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Public consultation on the application of audiovisual regulation to media service providers supported on video-sharing platforms

FIRST. - Background

Thanks to technical advances, the audiovisual market has evolved significantly. The Internet has become an important source of consumption of audiovisual content, making possible the emergence of new services and changing consumption habits, particularly in younger generations.

In the framework of its work to supervise and control the audiovisual media market, the National Commission for Markets and Competition (hereinafter referred to as CNMC) considers it appropriate to collect information, through this public consultation, on the provision of services by new agents supported by video-sharing platforms, because this provision could have a significant impact on matters that are protected by Law 7/2010, of March 31, on Audiovisual Communication (hereinafter referred to as Audiovisual Law).

SECOND.- Competence Enabling

The powers of the CNMC to intervene result from the provisions of the sectoral legislation and, in particular, of Law 3/2013, creating the National Commission on Markets and Competition (hereinafter, CNMC Law).

In accordance with article 1.2. of the CNMC Law, it "aims to guarantee, preserve and promote the proper functioning, transparency and the existence of effective competition in all markets and productive sectors, for the benefit of consumers and users".

More specifically, article 9 of the CNMC Law provides that the CNMC "shall supervise and control the proper functioning of the audiovisual communication market".

In particular, article 9 of the CNMC Law states that the functions of this Commission are to "monitor compliance with the obligations imposed to give effect to the rights of children (...)", to "supervise the compliance of audiovisual content with current legislation (...), and to "monitor compliance with obligations, prohibitions and limits on the exercise of the right to make audiovisual commercial communications (...)", among others.

On the basis of the foregoing, and to the extent that new market players could qualify as providers of audiovisual media services, it is appropriate to collect information on the application of the Audiovisual Law to their activities in matters falling within the competence of this Commission.

ANNEX

Public consultation on the application of audiovisual regulation to media service providers supported on video-sharing platforms

1. Introduction

The audiovisual legal framework requires the concurrence of a series of requirements to define a service as an audiovisual media service and, therefore, that is subject to its legal regime, in accordance with the provisions of Law 7/2010, of March 31, on Audiovisual Communication (hereinafter referred to as Audiovisual Law), and Directive 2010/13/EU on the coordination of certain laws, regulations and administrative provisions of Member States relating to the provision of audiovisual media services (hereinafter referred to as Audiovisual Directive), as amended by Directive 2018/1808 of the European Parliament and of the Council of November 14, 2018 (hereinafter referred to as New Audiovisual Directive).

In particular, the requirements that can be drawn from the regulations are the following: it must be an economic service; the provider must have editorial responsibility for the content it broadcasts; it must be a service aimed at the general public, whose function is primarily to inform, entertain or educate the general public and whose main proposal is the provision of programmes, these programmes being audiovisual; and, in addition, it should be provided through electronic communication networks¹.

This definition of an audiovisual media service and the identification of the agents providing it had not been questioned for a long time, so it was relatively easy to identify an audiovisual service and, in those cases, the kind of audiovisual service: linear or non-linear².

However, technological developments in recent years and new consumer habits have increased the relevance of new players in the audiovisual sector, such as video distribution platforms. Similarly, new forms of audiovisual services have emerged, the nature of which has not been easy to identify, mainly due to the difference in the business model, the format of the content and the behaviour of their providers compared to traditional audiovisual services.

In some cases, court rulings have been required to confirm their identification as audiovisual services subject to regulation.

In this regard, the decision of the Court of Justice of the European Union, in its judgment of October 21, 2015, in case C 347/14, New Media Online GmbH, should be highlighted. The Court, analysing the nature of a particular type of service, noted that the concept of a programme - one of the essential requirements for the definition of an audiovisual service - should be interpreted as encompassing the provision, on a subdomain of a newspaper's Internet site, of short videos corresponding to short

¹ These criteria are derived from the definitions of article 2 of the Audiovisual Law and the exclusions of article 3 thereof.

² Article 2 (a) and (b) of the Audiovisual Law.

sequences extracted from local news, sports or entertainment.

This decision has meant that some services that provide audiovisual content, which could be doubted as to their inclusion in the regulatory framework of the audiovisual sector, are definitely included in the object and legal scope of the audiovisual sector regulation.

In fact, this extension of the scope of the rule beyond what we may consider to be traditional services has been expressly introduced and generalised in the New Audiovisual Directive. In effect, this rule redefines the term "programme" by eliminating the requirement of comparability with the form and content of television broadcasting and moving away from traditional television as a defining element of audiovisual services³.

In this regard, it is necessary to highlight that the online environment has led to an increase in the volume of audiovisual content produced and the proliferation of new forms of access to such content by the public. As a result, the Internet has become an important source of consumption of audiovisual content, particularly through video-sharing platforms. Note that Eurostat already published in 2016 that one of the most popular Internet activities among young people in the European Union, aged between 16 and 24, was watching videos⁴.

Consequently, the New Audiovisual Directive, aware of the importance of these new types of content, expressly recognises that: *"(...) Channels or any other audiovisual services under the editorial responsibility of a provider can constitute audiovisual media services in themselves, even if they are offered on a video-sharing platform (...)"*⁵. This new approach introduces disruptive elements within a regulatory framework for audiovisual services whose focus over the last 30 years has been on the usual content of traditional television, allowing that - subject to compliance with the other legal requirements to be considered audiovisual media service - short videos can also be considered programmes and, thus, the subjective scope of audiovisual regulation is extended to new actors.

In fulfilment of its duty to ensure the proper functioning of the audiovisual market, the CNMC, in its capacity as Audiovisual Authority, is responsible for analysing the implications that might arise from the participation of new actors in the audiovisual field.

2. Current situation

According to the Household Panel Survey of this Commission for the fourth quarter of 2019, there is an increasingly important demand for audiovisual content via the Internet in Spain. 48.3% of the people interviewed consume audiovisual content on the Internet at least once a week. Of this sample, 54.9% consume short videos; this being the most consumed type of online audiovisual content, followed by series (49.5%) and movies (36.5%).⁶

³ Article 1 (1) (c) of the New Audiovisual Directive.

⁴ Statistical Office of the European Union. Available at <https://ec.europa.eu/eurostat/cache/infographs/ict/bloc - 1b.html>

⁵ Recital 3 of the New Audiovisual Directive.

⁶ Household Panel Survey. Information for the fourth quarter of 2019 (IV – 2019). Available at: www.cnmc.es.

Meanwhile, Barlovento Comunicación, in its Report on Internet Consumption vs. Television from February 2020, includes data on video consumption on the Internet, resulting in viewers over 18 years of age consuming an average of 5 hours and 25 minutes of television per day in February, while the average Internet browsing per visitor was 2 hours and 59 minutes per day. It also indicates that the profile of the viewer of videos on the Internet is younger than on television. In ages between 4 and 17, the percentage of audience with respect to television consumption would be 6.8 per cent, and with respect to video consumption on the Internet would be 7.7 per cent.⁷

With more concrete results on the consumption of audiovisual content on the Internet by children, the report "Children and parents: *Media Use and Attitudes 2018*" by OFCOM notes that there is a clear preference for watching content on YouTube over watching TV, at a ratio of 49% versus 14% between the ages of 8 and 11 and 49% versus 16% between the ages of 12 and 15⁸. While Youtube is the most successful platform among the youngest children's audience, older minors combine access to this platform with others such as Instagram, Twitch or Tik Tok. These services allow children to have greater control over what they see and when they see it; and allow the selection of content more adapted to their tastes.

The demand for content on video-sharing platforms by children is relevant, since, as consumer habits are forged at an early age, it is expected that the trend in the consumption of this type of content will increase, as has been happening in recent years.

Besides, the CNMC warns that an additional factor that would corroborate the increase in the supply of content published on video-sharing platforms would be the growing advertising investment in the so-called influencer marketing.

According to the Infoadex Study of Advertising Investment in 2019, investment in advertising through influencers reached 61.8 million euros, a share of 0.9% of total unconventional or estimated advertising media (personalised mailing, telephone marketing, on-the-spot advertising, among others) and a growth over 65% in its investment figure⁹. This fact, even being symbolic in terms of investment, shows an explicit recognition of the consolidation of this new advertising modality.

An additional example of this consolidation is the professionalisation of the influencer marketing sector. In other words, they are agents with advanced knowledge of

⁷ BARLOVENTO COMUNICACIÓN. TV vs. Internet Consumption Report, March 30, 2020. Slides 4, 7 and 9. Available at: <https://www.barloventocomunicacion.es/wp-content/uploads/2020/03/Informe-Barlovento-consumo-Internet-Comscore-y-Televisión-Febrero-2020.pdf>. Barlovento Comunicación is a consultancy firm specialised in the audiovisual sector that offers measurement of audiences' services.

⁸ OFCOM. Children and parents: Media Use and Attitudes report 2018. Pages 5-6. Date of publication: January 29, 2019. Available at: <https://www.ofcom.org.uk/research-and-data/media-literacy-research/childrens/children-and-parents-media-use-and-attitudes-report-2018>.

⁹ INFOADEX. Summary of the INFOADEX Study of Advertising Investment in Spain 2020. February 19, 2020. Pages 4 and 6. Available at: <https://www.infoadex.es/home/wp-Content/Uploads/2020/02/NP-Studio-Infoadex-de-The%20C3%B3N-Publicity-in-Spain%20C3%B1a-2020.pdf>. INFOADEX is a company specialised in the advertising sector that provides consulting services on investment indicators, among others. Another study such as the one on Advertising Investment in Digital Media by IAB Spain and PricewaterhouseCoopers shows a more conservative estimated investment figure of 26.4 million euros in 2019, although it agrees that there is an annual growth of 69,8%. IAB is the association representing the advertising and digital communication sector in Spain.

communication who have been able to adapt to the needs of today's advertising industry. In this regard, the First White Paper on Influencers Marketing prepared by the Interactive Advertising Bureau (IAB Spain) provides detailed information to the advertiser on how to carry out a marketing strategy focused on influencers (influencers profiles, indicators of success of the advertising campaign, negotiation of the advertising campaign, among others)¹⁰.

Finally, with regard to the audiovisual regulation that will be taken into account in this consultation, we should point out that, even if we are in the process of transposition of the New Audiovisual Directive, we will refer to the Audiovisual Law in force, without prejudice to the fact that it may be necessary to adapt to the modifications that could be made in this area during such transposition.

3. Analysis of the status of Provider

Based on a "neutral approach" to the service, that is, regardless of the type of agent that broadcasts it, it is analysed whether, based on the requirements set out in the Audiovisual Law, the service provided by those who create content on video-sharing platforms should be considered, for the purposes of audiovisual regulation, audiovisual media services.

A. The service provided involves an economic activity.

Platforms allow you to monetise published content, under certain requirements such as number of subscribers or number of hours of viewing or streaming.

The types of income that can be earned vary depending on the platform, but they can usually be: advertising revenue from ads managed by the platform, subscription to premium content, sale of own products; and donations made by the audience.

In addition, content creators can earn advertising revenue through commercial agreements (brand or ad) with advertisers, outside the platform.

B. The content creator has editorial responsibility.

Editorial responsibility involves the exercise of effective control both over the selection of the programmes being broadcasted and over the organisation of the programmes, either in a chronological schedule or in a catalogue¹¹.

In the case of content creators on Internet platforms, the criterion of effective control in the selection of programmes would be met with the management of an account on the platform through which it is the content creator who ultimately publishes content.

On the other hand, the criterion of effective control in the organisation would be met

¹⁰ IAB Spain White Paper on Influencers Marketing. Available at: https://iabspain.es/wp-content/uploads/iab_libro_blanco_influencers_nov_2019_edicion_1_c5.pdf.

¹¹ Article 2.13 of the Audiovisual Law. About the configuration of the contents through a schedule or a catalogue, we will return later.

with editorial decisions made by the content creator, such as: the formulation of a description or the selection of an image that serves as the cover of the video or even - although this would not be decisive - the generation of playlists that make it possible to create a collection of videos with a particular theme.

C. The service is intended for the general public.

Although content creators are more likely to reach specific segments of the population depending on the subject they broadcast, there are not any limitations on subscription and/or consumption of its services, so these are available to the general public.

D. The function of the service is to inform, entertain or educate.

Depending on the theme chosen, this service fulfils the functions of an audiovisual media service: Some provide information on travel, decoration or current affairs; others provide entertainment with video games, series, children's content or music; and, finally, others provide educational content through which they teach lessons in various subjects (languages, mathematics, chemistry, etc.) and explain step by step how to do any type of task.

E. The main objective of the service is the distribution of audiovisual content.

The service is mainly based on the activity of creating and publishing videos; it is not an accessory or complementary activity.

F. The service distributes audiovisual programmes.

The service consists of the provision of audiovisual programmes in the format of videos, usually short.

In this respect, it is important to refer to the above judgment of the Court of Justice of the European Union in Case C 347/14, *New Media Online GmbH*, which considers that the 2010 Audiovisual Directive does not impose any requirements on the duration of programmes, and therefore the definition of 'programme' includes short-duration videos published on the Internet.

G. The service is provided through electronic communications networks.

The analysed service is available on the Internet, so access is possible thanks to electronic communications networks, in particular those that allow access to the fixed and mobile Internet.

As a result of the analysis carried out, it should be noted that the service provided by those who create and broadcast content on video-sharing platforms may meet the legal requirements to be considered audiovisual media services.

In addition, as regards the type of service, the audiovisual media service supported on video-sharing platforms is provided for the viewing of programmes and content at the time chosen by the viewer and at his own request on the basis of a catalogue of

programmes selected by the communication service provider¹².

Consequently, in general terms, this service adopts the modality of on demand audiovisual media service or non-linear service, in the terms of articles 2 (2) (b) and 2 (11) of the Audiovisual Law.

We will henceforth refer to them as audiovisual media services supported on video-sharing platforms (or, also, new services).

Finally, it is important to note that in accordance with Article 3.1 of the Audiovisual Law, in order to give effect to the Commission's competence over media service providers supported on video-sharing platforms, they must be established in Spain. In this sense, the CNMC is not competent in the case of providers established in other Member States of the European Union.

4. Purpose of the consultation

The CNMC considers that, under the cumulative fulfilment of the above criteria, agents who publish and/or broadcast content on video-sharing platforms enjoy the status of audiovisual media service providers. As a result, the obligations of the audiovisual framework, such as content control, protection of minors, advertising, etc., apply to them.

Notwithstanding the foregoing, the Commission is aware that this analysis must, in many cases, be carried out on a case-by-case basis on each service or mode of service in order to effectively identify those principles.

Therefore, in order to collect relevant information on the functioning of these new services and the possibilities of action that their providers have, aspects that require a higher level of analysis and evaluation have been identified.

It is not the subject of this consultation to assess the imposition of obligations on video-sharing platforms. Commercial communications (advertising) directly managed by the platform itself are also not the subject of this consultation. These aspects of audiovisual regulation will be addressed by the law transposing the New Audiovisual Directive into our legislation.

In accordance with the above, the questions focused on the tools provided by video-sharing platforms in this consultation are only for an informative purpose.

5. Issues subject to public consultation

In order to achieve this analysis, it has been considered essential to collect the different opinions and suggestions of the agents involved (be they service providers, social organisations, advertisers, advertising agencies, the platforms that serve as support,

¹² This approach is consistent with the non-linear service qualification given to this type of service by other audiovisual authorities, such as Medietilsynet (Norwegian audiovisual authority) and the Rundfunk und Telekom Regulierungs-GmbH (Austrian audiovisual authority).

In this regard, article 7.5 of the Audiovisual Law states that: *"When the audiovisual media service is carried out through a catalogue of programmes, providers shall draw up separate catalogues for content that may seriously harm the physical, mental or moral development of minors. For this purpose, providers shall establish effective, upgradable and easy-to-use devices, programmes or mechanisms that allow parental control through blocking content harmful to minors, so that they cannot access content that is not directed to them"*.

The above-mentioned obligation extrapolated to media service providers supported on video-sharing platforms would result in the fact that when those providers broadcast content seriously harmful to minors in their programme catalogues, they would have an obligation to establish parental control allowing children to be blocked.

The rule does not set specific parental controls to be imposed, so it would seem clear that the assessment of parental control mechanisms will depend on the nature of the service and the technological progress available.

In order to understand the scope of action of the providers of these new services in this area, it is necessary to understand the tools aimed at preventing access by minors that are usually made available to some of the video-sharing platforms.

- Platforms usually offer the possibility to indicate whether the video that the provider is about to publish has restricted access content for over 18 years (+18). If this restriction is activated by the provider, when the viewer wants to view the video, identification will be requested through the user account of the platform. This way, by the validation of the user account, the age of majority is checked and, if appropriate, access to the video is given.
- Access is also provided through a restricted mode of navigation. Restricted access would automatically remove inappropriate content from the platform based on reading the title, label or description of the video (this data is included in each video via metadata).
- Another option is the possibility to remove an entire account from the navigation, but this option is only activated at the initiative of the provider.

According to the above, the actual effectiveness of the mechanisms implemented by the platform ultimately depends on the contextual information provided by the service provider in each of their videos, that is, providers should own, describe and, in general, record information about the content of their videos, as well as adding an age restriction (+18), as diligently as possible, for the proper functioning of the parental control systems of the platform¹⁴.

In this regard, it is important to note that the internal rules of the platforms generally do not impose the obligation to add an age restriction to videos with seriously harmful content, treating the matter as an optional issue. This, coupled with the fact that age-restricted videos are often not allowed to monetise, creates the economic incentive for providers of these new services to not adding viewing restrictions, as if they do, they earn

¹⁴ The above measure would also avoid the problem of misleading contextualisation of content, through the use of titles in videos that do not serve an informative function of the content but aim to achieve many views in order to make it profitable, using popular terms such as "paw patrol" (name of a successful cartoon) or any other. At doing this, they do not mind the fact that the audience can be made up of minors, but that the more visualisations, the more the algorithms will recommend the video. In relation to this, you can see: Bridle, James. *"The nightmare videos of children - and what's wrong with the Internet today"*. Available at: <https://www.youtube.com/watch?v=v9EKV2nSU8w>.

less income from their video.

Question 4. Do you find any particular problems or difficulties in applying these obligations to media service providers supported on video-sharing platforms?

Question 5. Do you find it sufficient that, in order to comply with the obligation to implement parental control mechanisms that prevent minors from accessing content which is likely to seriously harm them, media service providers supported on video-sharing platforms are required to manage the correct contextual information or metadata on each video and to make responsible use of the age restriction mechanisms available on the platforms?

Question 6. What other measures could the providers of these new services implement to prevent minors from being exposed to content that could seriously harm their physical, mental or moral development?

Question 7. If you find that the mechanisms offered by video-sharing platforms are insufficient to ensure that minors will not access seriously harmful content, do you think it is preferable that such content should not be made available until such a guarantee is provided?

5.2.2. Content (not seriously) harmful to minors

Furthermore, the broadcasting of other types of content, that is, those that may harm, even if not seriously, the physical, mental or moral development of minors, is regulated as follows in article 7.6 of the Audiovisual Law: *"All audiovisual products distributed through television audiovisual media services must have an age rating, in accordance with the instructions on their grading issued by the State Council for Audiovisual Media."*

According to the extensive and not limited nature of the said article, the Audiovisual Law states that all audiovisual products distributed through audiovisual media services must have an age rating, in accordance with the instructions on their grading issued by the CNMC.

In application of Article 7.6, on July 9, 2015, the CNMC adopted the "Resolution approving the Guiding Criteria for the Rating of Audiovisual Content" (see CRITERIOS/DTSA/001/15 file)¹⁵, which aims to establish criteria for the classification of audiovisual content by media service providers and which will be applied by this Commission in the exercise of its function of monitoring the proper rating of programmes.

It should be noted that the classification of audiovisual content according to age ranges is a fundamental tool to protect minors against harmful audiovisual content, as it seeks

¹⁵ Resolution of July 9, 2015, approving the Guiding Criteria for the Rating of Audiovisual Content (see CRITERIOS/DTSA/001/15 file, page 4). As to its subjective scope, the CNMC made it clear that: "This resolution shall apply both to providers of linear audiovisual media services (both open and coded or provided through television platforms) and to non-linear audiovisual media services (on request) in accordance with the definitions set in Article 2 of the Audiovisual Law and Article 1 of the Audiovisual Media Services Directive, and irrespective of the means of transmission used - be they terrestrial, satellite, cable or Internet (IPTV, online television, web pages, mobile applications, etc.)".

In the particular case of media service providers supported on video-sharing platforms, it is necessary to take into account that advertising has evolved towards new advertising techniques. Thus, we find new advertising formats such as branded content (creation of content that looks like non-advertising but implicitly transmits the values of a brand), unboxing (content that shows how the product reaches the consumer, how is the unpacking process and what one finally receives, so that the consumer can appreciate all the characteristics of the product) or haul (content by which a person describes the objects purchased in a store and gives his opinion about them in terms of quality, price, taste, etc.).

In order to achieve the objective of transparency towards the audience in these new advertising formats, it should be recalled that article 14.3 of the Audiovisual Law provides that: *"In the broadcasting of advertorials, telepromotions and, in general, of those forms of advertising other than television advertisements which, by the characteristics of their broadcast, could confuse the viewer as to their advertising character, transparency must be permanently and clearly legible with the indication 'advertising'."*

Currently, some video-sharing platforms have enabled the provider to make the declaration that a video contains advertising, either with temporary notices such as text overlay in the first seconds of the video or permanent notices such as advertiser tagging in the publication.

However, platforms do not assume responsibility for compliance with advertising identification by the provider, and in general they do not have a reporting system for unsigned advertising.

In this case, the provider of the audiovisual media service supported on the platform, who is the obligated subject, is the one who has under his editorial control, among other things, the name of the video title, the cover that presents the video, the description of the video content, as well as the audio itself and the image of the video; tools with which you can fulfill the duty to identify advertising and/or strengthen communication about the existence of advertising.

Question 13. Media service providers supported on video-sharing platforms must identify advertising in their contents. In this regard, do you consider that the tools, if any, made available by the platform for the identification of the existence of commercial communications on the videos of these providers are sufficient to make end-users aware of their existence?

Question 14. In addition to the above, do you think that the providers of these new services should report the existence of commercial communications within the content to be issued?

Question 15. In this respect, the regulation provides that transparency must overlap, permanently and clearly legible, with the indication *"advertising."* What do you think is the best way to identify such advertising: on the cover that introduces the video (before clicking), on the video itself during the advertising show, in the video description, or in a combination of these alternatives?

5.3.2 Illicit advertising

Article 18 of the Audiovisual Law prohibits, inter alia, any unlawful commercial

communication that violates human dignity or encourages discrimination or uses the image of women in a discriminatory manner; advertising that promotes harmful behaviours such as tobacco advertising, advertising on medicines and medical devices, and advertising of alcoholic beverages under certain circumstances; and advertising promoting behaviours that are harmful to the environment and to the safety of persons.

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| <p>Question 16. Is there any particular problem or difficulty in requiring media service providers who are supported on video-sharing platforms to comply with the prohibitions referred to above, as set out in article 18 of the Audiovisual Law?</p> |
| <p>Question 17. To what extent can video-sharing platforms contribute to the fulfilment of this obligation?</p> |
| <p>Question 18. Additionally, what measures could be implemented by media service providers supported on video-sharing platforms to prevent the dissemination of this type of illicit commercial communications?</p> |

5.3.3. Requirements for other advertising figures

As to the requirements for certain advertising figures imposed by the Audiovisual Law, the case of sponsorships and sites should be highlighted.

Concerning sponsorships, article 16 of the Audiovisual Law states that: *"1. Providers of the audiovisual media service have the right to have their programmes sponsored, with the exception of current news programmes. 2. The public must be clearly informed of the sponsorship at the beginning, after advertising breaks, or at the end of the programme by the name, logo, or any other symbol, product or service of the sponsor. 3. Sponsorship cannot condition editorial independence. Nor may it directly encourage the purchase or lease of goods or services, in particular through specific promotional references to them. Besides, sponsorship may not affect the content of the sponsored programme or audiovisual communication or its broadcasting schedule in such a way as to affect the liability of the media service provider."*

Article 17 of the Audiovisual Law allows product sites under the following terms: *"1. Providers of the audiovisual media service have the right to place products in feature films, short films, documentaries, films and TV series, sports programmes and entertainment programmes in exchange for remuneration. In cases where no payment is made, but only the free supply of certain goods or services - such as material production aids or prizes - for inclusion in a programme, this shall only constitute a product placement and shall therefore be permitted if such goods or services have a significant value. 2. When the programme has been produced or commissioned by the service provider or one of its subsidiaries, the public should be clearly informed of the location of the product at the beginning and end of the programme, and when it resumes after an advertising break. 3. The product placement cannot condition the responsibility or editorial independence of the media service provider. Nor may it directly incite the purchase or leasing of goods or services, make specific promotions of goods or services, or give undue prominence to the product. 4. It is prohibited the*

*product placement in children's programming*¹⁸.

Sponsorships and placements are also present in the advertising of media service providers supported on video-sharing platforms.

Question 19. Is there any particular inconvenience or difficulty in requiring media service providers supported on video-sharing platforms to comply with sponsorship or product placement obligations? Do you think that these advertising figures should observe any specificity of these new services?

Question 20. To what extent can video-sharing platforms contribute to the fulfilment of this obligation?

5.4 Obligations in the field of advertising directed to minors

The Audiovisual Law also aims to avoid inflicting moral or physical harm on minors in the field of audiovisual commercial communications, as minors are a group characterized by immaturity, inexperience, credulity and reading difficulty.

In this regard, article 7.3 of that rule provides that: "*Commercial communications shall not cause moral or physical harm to minors. Accordingly, they are subject to the following limitations: (a) They must not directly incite minors to purchase or lease goods or services by taking advantage of their inexperience or credulity. (b) They should not directly encourage minors to persuade their parents or third parties to buy advertised goods or services. (c) They should not exploit the special trust that minors place in their parents, teachers or other persons. (d) They must not, without reasonable grounds, show minors in dangerous situations. (e) They should not incite conduct that favours inequality between men and women. (f) Commercial communications on products specially aimed at minors, such as toys, shall not mislead the characteristics of the toys, their safety, or the abilities that the minor needs to use them without causing harm to himself or others.*"

It should be noted that the application of the regulation contained in the Audiovisual Law is particularly relevant in the case of these new services, as a significant part of the demand would be made up of children's audience¹⁹.

Concerning the prohibition contained in art. 7.3 (c), it is important to mention that there are studies that indicate that children may feel that they know the provider on a personal level, that they are friends and/or role models²⁰, and therefore trust the content they develop. Thus, for example, high exposure to certain food products by these providers could give children the impression that such products are important

¹⁸ The prohibition of product placement in children's programming will be discussed in paragraph 5.4 of this public consultation.

¹⁹ The most popular YouTube channels in Spain are aimed at minors, not at a youth audience or pre-teens, but at very young children, according to the channel report obtained from SOCIAL BLADE on September 16, 2019. SOCIAL BLADE is a consultancy specialised in producing statistics on various technology platforms.

²⁰ OFCOM. Children and parents: Media Use and Attitudes report 2018. Page 7. Date of publication: January 29, 2019. Available at: <https://www.ofcom.org.uk/research-and-data/media-literacy-research/childrens/children-and-parents-media-use-and-attitudes-report-2018>.

to the provider, influencing their own relationship with meals and beverages²¹.

Lastly, reference should be made to the ban on placing products in children's programming stated in article 17 of the Audiovisual Law; a matter of particular concern, as this is a fairly recurrent advertising format for the providers of these new services.

Question 21. Is there any particular inconvenient or difficulty in requiring media service providers who are supported on video-sharing platforms to comply with their obligations relating to advertising directed to minors? What aspects should be taken into account in order to make advertising identifiable by minors, bearing in mind that it is a gullible, inexperienced audience with limited reading capacity?

Question 22. Do you consider that the advertising formats of the providers of these new services are compatible with the ban on incorporating product placement or other commercial communications into programmes or content aimed at children?

Question 23. In the specific case of influencers, should it be interpreted that they are part of the group of persons with whom minors have a special relationship of trust, in the terms of article 7 (3) (c) of the Audiovisual Law?

Question 24. If necessary, what measures could be taken to make advertising on content aimed at minors compatible with the obligations set out in the Audiovisual Law?

Question 25. To what extent can video-sharing platforms contribute to the fulfilment of this obligation?

5.5 Subjective scope of application

The Audiovisual Law excludes certain activities from its scope. Specifically, article 3 of the Audiovisual Law states that "*2 The following activities are excluded from the scope of this Law (...) c) Non-economic audiovisual communications, with the exception of non-profit community media services under Article 32 of this Law, as well as services which do not constitute mass media, i.e. which are not intended for a significant part of the public and do not have a clear impact on it, and in general any activities that do not compete for the same audience as television broadcasts. In particular, the following sites are excluded from the scope of the Act: websites that are privately owned and those that have as their object audiovisual content generated by private users.*

For the purposes of this public consultation, it should be noted that activities that are not fundamentally economic, such as distribution through these platforms of audiovisual content generated by users, would be exempted from audiovisual regulation.

In accordance with the above, not all those who broadcast content on video-sharing platforms would necessarily be qualified as providers and obliged to comply with audiovisual regulations, since, among other requirements, it must be proved that they have an economic activity.

²¹ COATES AE, HARDMAN CA, HALFORD JCG, CHRISTIANSEN P. and BOYLAND EJ. Food and Beverage Cues Featured on YouTube Videos of Social Media Influencers Popular With Children: An Exploratory Study. September 20, 2019. *Frontiers in Psychology*. 10:2142. doi: 10.3389/fpsyg.2019.02142. Pages 7-8. Available at: <https://www.frontiersin.org/articles/10.3389/fpsyg.2019.02142/full>

Question 26. What objective criteria could be used to differentiate users of video-sharing platforms that distribute audiovisual content without being audiovisual service providers, from those who provide audiovisual media services supported on these platforms, exercising an economic activity?

5.6 Territorial scope of application

The Audiovisual Law applies to providers of audiovisual media services established in Spain that are supported on video-sharing platforms. However, given the cross-border nature of these services, that is, that the place of establishment of the provider of these new services may differ from the place where the public is, it becomes necessary to focus on the case of providers established outside Spain.

In the case of providers established in other Member States of the European Union, they must comply with the rules of the country in which they have decided to establish themselves and are subject to control by the competent audiovisual authority in the country of establishment, based on the Country of Origin Principle²². In this case, European audiovisual regulation establishes the necessary coordination mechanisms between the audiovisual authorities of the Member States concerned to ensure compliance with audiovisual obligations.

However, monitoring compliance with audiovisual regulations by providers established outside the European Union poses the problem of the lack of effective enforcement tools.

Some countries around us, aware of their limited capacity to effectively prosecute certain breaches, are taking advantage of the transposition of the New Audiovisual Directive to give the national audiovisual authority the power to order the blocking of access to these audiovisual media services.

In the Spanish legal system, there are similar measures to this one, for example in the field of gambling²³, which have produced very good results at cornering providers who, seeking to evade Spanish regulations, provided services via the Internet by establishing themselves in other jurisdictions²⁴.

Question 27. How do you assess the situations that may arise with regard to media service providers established outside the European Union supported on video-sharing platforms?

²² The Country of Origin Principle implies that only one Member State, the one in which the media service provider is established, has jurisdiction over the audiovisual media services broadcast by that provider, irrespective of where they are broadcast. This is because the aim of this Principle is to provide legal certainty (security which is a necessary basis for the implementation of new business models) and that the provider abides by the law of the home Member State, as long as the Home Member State has harmonised legislation, thus avoiding having to comply with controls in each receiving Member State.

²³ Article 21.8 of Law 13/2011, of May 27, regulating gambling.

²⁴ In this regard, see: <https://www.ordenacionjuego.es/es/memorias-informe-anual>

