in ten countries and may be related to subtitling¹⁰⁴, audio description¹⁰⁵, and sign language¹⁰⁶. In nine cases, NRAs affirmed that there is no degree of flexibility for quantitative obligations.

Qualitative obligations are less common than quantitative obligations. Eight NRAs informed that qualitative obligations concern different techniques of broadcast. While in some cases, qualitative obligations must be addressed with proportionate measures,¹⁰⁷ they may also focus on subtitling,¹⁰⁸ sign language,¹⁰⁹ and audio description¹¹⁰. In only four cases, qualitative obligations are imposed for on-demand service and in two cases they concern subtitling (for the deaf and hard of hearing).¹¹¹

From the ERGA report, it is therefore possible to conclude that measures are in place in order to guarantee a progressive and continuous progress but that they differ, on the one hand, between quantitative and qualitative obligations and, on the other hand, between broadcasts and on demand services.

Interestingly, most national implementations envisage the submissions of actions plans,¹¹² in line with the General Comment No. 2 of the CRPD Committee. In only few cases actions plans are merely encouraged,¹¹³ following the wording of Article 7 AVMSD.

C. Means to achieve accessibility

Member States must ensure that accessibility must be achieved through proportionate measures. The 2021 ERGA Report concluded that proportionate measures differ from country to country with regard to providers, services, programmes, and the obligations themselves depending on techniques, quantity, quality, and so on.¹¹⁴ Some general trends are however identifiable.¹¹⁵ The most common type of regulatory system is the regulatory system and media regulators are usually involved in monitoring, therefore contributing to making audiovisual media services more accessible (often in cooperation with organizations representing the rights of persons with disabilities). With regard to providers, in most cases they include both public service providers and private/commercial

¹⁰³ Czech Republic, Ireland, Italy, Poland, Portugal, Turkey, Slovakia, and Sweden.

¹⁰⁴ Belgium (French Community), Finland, Netherlands, and Sweden.

¹⁰⁵ Belgium (French Community) and Sweden.

¹⁰⁶ Sweden.

¹⁰⁷ Croatia.

¹⁰⁸ Belgium (French Community), Finland, France, Greece, and Slovakia.

¹⁰⁹ Belgium (French Community), France, and Turkey.

¹¹⁰ Belgium (French Community) and France

¹¹¹ Finland and Greece.

¹¹² Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, Germany, Hungary, Latvia, Lithuania, Luxembourg, Malta, and Sweden.

¹¹³ Croatia and Cyprus.

¹¹⁴ ERGA, “New Rules on Accessibility (Article 7.1) - A Common Understanding of ‘proportionate Measures’” (2021), 23.

¹¹⁵ *Ibid.*, 23-25.

providers (in all cases public providers). Exemptions for service providers are foreseen in almost half of Member States (usually based on annual turnover and viewer time share).¹¹⁶ Programmes for which accessibility obligations apply usually include both pre-recorded programs and real time broadcasts (although obligations vary) and apply to programs both in countries' official languages and foreign languages. As mentioned above, quantitative and qualitative obligations are usually stricter for broadcasts than on-demand services. Finally, according to the ERGA Report, costs are not usually considered with regard to the obligations for making services and programmes more accessible for persons with disabilities.

A comparative overview of national implementation shows that the most common means to achieve accessibility are subtitling of programmes, sign language, audio description, and verbal subtitling, which are those that are mentioned under Recital 23 of the AVMSD. Further means, mentioned in Austrian legislation, are simple language and bilingual sound,¹¹⁷ therefore including other types of barriers. Austrian legislation also specifies that higher priority must be given to accessible design of early evening and prime time programmes on all television channels, to some online services and, with regard to information, 'to Federal State broadcasts, press conferences, election coverage and election results programmes and, in the information and entertainment categories, to children's programmes.'¹¹⁸

Latvian law must be mentioned for its detailed provisions about the means to achieve accessibility. In fact, in order to promote the accessibility, an electronic medium may provide, taking into account the type and format most appropriate to the service, sign language (sign language interpretation), subtitling, audio description, and production of content in sign language.¹¹⁹ For these means, guidelines are provided with regard to users, methods, technical guidance, and accessibility. In addition, audiovisual media service providers may provide a transcribed audio recording posted on their website or social media account, the possibility to increase the font size on their website, the possibility to listen to written information in audio mode; and an electronic description of the programme on their website.¹²⁰ Further services by media service providers must ensure that such services are appropriate for the aim of achieving accessibility.

¹¹⁶ For exceptions in implementing accessibility obligations, see further next section.

¹¹⁷ Federal Act on the Austrian Broadcasting Corporation (ORF-G) - consolidated 1st January 2021 - Art. § 5. 2. and 2a.

¹¹⁸ Ibid,

¹¹⁹ Guidelines for the Electronic Media Law for the application of the guidelines for promoting access to electronic content media programmes and services - Art. 4.

¹²⁰ Ibid.

D. Exemptions and differentiated obligations

Concerning exemptions, limits, and differentiated application of accessibility measures, reference is made to technological development/capacities,¹²¹ economic feasibility¹²² (sometimes related to turnover)¹²³, low average audience share in the previous calendar year,¹²⁴ specialised on-demand audiovisual services,¹²⁵ the provision of subsidies from public funds,¹²⁶ local or regional programmes,¹²⁷ and live content¹²⁸ (in particular, live sports broadcasts¹²⁹ and music performances¹³⁰). The latter is due also to higher costs for guaranteeing such services.¹³¹ Exemptions in the application of accessibility obligations may concern commercials and other advertisements (like teleshopping)¹³² or visual radio offerings.¹³³ In some cases, obligations must be observed as far as they do not constitute a ‘disproportionate burden’.¹³⁴ In the case of Germany, it is interesting that ‘disproportionate burden’ must be understood in accordance with Annex VI of the Accessibility Act and should not entail ‘a substantial modification of the service providing access to audiovisual media services that leads to a fundamental change in its nature’.¹³⁵ The disproportionate burden may not be understandably invoked in the case the providers received ‘non-proprietary public or private funding to improve accessibility’.

¹²¹ [AT] Federal Act on the Austrian Broadcasting Corporation (ORF-G) - consolidated 1st January 2021 - Art. § 5. 2; [BE] French community - Fifth RTBF Management Contract 2019-2022 - Art. 32; [FI] Act of Åland (2011: 95) on radio and television broadcasting – Consolidated 1st January 2021 - Art. 13 (1) §; [DE] Interstate Treaty on Broadcasting and Telemedia - consolidated 30 June 2022 - Art. 7 (1); [SE] Requirements for the promotion of accessibility to television broadcasting and on-demand television - Promotion requirements.

¹²² [AT] Federal Act on the Austrian Broadcasting Corporation (ORF-G) – consolidated 1st January 2021 – Art. §. 5. 2; [FI] Act of Åland (2011: 95) on radio and television broadcasting – Consolidated 1st January 2021 - Art. 13 (1) §; [DE] Interstate Treaty on Broadcasting and Telemedia - consolidated 30 June 2022 - Art. 7 (1).

¹²³ [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 30b. 1. In the case of Finland, this exception applies for non-public television broadcasters that provide audio and subtitling services. In this case, costs may not exceed 1% of broadcaster’s turnover (FI) Electronic Communications Services Act (917/2014) – Consolidated 22 December 2021 - Art. 211 §).

¹²⁴ [HU] Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 23 June 2021 - Art. 39. § (2). See also, with regard to on-demand audiovisual media services, [PL] Broadcasting Act - Consolidated 21 April 2022 - Art. 18a 1. and 47g (2).

¹²⁵ [PL] Broadcasting Act - Consolidated 21 April 2022 - Art. 18a 1. and 47g (3).

¹²⁶ [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 30b. 1.

¹²⁷ [AT] Federal Act on Audiovisual Media Services (AMD-G) – consolidated 1st January 2021 - Art. § 30b. 1.

¹²⁸ [AT] Federal Act on the Austrian Broadcasting Corporation (ORF-G) - consolidated 1st January 2021 - Art. § 5. 2.

¹²⁹ [SE] Requirements for the promotion of accessibility to television broadcasting and on-demand television - Promotion requirements.

¹³⁰ With particular regard to audio and subtitling service, see [FI] Electronic Communications Services Act (917/2014) – Consolidated 22 December 2021 - Art. 211 §.

¹³¹ [AT] Federal Act on the Austrian Broadcasting Corporation (ORF-G) - consolidated 1st January 2021 - Art. § 5. 2.

¹³² [HU] Act CLXXXV of 2010 on Media Services and Mass Communication - Consolidated 23 June 2021 - Art. 39. § (2); [NL] 2008 Media Decree - Art. 17; [PL] Broadcasting Act - Consolidated 21 April 2022 - Art. 18a 1.; [SE] Requirements for the promotion of accessibility to television broadcasting and on-demand television - Promotion requirements.

¹³³ [NL] 2008 Media Decree - Art. 17(2)(b).

¹³⁴ [BE] German community - Decree 1 March 2021 - Decree. on Media Services and Cinema Screenings - Art. 21 §1 1st paragraph.

¹³⁵ [DE] Interstate Treaty on Broadcasting and Telemedia - consolidated 30 June 2022 - Art. 99a (1).

As a result, exemptions and differentiated obligations greatly vary across the EU, contributing to uneven access to audiovisual media services.

7. Conclusion

The AVMSD presents lights and shadows with regard to its provisions on accessibility rights for persons with disabilities. The 2018 revision undoubtedly contributed to enhancing accessibility in accordance with the CRPD and the CRPD Committee's General Comment No. 2 on accessibility. The revised Article 7 AVMSD refers to persons with disabilities instead of persons with a visual or hearing impairment, prescribes that services must be made 'continuously and progressively more accessible' through proportionate measures, envisages the submission of reports on accessibility implementation, encourages the adoption of action plans, establishes single online points of contact for providing information and for receiving complaints about accessibility issues, and ensures accessible emergency information. The 2010 version of the article did not contain any of these provisions, which certainly represent steps forward in aligning the accessibility provisions of the AVMSD with those of the CPRD.

Nevertheless, issues on accessibility rights for persons with disabilities persist. First, the definition of persons with disabilities within the AVMSD is potentially not fully consistent with the social or social contextual model of disability of the CRPD, which considers the interaction between the individual's impairment and societal as well as environmental barriers. While Article 7(1) AVMSD was revised to substitute 'persons a visual or hearing impairment' with the broader 'persons with disabilities', Recital 22 reads that 'the term "persons with disabilities" should be interpreted in light of the nature of the services covered by that Directive, which are audiovisual media services' and places a particular emphasis on persons with a visual or hearing impairment. This wording could suggest a narrower interpretation of disability and of persons with disabilities compared to the conceptualisation of the CRPD. The case law of the CJEU on the Employment Equality Directive shows the risks of a narrow interpretation of persons with disabilities in light of the purpose of a directive given that in practice the Court relied upon a medical understanding of disability. A narrow interpretation would however be in contrast with the CPRD and with the letter of the current version of Article 7(1), which refers to 'persons with disabilities'. The inconsistencies between Recital 22 and Article 7(1) should be solved by adopting the broader interpretation of the latter, as recitals have no legal value, but are interpretative tools that cannot conflict with clearly formulated operative articles. Ambiguities however exist also at the national level. In fact, some Member States' provisions on accessibility of audiovisual media services only cover persons with visual and hearing disabilities. Both the AVMSD and national implementations envisage additional

terminology, which blurs the definition of the CRPD, but may be used to cover additional forms of barriers.

Second, the AVMSD provision on the progressive and continuous obligations establishes rules for a process of making audiovisual media service more accessible through proportionate measures. Obligations are however undefined, and the adoption of action plans is merely encouraged by the AVMSD. Member States have adopted measures in order to guarantee a progressive and continuous progress. Nevertheless, differences exist, on the one hand, between quantitative and qualitative obligations and, on the other hand, between broadcasts and on demand services. National implementations however commonly envisage the submissions of actions plans in accordance with the General Comment No. 2 of the CRPD Committee, with only few cases where actions plans are merely encouraged, following the wording of Article 7 AVMSD.

Third, the limitations concerning a potentially narrower definition of persons with disabilities is also reflected in the means to achieve accessibility that are listed under Recital 23, i.e., sign language, subtitling for the deaf and hard of hearing, spoken subtitles, and audio description. Although this is an open list of means, the focus on persons with a visual or hearing impairment may contribute to neglecting other kinds of barriers, such as those related to mental disabilities. National implementations confirm that relatively limited measures have been adopted as the most common means to achieve accessibility are subtitling of programmes, sign language, audio description, and verbal subtitling, therefore mostly covering those means expressly listed under Recital 23 of the AVMSD. Measures as simple language and bilingual sound are rarely envisaged. In this context, the meaning of ‘proportionate measures’ is unclear both in the AVMSD and in national implementations.

Fourth, an open question is the extent to which exemptions and differentiated obligations are legitimate given that they greatly vary across the EU and that they do contribute to uneven access to audiovisual media services.