

ERGA scoping paper

on territorial jurisdiction in a convergent audiovisual world

1. Introduction and context

The AVMS Directive aims at the creation of a European-wide market for audiovisual media services, without internal frontiers, ensuring freedom of circulation for audiovisual media services within the European Union whilst, at the same time, putting forward the need to protect legitimate general interest objectives.

Beside the two work streams already existing under the theme “adapting the EU regulatory instruments to a convergent audiovisual world” – one looking at the protection of minors, the other looking at material jurisdiction (scope of the Directive) in a converged environment – ERGA’s Work Programme for 2015 has proposed to add a third work stream looking at territorial jurisdiction.

In broad terms, this subgroup will examine the fitness of the provisions on territorial jurisdiction of the AVMS Directive. The notion of territorial jurisdiction determines the regulation of which Member State shall apply to the audiovisual media services available in one or more Member States.

As stated in its recital 33, the regime of territorial jurisdiction applied in the AVMS Directive is based on the country of origin principle. Combined with freedom of establishment, the country of origin principle means that audiovisual media services providers are allowed to operate in other Member States, while only complying with rules from the Member State under whose jurisdiction they fall.

The AVMS Directive was adopted more than seven years ago. Since then, the European audiovisual sector has evolved rapidly and undergone significant changes, such as the development of internet-based television and of broadband on-demand audiovisual media services, with the availability of new forms of contents, provided by a growing range of content providers – originating in EU or non-EU countries – on a growing number of devices. These recent developments, often referred as under the topic of “convergence” (meaning “the progressive merger of traditional broadcast and internet services”, according to the definition given by the European Commission in its Green Paper “Preparing for a fully converged audiovisual world: growth, creation and value”), may raise questions concerning the regime of territorial jurisdiction of audiovisual media services at EU level. In parallel, along the years, the implementation of the AVMS Directive has given rise to difficulties in applying its provisions related to territorial jurisdiction.

Overall, these challenges could include (but may not be limited to):

- the protection of national general interest objectives, including the conditions of fair competition between all players targeting European national markets with audiovisual media services;

- the implementation of the establishment criteria that determine jurisdiction;
- the functioning of several mechanisms foreseen in the AVMS Directive, including the procedures to promote cooperation, the procedures for substantiating deliberate circumvention, and the procedures for derogating from the principle of freedom of transmission.

This paper proposes that ERGA should undertake work to analyse whether difficulties have arisen from the implementation of the AVMS Directive or from developments since the AVMS Directive was introduced, and whether these might justify a change of approach. This is supported by an on-going wish to ensure that public policy goals will still be achieved in a connected society.

As agreed in ERGA's work programme for 2015 and in the Terms of Reference of the subgroup, the subgroup on territorial jurisdiction has produced this scoping paper. Its purpose is to outline what we consider as the important topics that arise on the matter of territorial jurisdiction. The remainder of this document suggests an approach to how ERGA might wish to develop its answers to these questions and sets out proposals for an in-depth study that we believe ERGA should produce so that we can address this issue.

Since questions of territorial jurisdiction are also important considerations in the discussion about material jurisdiction and protection of minors in a convergent audiovisual world, the Chairs of the three subgroups will maintain regular dialogue.

2. Key issues

2.1 High-level analysis of the provisions on territorial jurisdiction of the AVMS Directive

2.1.1 The main principles and objectives of the AVMS Directive in terms of territorial jurisdiction

Objective

The AVMS Directive aims at ensuring the freedom of circulation for audiovisual media services within the European Union, based on the principle of the internal market, while at the same time taking account of cultural diversity within the European Union through minimum harmonisation. With this in mind, the country-of-origin principle forms the core of that Directive. This part of the analysis aims at going back to the principles which presided over the adoption of the country-of-origin approach and to the key concepts of its implementation, to be able to assess the current situation against them.

Context

Recital 104 of the AVMS Directive states the main goals of this legal instrument, namely “the creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities.”

More broadly, the European Commission states the public policy goals of the coordination ensured by the AVMS Directive as follows:

- providing rules to shape technological developments;
- creating a level playing field for emerging audiovisual media;
- preserving cultural diversity;
- protecting children and consumers;
- safeguarding media pluralism;
- combating racial and religious hatred;
- guaranteeing the independence of national media regulators.

With the AVMS Directive, the legislators have tried to reach a regulatory balance, by creating a border-free market for audiovisual media services, whilst giving the Member States the freedom to require media service providers under their jurisdiction to apply more detailed or stricter rules in the fields coordinated by the Directive.

The AVMS Directive tries to achieve this through the coordination of national legislations on a designed range of areas. On these areas, the AVMS Directive provides a minimum set of common content rules. The areas for EU coordination are:

- prohibition of incitement to hatred;
- accessibility for people with disabilities;
- principles of Jurisdiction (“country of origin” principle);
- events of major importance for society;
- promotion and distribution of European works and independent works;
- audiovisual commercial communications;
- protection of minors.

Recital 40 of the AVMS Directive recalls that media service providers benefit from the freedom of establishment instituted by the Treaty on the Functioning of the European Union. The Articles 49 to 55 of this treaty lay down the freedom of establishment as a fundamental right of the European Union.

Looking at these main principles and objectives of the AVMS Directive from the point of view of territorial jurisdiction leads to question and analyse the sticking points between them. For instance, differences in the implementation of the AVMS Directive among the Member States – be it regarding the different ways of implementing the Directive’s provisions or concerning the possibility given by the AVMS Directive to Member States to adopt stricter rules in the areas coordinated by the Directive – may result in an unlevel playing field for AVMS providers and in forum-shopping behaviours that can lead to a global reduction of the level of protection for the European citizens.

Key Questions

- Has the freedom of establishment led to an unlevel playing field for AVMS providers in your Member State?
- How to reconcile principles of free establishment, free circulation and possibilities offered by the AVMS Directive to Member States to adopt stricter rules in specific areas? Could an enhanced harmonisation of the related Members States’ complementary rules of public interest be seen as an acceptable answer?
- Does the application of the country-of-origin principle lead transnational services to propose the same offer in all EU countries?

- Does the country-of-origin principle enable public policy objectives to be met within a coordinated but not a maximum harmonisation framework?
- Should services whose content originates largely in non-European countries, or services that are made available in the EU but which originate and are controlled in other countries, benefit from and be subject to the European regulatory framework (which provides freedom of transmission but requires compliance with the EU’s content standards)?

2.1.2 The evolutions of the audiovisual sector having an impact on the question of territorial jurisdiction

Objective

This part describes the changes that the sector is currently undergoing, including through media convergence, technological evolutions, the impact on the ways of consumption of audiovisual content, and other parameters in the organisation of the audiovisual media sector. It will then consider the impact of these changes on the issue of territorial jurisdiction. This question will be dealt with in close cooperation with the subgroup on Material Jurisdiction, in order to avoid duplication of work.

Context

As stated above, the European Commission defines media convergence as “the progressive merger of traditional broadcast and internet services”¹. More broadly, the word convergence has been used since the 1990s to refer to the progressive coming together of what were considered before as separate clusters of the economy: information technology (IT), electronic communications and media. Such a trend was made possible thanks to rapid technological developments over the past 20 years. A previous Green Paper of the European Commission² issued in 1997, already underlined the various dimensions of the concept of convergence, namely:

- the convergence of networks: networks which were used for telecommunications (including access to the Internet) are now widely used for broadcasting audiovisual media, and vice-versa (e.g. cable television networks);
- the convergence of devices: connected TV sets are now a common thing, while computers, smartphones and tablets give access to an always wider range of audiovisual content;

¹ European Commission’s Green Paper “Preparing for a fully converged audiovisual world: growth, creation and value”

² European Commission’s Green Paper on the convergence of the telecommunications, media and information technologies sectors, and the implications for regulation – COM(97)623

- the convergence of services: with the rapid technological evolutions, new forms of services come up, mixing characteristics of the IT and media worlds, and are now available on a great variety of terminals.

Our analysis will consider an overview of new and developing services, changing consumption patterns and any obvious patterns that emerge in particular of geographical changes in how audiovisual service providers are operating.

Key Questions

- What could be the consequences of the development of broadband/internet-based audiovisual media services in terms of territorial jurisdiction?
- How to deal with non-EU based players which provide audiovisual media services through other technical means than satellite?
- How to ensure an adequate level of protection of the main principles of the AVMS system (such as competition, audience protection, promoting and financing of European works, diversity of contents) on the new services often not established in a EU country?
- How to reach all the AVMS providers that target Member States' audiences?
- Given the evolution and interpenetration of the markets – made possible by a greater mobility of the providers and services – does the Directive effectively allow a provider to broadcast programmes (both programmes per se and commercial communications) dedicated to the audience of another Member State, accessing in this way the advertising market of the latter Member State?

2.2 Analysis of the detailed operation of the current regulatory framework

2.2.1 Determining territorial jurisdiction

Objective

The aim of this section is to allow regulators to reflect on the establishment criteria laid out in the AVMS Directive to determine territorial jurisdiction (cf. annex 2), which are shared by both linear and non-linear services. Regulators could also discuss the relevance of the subsidiary technical criteria and the possible need to adapt these in light of technological developments.

Context

The structure of the audiovisual sector is currently evolving, creating new forms of establishment for the AVMS. Those represent alternatives to the conventional establishment in the Member State whose audience is targeted. Regularly, companies develop broadcasting activities in several Member States, spreading among them: head offices of related corporations and/or staff responsible for editorial decisions and/or varying number of company's personnel.

Different entities of an audiovisual group can claim bearing the editorial responsibility or sharing it together in various modes. The lack of criteria in the Directive on operations consisting in an effective control over the selection and organisation of programs could open the way to litigations and therefore to non-compliance with national and European rules.

Article 2 of the AVMS Directive sets out the key criteria by which jurisdiction is determined (i.e. which national authority has regulatory oversight over a broadcaster):

Establishment criteria

- the location of the **head office** and where **editorial decisions** are taken;
- (if these are not the same) the location of a **significant part of the workforce involved in the pursuit of the AVMS activity**;
- (in cases where editorial decisions are taken in one Member State and head offices are located in another and a significant part of the above mentioned workforce operates in each of these Member States) **the location of the head office**;
- (in cases where editorial decisions are taken in one Member State and head offices are located in another and a significant part of the above mentioned workforce operates in neither of these states) **the state where the media service provider first began its activities provided that there is a stable and effective link with the Member State's economy; and**
- (in cases where one of the two activities is located outside the EU), the location of the **head office or where editorial decisions are taken** provided that a significant part of the workforce involved in the pursuit of the AVMS activity is located in that state.

Criteria to determine jurisdiction where there is no EU establishment

- subsidiary **technical criteria** if other criteria do not point to a particular Member State, with services deemed to be established either in the Member State of the relevant satellite uplink, or the Member State to which the satellite capacity appertains.

Applying these criteria to linear services provided over traditional broadcasting delivery mechanisms means that any content receivable in the EU will necessarily fall under the jurisdiction of a Member State, even if the provider of that content is not “established” under primary criteria within the EU. Common examples are Middle East television channels that are transmitted across Europe by a satellite capacity appertaining to the territory of a Member State).

It is worth noting that the subsidiary technical criteria are in practice complex to apply and can cause difficulties, in particular in cases where the satellite uplinks are outside the EU and the satellite capacity owner has no direct relationship with the original media service provider, or in cases when a service is broadcast on more than one satellite. Moreover, these subsidiary criteria do not apply to content delivered online, which does not rely on (European) satellites or (European) uplinks, into European jurisdiction.

There is no provision in the Directive for a mandatory licensing regime. As a result, not all Member States operate a licensing regime for AVMS, and those regimes that do exist can vary significantly. Additionally, some Member States may consider that if they revoke a licence the AMVS in question no longer falls under their jurisdiction.

Recital 54 of the AVMS Directive seems to acknowledge the possibility of a country of reception approach in relation to services originating from outside the EU. Pursuant to Recital 54 Member States are free to take whatever measures they deem appropriate (i.e. make their own

arrangements) in relation to services from outside the EU and over which no EU Member State has jurisdiction.

Recital 38 of the AVMS Directive suggests that the subsidiary criteria should be adapted to take account of technological developments in order to ensure suitable regulation and its effective implementation. No further guidance is provided and Recital 38 refers specifically to developments with regard to digital satellite programmes, suggesting it is unlikely that it could be used as the basis for adapting the subsidiary criteria beyond traditional means of broadcasting.

Key Questions:

- The primary establishment criteria are dealt with in considerable detail in the AVMS Directive. Have regulators faced difficulties in applying these criteria? Is there a significant degree of variation in how the criteria are applied (e.g. how terms “editorial decisions” and/or “significant part of the workforce” are interpreted) between Member State?
- Are the original criteria still applicable to today’s market?
- How are questions of multiple entities with editorial responsibility, located in different Member States, handled? How to clarify the way editorial responsibility is endorsed? Which tasks consist in controlling the selection of programs and organizing it? Who really decides on content for local and dedicated audiovisual activities?
- What are the motivations of broadcasters to establish themselves in specific Member States?
- Is the practice of non-EU service providers using EU uplinks or satellite capacity common? What problems does this practice cause, if any? Do these problems relate to administration or content standards?
- Have regulators faced difficulties in applying the subsidiary criteria stated in the Directive and those that have been established in link with the Contact Committee (anteriority of the use of the satellite uplink/capacity, size of the satellite footprint)?
- Have there been any/many cases of disputed jurisdiction? If so, how have the cases been handled/solved?
- Have we learned lessons that might contribute to improving the definitions in the Directive and/or would they suggest any new definitions that might help determine establishment of AVMS in the future?
- Could regulators usefully share information about cross-border content services seeking to establish themselves in their jurisdictions? How to anticipate the multi-licensing or registration process by NRA’s to avoid legal disputes and strengthen legal security which is necessary for audiovisual media service providers. How to ensure regulators’ independence in arbitration procedures of jurisdiction between Members States?
- Would a harmonised licensing framework and/or a system of mutual recognition of the authorisation/ban-related decisions have a positive benefit?
- What secondary criteria might be considered in relation to content provided using other technologies?

2.2.2 Freedom of reception, exceptions and derogations

Objective

The aim of this section is to analyze the operation of the provisions in the AVMS Directive that permit Member States to derogate from the principle of freedom of reception, in relation to both linear and non-linear services, and consider whether these provisions have been and remain effective.

Context

Article 3.1 of the AVMS Directive requires Member States to ensure freedom of reception and prevents them from restricting retransmissions on their territory of services from³ other Member States. Article 3.2, however, allows Member States to restrict circulation of those services in a set of specific circumstances; these differ depending on whether the service is linear or non-linear.

In the case of television services, derogation is permitted if:

- a) *a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 27(1) or (2) [protection of minors] and/or Article 6 [incitement to hatred];*
- b) *during the previous 12 months, the broadcaster has infringed the provision(s) referred to in point (a) on at least two prior occasions;*

Additionally, appropriate and timely notifications must have been made to the broadcaster and the Commission, and previous consultations with the Member State that has jurisdiction and the Commission have not produced an amicable settlement.

For non-linear services, derogation is permitted on a set of different grounds, which are set out in Article 3(4): namely, the necessity of the derogating measures for public policy, the protection of public health, public security and the protection of consumers. These measures can only be taken against an on-demand service that prejudices or presents a serious or grave risk of prejudice to these objectives, and before taking the measures the Member State must carry out a set of preliminary actions including entering into discussions with the Member State that has jurisdiction and the Commission.

The Directive also allows for emergency steps to be taken – without the preliminary steps outlined above – in “urgent cases” (Article 3(5)).

Key Questions:

³ The wording of the Directive here is “from” other Member States; in practice it seems this would mean “established in, for the purposes of the Directive.”

- Do all Member States have implementing legislation that gives effect to the powers to restrict transmission?
- How do Member States interpret legal concepts such as “manifestly, seriously and gravely”?
- Have the provisions proved effective? What has been regulators’ experience of the procedures set out in Article 3 of the Directive to derogate from the principle of freedom of reception?
- Is it difficult to prove the need to derogate from freedom of reception and retransmission?
- Have there been any “urgent cases” where regulators were required to act without recourse to the notification and cooperation processes envisaged? Do we have evidence that the provisions of Article 3(5) offer a practical solution?
- Have regulators been involved in cases where they would have considered or recommended derogation to restrict transmission of either linear or non-linear services but were unable to take action for any reason?
- Do regulatory authorities routinely monitor/assess the content of services outside of their jurisdiction? Have regulators experienced cases where other Member States have acted against services authorised, licensed or established in their jurisdiction?
- Are there grounds for improving the procedures and conditions set out in the Directive? If so, how?
- Should the grounds for derogation be widened to include other important policy priorities?
- Should the grounds be the same for both linear and non-linear services?
- Do Member States in practice have different rules for linear and non-linear services? If so, what are the differences between the provisions?

2.2.3 Stricter rules

Objective

The aim of this section is to consider the challenges to national general interest objectives created by some services, which are under the jurisdiction of one Member State but target or are receivable in another Member State with stricter rules in the fields coordinated by the Directive.

Context

In accordance with article 4(1) Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by the Directive provided that such rules are in compliance with Union law. Some Member States have therefore adopted stricter rules or more detailed rules in regards to for example protection of minors, commercial communications and promotion of European works.

Due to the increasingly international nature of media service providers there are more and more AVMS that fall under one Member State's jurisdiction while targeting or being receivable in another Member State. In some of these cases the Member State being targeted by the AVMS has adopted stricter or more detailed rules of general public interest than the ones adopted by the Member State with jurisdiction. As a media service provider is only obliged to comply with the rules of the Member State with jurisdiction, this can cause a challenge for the Member State being targeted by the AVMS as it has no direct way to enforce its stricter rules on a service outside of its jurisdiction. This can render not only the freedom to adopt stricter rules ineffective but also create an unlevel playing field for media service providers established in different Member States.

Key Questions

- What stricter or more detailed rules of general public interest have Member States decided to adopt and on what basis?
- Has the freedom to adopt stricter or more detailed rules of general public interest been effective for the Member States that have chosen to adopt such rules? Has it been effective both in regards to AVMS falling under the jurisdiction of those Member States and AVMS that fall under another Member State's jurisdiction that have not adopted the same stricter rules (due to the media service provider willingly complying with the stricter rules)?
- If the freedom to adopt stricter or more detailed rules of general public interest has not been effective, what are the reasons for this?
- Have there been cases when a Member State has not been able to enforce its stricter rules due to the AVMS falling under another Member State's jurisdiction (due to both primary and secondary establishment criteria) that has not adopted the same rules? If there have been cases like this, how was the situation handled? Are such cases becoming more common for on-demand services?
- Have there been cases when a Member State has not been able to enforce its domestic rules due to the AVMS not falling under any EU Member State's jurisdiction, but a third country's jurisdiction? If there have been cases like this, how was the situation handled?

2.2.4 Informal and formal cooperation; circumvention

Objective

The aim of this section is to assess the practical efficiency of the procedures of the AVMS Directive for cooperation between Member States and regulatory authorities, and their effectiveness in (a) addressing public policy concerns arising from discrepancies between national rules, and (b) demonstrating deliberate jurisdiction circumvention by existing cross-border services. This analysis

should be carried out with reference to cases regulators have faced to date and should include consideration of the possible updates to the Directive's procedures in this area.

Context

Cooperation between Member States and their competent regulators is a principle frequently mentioned in the Directive, in various Articles and in Recitals 41 and 95. For example, the latter states that:

“Close cooperation between competent regulatory bodies of the Member States and the Commission is necessary to ensure the correct application of this Directive”.

Cooperation is envisaged as a potential means of solving problems that might arise due to the fact that the AVMS Directive is a minimum harmonization Directive and Member States are able to introduce stricter or more detailed rules domestically for services within their jurisdiction. It can also be seen as a means of solving other problems, such as difficulties related to determining territorial jurisdiction.

Articles 3 and 4 also refer to a form of cooperation. Article 3 makes consultations with and requests to Member States having jurisdiction over a service a pre-requisite for derogation from the principle of freedom of transmission (see above). Article 4(2) sets out a more formal cooperation process to be followed in relation to cross-border transmissions in cases where Member States have exercised their freedom to adopt more detailed or stricter rules than those included in the Directive.

National regulators have considerable experience of day-to-day cooperation, including the development of bilateral relationships and even regional networks, often with successful outcomes. Indeed, it can be observed that any problems with cooperation have in the past been identified more in the formal cooperation procedure than with actual cooperation between two Member States or their regulatory authorities .

Significantly, formal cooperation (as described in Article 4(2)) is only possible in cases where a Member State⁴ assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast⁵ that is “wholly or mostly directed towards its territory”.

If formal cooperation has failed to address concerns by the receiving Member State, that Member State may seek to demonstrate deliberate circumvention. A Member State could take “appropriate measures” against a broadcaster if it can demonstrate to the Commission that “the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established in the first Member State” and the Commission agrees that the measures proposed are

⁴ The AVMS Directive refers only to Member States here, but in practice this process has been largely handled by regulatory authorities. Could this be addressed or formalised in any proposals for revision?

⁵ The AVMS Directive refers only to “television broadcasts” in this context.

compatible with Union law. Such measures should be objectively necessary, applied in a non – discriminatory manner and proportionate to the objectives which they pursue.

Key Questions

- What has regulators’ experience of informal and formal cooperation under the Directive been? Does the experience of informal cooperation (including networks that have developed spontaneously) have anything to teach us? Should it be more explicitly provided for, using more detailed rules, in the Directive? Which aspects do regulators feel work well, which ones less well?
- Could/should the roles of the NRA’s involved in a co-operation procedure be clarified in the AVMS Directive?
- Could/should formal cooperation (as set out in Article 4(2)) apply to on-demand services as well as television broadcasts?
- Is formal cooperation a suitable or effective procedure to address the challenges posed by the ability of Member States to impose stricter rules domestically? Have any regulators attempted to demonstrate deliberate circumvention? Is it possible to prove intention to circumvent? Why is it necessary to prove circumvention?
- Do regulatory authorities find it difficult to assess content of services that fall under their jurisdiction but target another Member State? If so, what factors make the monitoring difficult? How is the public reassured that the same effective control of the principles and provisions of the AVMS Directive is carried out in all Member States?
- What has been the regulators’ experience of cooperating with other Member States to help them use the procedures set out in Article 3 of the Directive to derogate from the principle of freedom of reception and retransmission?
- What factors might be relevant in determining the success of a claim of deliberate circumvention? For example, have regulators ever gathered evidence on: the nature of the stricter rules which the Member State has adopted in order to pursue a general interest objective; a factual assessment as to whether the service is wholly or mostly directed towards the Member State – where the objective evidence is overwhelming it may be argued that the intention can be presumed; the history of the service and the proportionality of the measure taken by the Member State?
- Has the “wholly or mostly test” proved particularly difficult to apply? Is there evidence of significant variation in how this criterion has been applied in practice? Does any Member State have any experience in attempting to obtain evidence on the basis of other factors?
- Could/should the grounds for making a deliberate circumvention case be set out in the Directive or in guidance?

2.3 Analysis of the consequences of the evolutions identified in the first two sections, identification of the challenges they raise and possible solutions to these challenges

2.3.1 Consequences regarding the evolutions of the audiovisual sector and the operation of the current regulatory framework for the question of territorial jurisdiction

Objectives

The objective of this section is to analyse and evaluate the impact of the diffusion of the new services on the articulated general principles of pluralism and free circulation led by the AVMSD, and to evaluate the impact and identify challenges to fair competition and public policies (which can be reflected in more detailed or stricter rules than are in the Directive) when a service provider is established in a Member State, claiming its attachment to the jurisdiction thereof on the ground of a well-founded criteria or not, but is targeting wholly or mainly another Member State's audience.

Context

The cross-border nature of European AVMS and the increasing diffusion of services via internet may cause challenges and tensions, particularly when there are difficulties in creating a link between an audiovisual media service and the jurisdiction of a Member State.

The operation of the Directive will be examined in section 2.2.1, 2.2.2, 2.2.3 and 2.2.4, in relation to the processes for determining territorial jurisdiction (art. 2 of the AVMS Directive), the implementation of procedures to override freedom of circulation (art. 3 of the AVMS Directive) and preventing a Member State's stricter rules from being circumvented. Analysis of this operation might reveal difficulties which may result in conflicts between jurisdictions.

Furthermore, an AVMS established outside of the EU is not subject to the values of the AVMS Directive: to ensure a fair competition between the different services, to guarantee pluralism, diversity of content, openness of the media, while ensuring audience protection with particular regard to categories such as minors, and the promotion and financing of European works. This might partly be because the framework supporting the operation of the country of origin principle is arguably not adapted to a convergent environment (for example, since at the moment the jurisdiction criteria seem to be tailor-made on satellite or digital terrestrial services and no clue is provided to determine whether a web-based service is falling outside the scope of the jurisdiction of a Member State or not).

Having this in mind, it is becoming more and more urgent to find out whether a convergent world prevents us from applying an adequate level of protection to services available to EU citizens, through an analysis of the following questions:

Key Questions

- Is forum shopping a reality, and if so what are the effects on EU content industries and markets?
- Can a service provider have a significant impact and position on an audiovisual market where it is providing its audiovisual media services without being established in this Member State?
- In regard to competition, do broadcasters do have access to equivalent financial resources, for example when specific public policy restricts advertising communication forms (for example, ban of advertising in children’s programs or ban of alcohol advertising)?
- In regards of other public policies focused on content, what are the practical consequences of these broadcasters not being subject to the same standards, for example when public policy answers to a particular national sensitivity towards minor protection (ratings and time schedules), health prevention (preventive warning of addiction), promotion of European works (effective quotas); and other supportive policies of culture in conformity with general interest objectives;
- What are consequences of these differences for the stability of public institutions, and for the legitimacy and effectiveness of regulation authorities to their users and other regulated actors?
- In regards of cooperation between regulatory authorities, do such practices drive regulatory authorities to compete with one another in regards of motives sometimes contradictory to regulation objectives? If so, what are the consequences of such competition?
- Is the framework supporting the operation of the country of origin principle still adapted to the converging reality or do we need to find other solutions?
- Under what conditions should a well-known non-European service, where there is some doubt about where editorial responsibility (i.e. “effective control over the selection and organisation of the offer” is carried out), be granted the benefit of free circulation of services in Europe under the European regulatory framework?
- Should be fair competition and equal treatment rules applied to both television and on demand services? How to avoid a similar circumvention of stricter public policies for on-demand services which are targeting specific markets?

2.3.2 Suitable solutions to address these challenges

At this stage of the work, it is obviously difficult to decide on suitable solutions to address the key issues that have been raised so far in this document. However, the development of these solutions might involve answering questions such as:

- To achieve the aim of ensuring non-discriminatory treatment of players active on the same market, would it be justified to consider the measured significant position on this market as a ground for imposing on this service provider the obligation to comply with the stricter or detailed rules adopted by the receiving country?

- Or are there other ways to reduce differences in the applicable regulatory regimes both in the Member State of the service provider's jurisdictional establishment and in the Member State where services are really provided, (i.e. where the service provider should bear the related editorial responsibility)?
- A broadcaster which is established in a Member State, but whose service is targeting the audience of another Member State, must, in due circumstances (under art. 4.2), apply the stricter or more detailed rules of the country of destination. In these cases, should the Directive provide for additional procedures allowing the country of origin's national regulatory authority to ensure that the country of destination's stricter or detailed rules are being applied?
- Article 2.3 (b) of the Directive adds the supplemental criterion of the « significant part of the workforce involved in the pursuit of AVMS activities » when the head office and place where editorial decisions are taken pertain to different States. Should this criterion also be applicable when the place of editorial decisions is uncertain or shared between two or more states? Should, also, the criterion of effective and stable economic link be taken into consideration to decide about these situations of uncertain location of the authentic place of decision or when it is demonstrated that the program is produced in a specific country?

The final objective of this subgroup will be to produce a report which will consist in an in-depth analysis of these issues and will contain recommendations to the European Commission in preparation for the review of the current AVMS Directive.

3. Suggested milestones and deliverables

Milestone	Date
1 Adoption of the scoping paper on territorial jurisdiction	14 April 2015
2 Questionnaire built on the basis of the scoping paper	Replies to the questionnaire expected by end of June 2015
3 Summary of the replies to the questionnaire	End of July 2015
4 Proposal for common conclusions on territorial jurisdiction	4 th ERGA meeting

Given the calendar announced by the European Commission on the REFIT exercise on the AVMS Directive, ERGA will be in a position to offer common lines of thinking on territorial jurisdiction by the end of 2015. However, this will not close the topic definitively and any additional element likely to accompany the reflexion on the subject will be made available in due time if needed.

Annex 1

Subgroup Terms of Reference for 2015	
Name of Sub-Group (SG)	Territorial jurisdiction in a convergent audiovisual world
SG Chair, NRA	Frédéric Lenica, Director-General, CSA, France
Background	<p>The Audiovisual Media Services (AVMS) Directive aims to coordinate the provisions laid down by law, regulation or administrative action in Member States, in order to allow free movement for audiovisual media services within the European Union.</p> <p>By defining which regulation shall be applied to the audiovisual media services available in a Member State, the concept of territorial jurisdiction has been the cornerstone of the current European legal framework for more than 25 years.</p> <p>The “Television Without Frontiers” Directive in 1989, then the Audiovisual Media Services (AVMS) Directive in 2010 have successively made the country of origin principle the core of the European regulation, with a view to the creation of an internal market for audiovisual media services. The country of origin principle means that audiovisual media services providers are allowed to operate in other Member States, while only complying with rules from the Member State under whose jurisdiction they fall. The implementation of this principle has granted the audiovisual media services providers with the legal security they need to develop services that are now available across national borders.</p> <p>However, recent evolutions in the European audiovisual landscape, such as the development of internet-based TV and of broadband on-demand audiovisual media services, along with differences in the implementation of the AVMS Directive among the Member States, call for a reflection on the territorial jurisdiction framework at EU level in relation to the protection of national general interest objectives including the conditions of fair competition between all players targeting European national markets with audiovisual media services. Secondly, within the prospect of the review of the European legal instruments, it seems also especially appropriate to launch a reflection on the functioning of the aspects of the AVMS Directive that are relevant to the operation of the territorial jurisdiction framework. These include a consideration of the fitness of the establishment criteria that determine jurisdiction and are used for resolution of conflicts; an</p>

	<p>analysis of how well the mechanisms to promote cooperation are working; an assessment of whether the minimum standards in the Directive cover the right areas and at the right level (acknowledging that some of this work is already underway as part of the ERGA subgroup on Protection of minors); and a review of the effectiveness of the procedures for substantiating deliberate circumvention and for derogating from the principle of freedom of transmission.</p>
Subgroup scope and purpose	<p>The subgroup has the remit to launch a scoping discussion on the topic of territorial jurisdiction in a convergent audiovisual world.</p> <p>The issues related to territorial jurisdiction are indeed core subjects regarding the evolution of the current regulation, and were requested by many members in the course of the consultation on the ERGA work programme.</p> <p>The subgroup will aim to produce a scoping paper, which will make proposals for more detailed work on the topic to be carried out by ERGA after its third plenary meeting. More specifically, this paper will outline the context, the problem definition, and the particular questions to be explored in detail, including planned milestones and topics for an in-depth analysis.</p>

Deliverables

Deliverable type	Report (scoping paper)
Deliverable title	ERGA scoping paper on territorial jurisdiction within the context of a convergent audiovisual world
Due date	Plenary meeting – 14 April 2015
Public consultation	No
Publication	Yes

Allocated Resources and anticipated level of involvement

High	CSA (France), NMHH (Hungary), AGCOM (Italy), NEPLP (Latvia), SBA (Sweden), OFCOM (UK), TJA (Estonia), RTK (Lithuania), BAM (Malta), AAAMS (FYROM)*
Middle	CSA/VRM (Belgium), AEM (Croatia), RRTV (Czech Republic), DLM (Germany), NCRTV (Greece), BAI (Ireland), CVDM (Netherlands), KRRiT (Poland), AKOS (Slovenia), CNMC (Spain), Medietilsynet (Norway)*
Low	CRTA (Cyprus), FICORA (Finland), ALIA (Luxembourg), ERC (Portugal), RVR (Slovakia)

* Observer

Work flow (internal and external milestones)

Date	Action / deliverable	Internal Sub-Group only	External Board, CN, Plenary, Publication
Year 2015			
January-February	Terms of Reference adopted by the sub-group and topics of interest expressed	Sub-group	
Mid. February	Adoption of ToR – electronic procedure		Plenary
Mid. February	Elaboration of the structure of the scoping document	Members/Drafters	
End February	Preparation of draft scoping paper	Chair/Drafters	
Beg. March	Meeting of the sub-group to review the drafting process	Members/Drafters	
Mid. March	Circulation of draft final scoping paper within the sub-group for approval	Members	
End of March	Submission of final scoping paper to the plenary	Chair	CN
14 April	Approval of report by plenary		Plenary
April	Publication on external webpage		Publication by secretariat

Annex 2: descriptive chart of the practical aspects for determining jurisdiction

The rules of the AVMS Directive related to the jurisdiction of Member States over the audiovisual media services (also including on-demand services) requires, as a first step, to identify the provider of a given service.

- Art. 1, d) AVMSD is leading a definition of a media service provider as “the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised”;
- Art 1, c) AVMSD stipulates that the notion of “editorial responsibility” should be understood as “the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;”

After the identification of the AVMS provider is clear, the following step calls in the territorial jurisdiction, in order to find out under which Member States’ jurisdiction the service is operating. Jurisdiction criteria over AVMS are established by article 2 of the AVMS Directive as summarised in the following picture.

