

THE PLATFORM IS THE MESSAGE
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KEY NOTE SPEECH MADELEINE DE COCK BUNING

Opening

Good afternoon ladies and gentlemen. I would like to express my warmest thanks to both CSA and Cullen International for organizing this conference. Thank you for inviting the European Regulators Group for Audiovisual Media Services to deliver the keynote speech. My name is Madeleine de Cock Buning, and I am the Chair of ERGA in 2016 and the president of the Dutch Media Authority.

The topic of today is highly relevant as these are exciting times for the European media sector. New technology and new players challenge the European media industries to find new ways to be successful. This is especially relevant when we look at the review of the European legislation in this field. Is the legislative framework still up-to-date and are the regulators still able of protecting the core values in the changing environment?

During my contribution I will tell you something about ERGA. In its short history ERGA has already produced reports which contain recommendations to the European Commission in the view of drafting a new Directive. I will highlight some of these recommendations, especially looking at today's topic. We see that the world is changing and to be able to protect our public values we have to keep our framework future-proof. I would like to take this opportunity to make a call to help us with protecting our values, especially when it comes to protecting our minors from harmful content.

ERGA

First of all, ERGA. ERGA was established in 2014 and consists of the national audiovisual regulators in the EU. Its task is to advise the European Commission on the Audiovisual Media Services Directive and other matters related to audiovisual media services within the Commission's competences.

In the beginning of 2016 ERGA published three reports on the following topics:

- the Independence of National Regulatory Authorities,
- Material Jurisdiction in a Converged Environment,
- the Protection of Minors in a Converged Environment.

The three reports all contain concrete recommendations to the Commission in the light of the revision of the AVMS Directive. I am sure that Lorena Boix-Alonso, who will participate in the next panel discussion, can reflect further on how the recommendations are received by the Commission.

Today I would like to share with you the observations and recommendations of the two reports on material jurisdiction and protection of minors which are particularly relevant with respect to the theme of today: *The message is the platform.*

Material Jurisdiction – key trends

In its report on material jurisdiction ERGA highlights key trends in the audiovisual market:

- Linear and non-linear services grow rapidly. Services particularly merge elements of linear and non-linear services, blurring two traditionally distinct environments.
- Live TV remains the main consumption platform, but there has been rapid growth in online and on demand consumption, particularly among the younger generation.
- A greater range of devices capable of delivering online content to the main TV screen are being brought to the market. Players are entering the content market from within the communications market and beyond. More players are making use of the open internet to deliver services directly to consumers, often referred to as Over the Top delivery.
- This makes it greatly complex to define the online value chain. In its report ERGA presents a rather simplified model to get a better grip on the situation in practice.

Consequently ERGA explores to which extend the public policy goals of the AVMS Directive remain still valid. In the group there is a consensus that the key trends do not call the relevance of the goals into question. Some members of the group underlined that some new goals may become important as the market evolves. In particular access, discoverability, prominence and integrity of audiovisual media services. And there were also some concerns in specific areas where fulfilment of goals may be challenged in the future. These include fair competition, promotion of EU content creation, cultural diversity and protection of minors.

Material Jurisdiction – recommendations

ERGA does not find that the new directive should attempt to identify and rigidly define the types of content providers that should be covered by a new framework.

ERGA suggests to keep on approaching this issue by using cumulative criteria to define these services. However, some updates do seem necessary.

- For example the “**TV-like**” criterion is unavoidably subjective and there are several different national interpretations.
- The emergence of mixed media services challenges the clarity of the “**principle purpose of one service**” criterion.
- The concept of **editorial responsibility** needs clarification to be able to deal with situations where more than one actor in the value chain exercises a form of control.

In the converged audiovisual environment, audiovisual platforms – *such as cable, IPTV or OTT players* – or intermediaries – *such as search engines* – play an enhanced role in the value chain. The AVMS Directive suggests that parties offering merely a transmission or hosting service do not carry editorial responsibility. However in the rapidly changing media value chain the actors are multi-faced and their roles can no longer be clearly distinguished. Due to convergence, globalisation and new business models the clear cut distinctions between transmission and content provision can no longer be made.

Material Jurisdiction – who is responsible?

Regulators are facing constantly challenges emerging from the blurring boundaries and have difficulties in determining the (editorial) responsibilities. How and where to draw the line in the following cases?

Players at different instances of the distribution chain have the ability to influence the choice of content that is available to the end user:

- Professional video hosting providers play a more structured role in handling content than traditional technical hosts. They promote certain content, in search results or on home pages, by using algorithms that take account of a range of content metadata and user data;
- Connected device manufacturers decide what services will be pre-installed or can be downloaded on their devices. They can influence the user's first point of access to audiovisual content through default screens;
- App stores can promote particular services over others by cleverly organising layouts or they can choose not to carry certain services, particularly of their 'competitors';
- Search engines determine in what order the various services they propose (legal or illegal) appear.

In these cases the "intermediary" assumes a role in modifying the service and may also act as a gatekeeper who may influence or even control the content offered to the consumer.

The impact of these new players can hardly be overestimated. More and more these *gatekeepers* have a decisive influence on what content we can choose from and how we can access it. So it may directly influence or even control

- the content offer,
- the choice of the consumer and
- the diversity and plurality of the available audiovisual media.

ERGA therefore recommends the Commission to consider the potential implications in terms of plurality, diversity and consumer protection. Is it desirable to introduce a specific set of rules for audiovisual platforms and intermediaries?

What rules should apply to these services?

The degree to which audiovisual policy obligations should apply, and the specific rules that could apply, should depend on the specific nature of a platform or intermediary. It could depend on whether a platform is operating as an “audiovisual platform” which purely acts as a platform for audiovisual content – such as a TV platform –, or as a platform for a much wider range of content and services – such as a general web search engine –. Other relevant factors in differentiating obligations could include the turnover, and the degree to which the platform provider plays an active or passive role in distributing services through its platform.

So if we decide to include these new parties in existing or newly designed regulatory frameworks we will need a graduated approach. A lot of things are still uncertain but one thing is clear: there is not a one size fits all solution.

The AVMS Directive currently differentiates rules on the basis of the means of delivery of content, with a lighter-touch regime in place for on-demand services. In its report ERGA identified:

1. rules that should remain coordinated across all AVMS;
2. rules in relation to which there should be a more consistent approach;
3. rules where a specific rule for AVMS is justified; and
4. areas which raise questions for further economic analysis.

ERGA makes concrete recommendations with the Directive's minimum harmonization approach in mind. We do not seek to comment on the appropriateness of the detailed wording of all of the rules, we review them through the lens of whether having a coordinated or graduated rule in each field is justified.

Integrated approach with other legislative frameworks

The design of eventual new rules of obligations should also carefully be aligned with the other relevant legislative frameworks: the e-Commerce Directive and the Electronic Communications Framework.

The new media value chain requires this holistic approach, and we should get rid of administrative burdens based on sector-specific regulations, otherwise we will definitely fail to achieve our public policy goals.

Exactly a week ago at the AV conference in Amsterdam during a panel discussion we already concluded that this integrated approach can help us to further encourage the production and distribution of European creative content. This overarching legislative and policy approach based on generic system fed in with valuable expertise and best practice experiences from

sector-specific domains input will help us to fill in the current gaps and remove existing duplications. We need to address the issues via the angle of generic legislation. And it goes without saying that this holistic approach also demands much more cooperation on both national and EU level, between all players involved.

Although it is legitimate to discuss whether certain intermediaries may play a role in fulfilling AVMS goals, AVMS rules designed for editorially responsible providers may not correctly address the issues at stake and not effectively guarantee the most relevant goals of the AVMS system.

In this light, we note that a separate set of rules would be more adequate. Measures to consider include the possibility of a graduated system of obligations to new intermediaries (e.g. depending on the extent of their role in handling the content supplied on their service) and improving the technologically neutral approach from the electronic communications framework.

New obligations could be designed on the basis of existing interventions that apply under separate frameworks. For instance, we may take into consideration ex-post “notice and take-action” schemes that operate under other frameworks.

Key values at stake

ERGA identified some specific public interest and key values of media regulation, and oversight which can be especially at stake in the new media value chain environment:

- fair competition;
- cultural diversity;
- the promotion of production and distribution of European works;
- the protection of minors.

If you allow me, ladies and gentlemen, I would like to take some time to address the last key value.

Especially due to the technological changes and changed consumption patterns of the converged online environment the protection of minors has been put very high on the EU agenda. And this is totally legitimate. All surveys, even a very recent one in the UK, demonstrate and we witness in our daily (family) life: youngsters watch more and more online, be it via Netflix, YouTube, Facebook and other social media networks. For them Internet has become an equivalent to TV. Therefore I would like to highlight our observations and recommendations to modify the rules regarding the protection of minors. On this specific topic ERGA published a separate report in the beginning of this year.

The protection of minors – modify the rules

The protection of minors is a fundamental public policy objective within the EU.

Parents across Europe are increasingly worried about the easy access of their children to potentially harmful content. Amongst children the use of smartphones and tablets on wireless and mobile networks is widespread. The proliferation of devices and delivery platforms in combination with faster and cheaper connections make children more vulnerable to harmful content than ever before.

ERGA makes clear recommendations to modify the Directive.

- We recommend to revise the regulatory distinction made between linear and non-linear content, as we find this distinction no longer to be useful or appropriate with regard to the protection of minors.
- We also recommend to level protections across linear and non-linear, recognizing both the different ways of controlling minors' access to audiovisual content and the harmfulness of content.
- We recommend to harmonize key definitions and concepts, such as the age at which a person can be considered a minor and the development of a set of universal content categories at a European level.

The protection of minors – enforcement and co-regulation

If we talk about enforcement, ERGA is of the opinion that state regulation should play an important role, combined with co-regulation. By closely involving both regulatory authorities and stakeholders, co-regulation can offer

- flexibility,
- prompt adaptability to change,
- legal certainty and efficient enforcement, potentially creating stronger support for regulation.

Especially in domains where fundamental rights, such as freedom of expression are involved, it can serve as a good addition to government control.

Many ERGA members would welcome a stronger encouragement of co-regulation at the level of the EU, while letting individual Member States to adapt systems as appropriate for their circumstances. Thus a revised Directive or alternative guidelines on EU-level should not go too much into further details on the criteria of co-regulation. It could be considered to further enhance the sharing of best practices between regulators, for instance on models and criteria in the field of effective co-regulation.

The protection of minors – the vision of ERGA

We all have to take our role and responsibility. Both parents and children should be aware of all available protection tools and be able to use them in the most adequate ways. We therefore consider the promotion of media literacy to be an important complementary measure to protect minors.

We propose to use the technology at hand to help us in protecting our minors. We envisage a system that is indeed able to protect minors in a converged world. A system with clear minimum standards and at the same time flexibility making it both future proof and sensitive for the cultural differences within the European Union. I would like to illustrate our vision.

Slide 2



This is House of Cards. A production that can be viewed in several countries. The producer has to qualify the production. First of all the producer must indicate in which countries the production will be shown.

Slide 3



Consequently the producer fills in a questionnaire, that contains European harmonized categories of harmful content.

For each category several questions are asked. For example whether the production contains images of specific body parts.

The answers to some questions may or may not have effect in a country, depending on the national interests and cultural preferences.

The system can also contain extra categories, that can be important in specific Member States. Discrimination is an example of such a category, that may contain harmful content in Germany and also in the Netherlands.

Slide 4



Based on the answers, the system calculates the outcome of the qualification for each country where it can be viewed. The content will be classified with the specific age category and icon for each country.

The classification data can be read for technical parental control systems. And it can be made visible to the viewer.

To make this possible, ERGA would advocate a common development fund enabling both the industry to foster the evolution and distribution of technical tools and the state sector to take responsibility for constant research and development efforts needed in this field. **We all have to take coordinated actions to protect our minors from harmful content. Now and in the future.**
