



Minutes of the 5th ERGA Meeting, 2 March 2016, Amsterdam

1. Introduction

The Chair - Prof. dr. Madeleine de Cock Buning - welcomed all the participants, in particular a new ERGA member- Ms. Tanja Borg Cardona, Chairwomen of the Broadcasting Authority of Malta. She also thanked the ERGA Chair in years 2014-2015 – Mr. Olivier Schrameck - for the ERGA achievements under his chairmanship. She mentioned that under his guidance ERGA produced three important reports and a statement on the freedom of speech. She also welcomed the new ERGA Vice-Chair – Ms. Mirjana Rakić. At the same time she thanked the outgoing Vice-Chair - Mr Jan Dworak, Chairperson of the Polish regulator. In view of the recent developments in Poland she expressed ERGA's support and solidarity with him. It was confirmed by the Statement on the necessity of the independent media, adopted in January 2016. Finally, the Chair thanked the Commission for the support in organising this ERGA meeting.

The Chair also described the ERGA achievements of the last two years. She mentioned the adoption of the three ERGA Reports: on independence, material jurisdiction and protection of minors. She also referred to the adoption of the ERGA Statements, in particular very effective cooperation leading to the adoption of the last ERGA Statement on the necessity of media independence. In the context of the Statement, she also pointed to the absence of the Greek regulator during the meeting.

The Chair then moved to the future of ERGA and possible improvements to the work organisation. She mentioned that these issues were discussed during the ERGA Board meeting that took place on 9 February, in Brussels. She also referred to the importance of cooperation with EPRA.

2. Adoption of the Agenda

Before the meeting EPRA requested to give more information about its work programme for 2016. The Any Other Business item was to be used for that. The meeting Agenda was adopted unanimously.

3. Information from the European Commission

Roberto Viola first congratulated ERGA for its achievements.

He then moved to the items on the Agenda. He first described the developments of the Digital Single Market strategy. He underlined that this is a very important moment for Europe where all the rules concerning digital economy and digital society will be changed. Many of the important reforms on the DSM will be presented in 2016. In April, the Commission will present a digital technology package that will touch vital technologies for industries (cloud and standards). In 2016 the Commission also aims at adopting rules on content portability and geo-blocking. Before summer the Commission intends to present the review of the AVMSD and over the summer the reform of the copyright rules.

In late September/beginning of October the reform of the telecom rules is expected, while in November 2016 – the reform of data protection rules.

Next, Lorena Boix Alonso presented the results of the public consultation that run from 6 July to 30 September 2015. She thanked all ERGA members for replying to the public consultation and the Refit questionnaire, as well as supporting the work of the contractors working on the impact assessment (IA) studies for the European Commission. She underlined that most of the data used in the IA comes from the replies to the public consultation and IA studies but also from the excellent ERGA reports and Refit questionnaire.

She then summarised the results of the public consultation. She said that the Commission received 438 replies and the preliminary trends have been published online together with the contributions of those who did not object to publication. Almost all the Member States' relevant Ministries and/or regulators have participated to the Public consultation on the AVMSD; 376 replies were given by organisations whereas 62 replies were given by individuals.

She further described the following trends that have been observed: As regards the scope of the AVMSD – there was a significant convergence of views on the possible need to extend the scope of application of the AVMSD to new types of services. Furthermore, she indicated that there is a strong support for strengthening of the rules seeking to guarantee the independence of audiovisual regulators. This is considered necessary in order to underpin free and pluralistic media and effective application of the AVMSD. The results also showed a very large support for maintaining the country of origin principle, considered critical for the functioning of the internal market; as well as for maintaining the status quo as regards rules on: must-carry/findability of public interest content; accessibility for persons with disabilities; listed events, short news reports and the right of reply.

However, a divergence of views was observed as to whether and, if so, how to adapt the rules on commercial communications, protection of minors and promotion of European works.

After the presentation by Lorena Boix Alonso, Roberto Viola summarised the state of play of the REFIT exercise on the AVMS Directive.

He mentioned that the REFIT evaluation showed that the Directive mainly works well but needs to be modernised. Therefore, what the Commission intends to do is rather to modernise it than drastically change it.

Replying to question by the CY regulator, Roberto Viola referred to the envisaged provisions on the independence of regulators. He explained that the Commission was looking at other models of setting the requirements of regulatory independence, such as telecom, energy or data protection frameworks. All these models do not enter into the appointment procedures. They rather refer to the mandate of the regulator.

Replying to the question by the IE regulator, Roberto Viola underlined the importance of independent regulators and the role of ERGA.

In reply to the question by the UK regulator, Lorena Boix Alonso specified that even though there is a big split of views as regards rules on protection of minors, there is no demand for lowering the level of protection.

The last item of the information from the European Commission was devoted to the Ecorys study for the European Commission on the exposure of minors to alcohol advertising. The study investigated the exposure of minors to alcohol advertising on linear (TV) and non-linear (on-demand) audio-visual (AV) media services and other online services in the European Union (EU).

The study found that approximately 7.3% of the total number of alcohol impacts on linear AV media services in 2013 were seen by minors. In absolute terms this means that, on average, a minor saw 200 alcohol impacts, while an adult saw over 450.

Online services and alcohol industry try to ensure minimal exposure through the implementation of measures and self-regulation, however, minors surveyed perceived a substantial level of exposure, while self-reported exposure increased with age and online activity.

The study also found that the most common themes employed in alcohol advertisements include the association of alcohol with sociability and the depiction of drinking with humorous tones. Respectively, 87% and 63% of 90 analysed TV advertisements and 33 online alcohol advertisements contained at least one element that can be considered appealing to minors. In addition, it found that 25% of the analysed advertisements reflect at least one of the criteria described in the AVMSD, but this does not necessarily imply that there is an infringement.

4. Sub-group on territorial jurisdiction

Martine Coquet, representing the FR regulator, explained that Mr Schrameck could not be present at the ERGA meeting, neither Mr. Lenica - the Chair of ERGA sub-group on territorial jurisdiction – as he no longer holds the post of the director-general of the FR CSA (he moved to the Cabinet of the Minister). The new director general – Mr. Guillaume Blanchot - will take over the Chairmanship of this ERGA sub-group.

After this introduction, she invited Paul Avril to describe the discussion paper on territorial jurisdiction. Paul Avril thanked all the members of the sub-group for their commitment and the ERGA members for replying to the questionnaire. He also underlined the importance of practical examples and invited the regulators to submit their own examples and data during the rounds of comments. After the presentation of the suggested conclusions, the ERGA Chair noted that a

sufficient alignment of views exists to build a shared position and encouraged Paul Avril to develop it further in the upcoming WG report on the subject.

Regarding the questions for discussion (as presented in the discussion paper), a number of regulatory authorities took the floor.

All regulators supported the development of information sharing system on national legislative frameworks **(Q1)**. However, some pointed out that this system should not duplicate what the European Audiovisual Observatory has done so far in this respect. Paul Avril clarified that the idea is to build on the existing instruments, including instruments by the Observatory.

As regards the role of ERGA in the non-legislative initiatives to clarify elements of the territorial jurisdiction framework **(Q2)**, majority of Members agreed that ERGA should play a role in this area. One regulator pointed to the difficulties in discussing non-legislative solutions when the legislative solutions are not yet decided.

All the regulators also supported further exploration of whether the secondary jurisdiction criteria could be modified to cover non-EU services delivered over technologies other than satellite **(Q3)**. As regards the grounds for derogations from the principle of freedom of reception it the majority of regulators agreed that the same grounds should apply to all audiovisual media services **(Q4)**. However, there was no agreement as to whether they felt these grounds should be levelled up or down.

Regarding the issue whether the Commission should consider ways of improving the formal cooperation procedure outlined in Article 4.2 ASMSD **(Q5)** a number of regulators (DE,CY, BE regulators) took the floor. They underlined that there is a need for improving the formal cooperation procedure and introducing fast track procedure. One regulator (BE CSA) underlined that it is important to reach a diplomatic agreement on this point. The fact that regulators need tools to implement these mechanisms should also be taken into account.

Regarding the anti-circumvention procedure, as set out in article 4.3 AVMSD **(Q6)**, regulators agreed that it should also apply to video on-demand providers. DE regulator also pointed to the need of improving the circumvention procedures by introducing the fast track procedure. Regulators also supported a broad recommendation for ERGA to work with the Commission to ensure optimal cooperation between regulators on matters of territorial jurisdiction **(Q7)**.

As regards possible changes to the country of origin principle, the regulators discussed to what extent they would support a change of approach in any of the circumstances mentioned in the discussion paper, e.g. for certain content standards obligations, in the context of video on-demand services or non-EU services. The regulators who took the floor felt it was premature to talk about the change of approach (FI, EE regulators) or would prefer to focus on exploring in detail the implications of this fundamental change (IE and UK, regulators), others suggested taking into consideration a graduated approach (IT regulator).

Paul Avril agreed to include the comments expressed during the meeting in the text of the Report. He also presented the timeline of adoption. The consolidation of comments should happen by the 18 March and then, by 1 April, the new draft report will be shared with the CN. The written procedure for the adoption of the final report could then start at the beginning of April.

The ERGA Chair complimented the sub-group for an excellent work and moved to the next point on the Agenda.

5. Terms of reference of the ERGA sub-groups

The Chair summarised the ERGA goals set in the WP 2016. She referred to the three new ERGA subgroups, underlining that the ERGA should make sure that the subgroups' work and deliverables will not overlap to allow for planning of the resources. In this context she mentioned that the planning of the subgroup 1 depends heavily on the Commission's planning.

5a. Terms of reference Audiovisual Media Services Directive Review Subgroup

The subgroup Chair- Oli Bird from the UK Ofcom- presented the principal tasks of the new subgroup, divided into three phases. He also described the envisaged timeline. Replying to comments by the DK regulator he proposed to discuss, during the first subgroup meeting, whether the output of Phase 1 should be approved by the Plenary. The subgroup should also reflect on the topics that are to be discussed under Phase 1, e.g the question of platforms, proposed by the DE regulator. The IT regulator emphasised the need to remain as flexible as possible.

The ToR was adopted unanimously.

5b. Terms of Reference future-proof European Audiovisual Regulation Subgroup

The subgroup Chair -Michael O'Keefe from the IE BAI- described the scope and purpose of the subgroup. Referring to the topics for action in 2016 he mentioned that the topics of protection of minors and accessibility to media services of persons who are visually or aurally impaired received the biggest support, followed by the topic of mechanism to assist regulators and remedies that may be imposed in addressing concerns around terrorist propaganda. Therefore, he proposed that in 2016, the subgroup should focus on the first two topics, adding that this issue will be discussed at the first subgroup meeting.

Few regulators took the floor, expressing strong support for the topic of terrorist propaganda and requesting to qualify the topic by distinguishing the issue of Islamic propaganda (CY, BG, FR).

MT regulators proposed to add the topic of the protection of minors in on-line gambling (advertising in the on-line gambling) while IT regulator wished to add a topic on the public service broadcasting. The Chair replied that he is open to suggestions but there can be maximum two topics for action this year so at the first meeting the sub-group would have to decide which topics will be dealt with in 2016. Replying to this, the DK regulator stressed the importance of a wide support for the subgroup's activities and remarked that they would have preferred if the remit of the subgroup's work was decided by all the members at the plenary meeting instead of by the sub-group members only.

As to the issue of public service broadcasting, the subgroup Chair clarified that it is outside the scope of the AVMSD so it cannot be covered by the remit of the subgroup. He also suggested that ERGA should give priority to the issue of terrorist propaganda next year. The title should be general, without distinguishing the Islamist propaganda.

Chair: ToR was adopted by the required majority.

5c. Terms of reference Digital European Toolkit Subgroup

The subgroup Chair -Tanja Kersevan Smokvina from the SI AKOS –described the scope and purpose of the subgroup. She mentioned the CIRCABC database operated by the Commission and created for the informal regulators group. It could be used as a basis for the document sharing between ERGA members.

It was suggested to set priorities as regards the types of documents to be collected.

The ERGA Chair invited more ERGA members to join this subgroup. The Terms of reference were adopted unanimously.

6. Independence of Media

This item on the Agenda aimed at discussing the recent development in some of the Member States where the independence of regulators was affected and the ways ERGA should react in these kinds of cases. First, the Chair requested the Chairperson of the Polish regulator - Jan Dworak - to summarize the situation in Poland.

Jan Dworak expressed his appreciation to all ERGA members and the Chair for the adoption of the well balanced ERGA Statement on the necessity of independent media. He underlined that it showed that all regulators share common values and that there is a need to strengthen the independence of regulators and transparency of media in the upcoming review of the AVMSD.

As the term of Mr Dworak was to expire in 2016 he also thanked all the ERGA members for the opportunity to participate in ERGA activities.

Next, the Commission representative – Giuseppe Abbamonte, Director Media and Data, DG CNECT-thanked ERGA for the Statement and explained the Commissions' possibilities to act in similar cases. He underlined that the Commission's powers are limited by the Amsterdam Protocol and the AVMS Directive does not provide a legal basis to act as regards the independence of regulators. As regards Poland, the Commission has opened the dialogue with PL – the so called "rule of law mechanism"- allowing the Commission to enter into dialogue with the Member State to prevent endangering fundamental freedom and democracy in that Member State.

Next, the ERGA Chair mentioned the difficult situation of the Greek regulator, functioning with only one remaining Board Member. In this context, a number of regulators (CY, BG, RO regulators) requested the Commission to be more responsive to the situations where the independence of regulators is at risk.

The Commission representatives replied that the Commission may not act in the areas where it does not have competences. Lorena Boix Alonso referred to the example of the Hungarian Media law where the Commission required the Hungarian government to change the Media Law in the areas that were not in conformity with the EU law. However, as all ERGA members are aware, at the

moment the AVMSD does not provide for a legal basis to require Member States to ensure independence of the audiovisual regulatory bodies.

It turned out from the discussion that it would be best to express the concerns that were raised regarding the situation in Greece in a press release about the fifth ERGA meeting. It was followed by a long discussion on the conditions of adopting ERGA statements in the future. The Members agreed that ERGA should act within its remit when adopting statements in the future (UK, NL). It should focus on principle matters - when the public key values of the regulators are at stake - and not political matters and the need to adopt statement should be assessed on a case by case basis (FI/DK/EE). Others underlined that independence of media is one of the core values (IE, RO, BG).

7. ERGA forward looking

The last point on the Agenda was devoted to the improvements of the existing ERGA work processes and possible amendments to the rules of procedure. Marianne Minneché from the NL regulator gave a presentation on the possible improvements.

Members supported strengthening of the CN, however some pointed out that ERGA does not have as many working groups as BEREC therefore similar structure to BEREC's CN might not be necessary. ERGA sub-groups could be empowered to do the work of CN (FIN).

Lorena Boix Alonso also pointed out to the need to act within ERGA's budget.

Next, ERGA members discussed the improvements to the written procedure. All accepted that there is a need to introduce the emergency written procedure, as proposed in the 'Wishlist' document prepared by the Presidency. However, some members pointed out that, in order not to misuse this procedure, there is a need to qualify the situations when it can be used. In other cases it should be subject to the decision of the Board. The rules of procedure should also specify that the written procedure can be used for the adoption of the Work Programme, though as a general rule ERGA should strive to adopt as many decisions as possible in the Plenary.

As regards, the appointment of the sub-group chairs it was agreed that this matter does not need to be addressed in the rules of procedure and can be based on the standard practice established so far.

Others proposed to align the working practices within the subgroups as they differed among the subgroups, e.g. the involvement of the CN, different timing for delivering outcomes, the role of active members and other members. The Members also raised the issue of workload/deadlines.

The Chair committed to sum-up all the issues raised in the Plenary and resubmit the 'Wishlist' to the members and the Commission. She also mentioned that this year, to avoid excessive workloads, the subgroup chairs will try not to concentrate deadlines for deliverables at the same time.

The Commission representative mentioned that the Commission intends to provide for an institutional setting for ERGA in the revised Directive. The idea would be to have a role for ERGA in a number of issues, such as jurisdiction, country of origin, protection of minors or audiovisual commercial communications.

8. Any Other Business

Before closing the meeting, the EPRA Chairperson, Celene Craig, formally recorded the appreciation of EPRA for the invitation to participate in ERGA and its sub-groups. She welcomed the initiative on the part of the ERGA Chairperson to informally consult on aspects of the ERGA Work Programme for 2016 and in particular on its complementarity with EPRA's work programme for the year. She recorded EPRA's belief that such co-operation would be of benefit to both organisations and, in this context, welcomed the fact that the ERGA Chairperson would participate in EPRA's spring 2016 meeting in Barcelona. Such regular participation would be most welcome in the future and would strengthen co-operation further between the organisations. The ERGA chair agreed with this observation and thanked everyone for their active participation and closed the meeting.