



[Annex 2 to Final Report of Subgroup 3]

ERGA Subgroup 3 – Taskforce 2

“Video-Sharing Platforms under the new AVMS Directive”

Paper

(Deliverable 2 of ToR)

Background

In accordance with the 2019 ERGA Subgroup 3 'Terms of Reference', Taskforce 2 is expected to focus on the provisions set out under Article 28b of the revised AVMS Directive. More specifically, after the first meeting, members agreed that the Taskforce should deliver on:

- an easy-to-use list of analytical questions which would help NRAs in the identification of VSPs, in accordance with the definition provided in the revised AVMS Directive and without prejudice to the upcoming Commission guidelines foreseen in Recital 5;
- analysing the NRAs' responsibilities in the monitoring and assessment of the measures that VSPs are required to implement pursuant to Article 28b of the Directive;
- providing answers to some key issues that NRAs may need to consider in their approach to the regulation of VSPs, in particular where cross-border cooperation might be necessary.

The purpose of this draft paper is, on the one hand, to make sure that ERGA members fully understand what the Directive may request them to do in the event where one or more VSPs were to be found under their territorial jurisdiction and, on the other hand, discussing the practical implications of these formal tasks, in particular in terms of NRAs cooperation.

This document therefore features:

- a proposed analytical framework for the identification of VSPs (page 2);
- a mapping of the tasks incumbent upon individual NRAs pursuant to the revised AVMS Directive (page 5) and;
- a discussion paper elaborating on some of the key practical questions raised by these new tasks, including those which may require NRAs to find ways of cooperation (page 6).

Framework for the identification of Video Sharing Platforms (VSPs)¹

ERGA has studied the definition of ‘video-sharing platforms’ as part of its work in Taskforce 2 of SG3 on the revised AVMS Directive. The starting point of this specific workstream was to test the legal definition of the Directive against concrete case studies. The 13 case studies were selected regardless of whether the services concerned would be established or deemed to be established in the EU according to the jurisdiction rules defined in the Directive. The Taskforce members engaged in a critical discussion about each criterion of the definition, with a view to identify any potential issues relating to their practical application.

In relation to each of the criteria of the definition below are a series of questions (non-exhaustive list) which NRAs may wish to consider in their approach to the definition of VSPs. ERGA has no recommended answers to these questions but they may be useful to help NRAs identifying VSPs established under their jurisdiction. When it comes to the criterion of essential functionality, these questions are without prejudice to the upcoming Commission guidelines on this issue. Issues related to the measurability of the criteria (e.g. data access issue, assessment of performance or ratio indicators), while being considered equally critical for regulators, are not addressed here.

Defined as a service *‘The service is a service within the meaning of Articles 56 and 57 TFEU’.*

Questions to consider:

- Is the service offered regularly (i.e. constantly and/or periodically)?
- Does the service include activities of economic character: is the content provided for remuneration and, if not, are there indirect sources of income (advertising, crowdfunding, etc.), for the service provider (e.g. direct and/or indirect monetization of the processing of users’ data)?

Availability of the service *‘The service is made available by means of an electronic communications network’.*

Question to consider:

- Is the service made available through the internet (including through an application)?

Principal purpose of the service² *‘The principal purpose of the service is the provision of programmes, user-generated videos, or both’.*

Questions to consider:

¹ This section and the developments hereafter builds on Proposal 3 of the 2018 ‘ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised AVMS Directive: ‘ERGA to exchange views on the different contents of the definition of VSPs and work towards a common qualification methodology’ [p.70]

² It should be noted that only one of these three criteria (principal purpose, principal purpose of a dissociable section, and essential functionality) - provided that the other criteria of the definition of VSP are fulfilled- would be sufficient for NRAs to demonstrate that the service in question is a video-sharing platform. Furthermore, the three criteria are not mutually exclusive.

- What is the relevant service to be considered? Is it made of one single vs. multiple component(s)?
- If made of multiple components, can one (or some) of them be identified as an 'on-demand audiovisual media service' under the editorial responsibility of a service provider?
- Does the service offer the possibility to provide (including sharing) audiovisual content?
- Is the audiovisual content (for instance, as opposed to other categories of content) highlighted on the service by any means?
- Would the removal of audiovisual content make the service useless (from the user/VSP/any third party's point of view) or affect the functioning of other functionalities?
- Can a user neglect audiovisual content in order to use the service?
- What is the share of audiovisual content in relation to all content, provided that this type of data is known or easy to access, and as long as it is measurable?³

Principal purpose of a dissociable section of the service²

'The principal purpose of a dissociable section of the service is the provision of programmes, user-generated videos, or both'.

Questions to consider:

- Is there a structurally separate and easily accessible section (e.g. from the homepage) which is dedicated to posting/sharing of videos?
- If so, does this dedicated part stand alone or does it complement the main activity of the provider as a result of the links between this separate section and the main activity (e.g. is there any content which is only available in that section and not in other sections of the service)?
- Does the audiovisual content which is accessible through this section exist independently of the rest of the service?⁴
- Is the ability to post/share videos only accessible in that section or fully integrated within the other sections of the service?
- Do all the users of the service have full access to this section?
- Are there different services on subdomains of the website?

Essential functionality of the service²

'An essential functionality of the service is the provision of programmes, user-generated videos, or both'.

Questions to consider:

³ Nevertheless, it should be specified that this type of data is neither easily retrievable nor measurable.

⁴ This question has to do with access to content whereas the previous question ('does this dedicated part stand alone or does it complement (...)?') is about content per se.

- Is the audiovisual content merely ancillary to, or does it constitute a minor part of, the activities of that social media service?
- Does the service offer tools to organise and facilitate the publication, promotion, visibility and viewing of audiovisual content?
- Does the provision of audiovisual content contribute to the overall value of the service (in economic terms)?
- Would the removal of audiovisual content make the service significantly less appealing (from the user/VSP/any third party's point of view) or affect the functioning of other functionalities?
- Does the audiovisual content allow provider and/or creators (i.e. users who upload their own videos to the platform) to earn money?
- Where appropriate, how are the revenues shared between the VSP provider and the users of the service?

Devoted to the general public

'The provision of audiovisual content is aimed at the general public'.

Questions to consider:

- Is the content (in practice) accessible by an indefinite or a significant enough number of potential recipients (e.g. 'registered users')?
- Do you need an account or registration to use the service and if so, can anyone create an account on the service or is access restricted?

Editorial responsibility over the content

'The VSP provider does not have editorial responsibility'.

Questions to consider:

- Can the audiovisual content be instantly shared by the uploader?
- What is the user's degree of control over the content? E.g. is there a user panel to edit videos? Can the user choose the way the audiovisual content is presented? Have users the ability to delete the content they have previously posted?

Informational, entertainment or educational content

'The audiovisual content is provided in order to inform, entertain or educate'.

Question to consider:

- Is the audiovisual content only provided for promotional purposes (while not being defined as a commercial communication, according to the distinction made in the ECJ decision in the Peugeot case⁵)?

⁵ Judgement of the European Court of Justice of 21 February 2018, C-132/17, *Peugeot Deutschland GmbH v. Deutsche Umwelthilfe eV*

Organisation of the content

'The organisation of the content is determined by the VSP provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing'.

Questions to consider:

- Does the service use algorithms to present content to the users?
- Is the audiovisual content categorised by the platform (e.g. through 'hashtags' or other types of tags)?
- Does the service automatically rank content according to what is popular or trending?

Legal mapping of NRAs' responsibilities⁶

The assessment of the measures taken by VSPs

NRAs are tasked with the responsibility to assess the 'appropriateness' of the measures which VSPs under their jurisdiction have to take pursuant to paragraph 3 of the same Article, regardless of the nature of the regime through which these measures are imposed (statutory rules or co-regulation).

Article 28b, paragraph 5 and 6

In their assessment, NRAs should particularly pay attention to whether the measures taken by VSPs are appropriate in view of; *inter alia*:

- 'the nature of the content in question';
- 'the harm it may cause' and;
- 'the characteristics of the persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created or uploaded the content as well as the general public interest'.

It is also relevant to note that Member States have an obligation to ensure that the measures imposed on VSPs are 'practicable and proportionate' (taking into account 'the size of the video-sharing platform service and the nature of the service that is provided').

Finally, paragraph 6 of that same Article sets out that Member States are not entitled to impose on VSP providers measures that are going beyond the requirements of Directive 2000/31/EC (referred to as the 'e-commerce' Directive).

Key questions: *what key metrics would NRAs need in order to assess the 'appropriateness' of the measures set out under Article 28b (3)? How often should the VSP provider report about how the measures are being applied? What*

⁶ The following developments are without prejudice to the legal and policy options made by national parliaments and governments as part of the transposition of the Directive.

information should actually be reported to NRAs and in what form? How can NRAs effect change in the VSP's regulation to ensure it meets appropriate requirements? How to keep the corrective measures 'practicable and proportionate'? Etc.

**Out of court
redress
mechanisms**

*Article 28b,
paragraph 7*

All Member States - not only those where VSP providers are established - have an obligation to ensure that 'out of court redress mechanisms' are available to users who find themselves in dispute with a VSP provider. Presumably, the corollary of this obligation is that, in practice, such mechanisms can be guaranteed such as any complainant, regardless of its location, can effectively rely on a system where its complaint is eventually being addressed by the NRA (or any other responsible authority/body) which has jurisdiction over the VSP service provider. In some cases, the impartial settlement of disputes between a VSP provider and a user (provided that both failed to find a common ground in the first place) may be (only or best) achieved if all the concerned NRAs (or other responsible bodies) cooperate.

Furthermore, while the origin of the dispute may primarily be about the alleged problematic nature of the content posted by a user of the platform (as opposed to whether e.g. the age verification system in place is effective), it does not seem that the settlement of the dispute would require NRAs to go beyond assessing whether the technical measures have been appropriately implemented by the VSP provider, which is their core task in accordance with Article 28b, paragraph 5 (see above).

Key questions: *what is the process for the NRAs (or other responsible bodies) concerned to cooperate and ensure that redress mechanisms are effective in cross-border cases? What is the scope and possible scale of that cooperation, in particular with due respect for the country of origin principle? What does 'impartial settlement of the dispute' exactly cover?*

Issues for consideration by ERGA members⁷

1. Issues related to the assessment of the appropriateness of the measures taken by VSPs

As described above, Article 28b (5) requires EU Member States to ensure that their national regulatory authorities are empowered to assess the appropriateness of the measures put in place by VSP providers under their jurisdiction to moderate content on their services and therefore contribute to achieve some key public policy objectives.

This paper assumes that such a task would be best fulfilled if a comprehensive regulatory assessment framework is being established (either through the law or in the form of co-regulatory codes, or both) and that the national regulator is tasked with the responsibility to oversee VSP providers' compliance on a 'macro-level'. Under such a scheme, the 'micro-level' application of the measures referred to in Article 28b (1) and (3) are expected to be directly enforced by the VSP provider, e.g. in relation to content possibly infringing the platform's policy regarding protection of minors.

While significant and detailed work will be necessary to develop such comprehensive regulatory framework for VSP providers in the Member States, ERGA is of the view that at least the following points should be considered:

- a. In order to fulfil their task, NRAs should have visibility of the VSPs' measures taken and the outcomes of these measures. This may be through a regular (annually or biennially) reporting obligation of the VSP providers. They could, for instance, be required to provide a statement outlining their key commitments and the concrete measures they will take in order to meet these objectives.
- b. Both VSP providers and NRAs could be required to provide their own assessment of the performance of the service against the stated objectives. Where appropriate, the regulator's report could include binding recommendations on certain issues for which improvements from the VSP provider would be expected to ensure better compliance with its obligations.
- c. It may also be necessary for the competent NRA to have some visibility of both the content and audience of the platform in order to understand the potential harms at stake. VSP providers could accordingly be required to share information with the regulator in order to facilitate its work. Such information could relate to, inter alia: certain categories of content on the service (for example regarding commercial communications), quantitative and qualitative data on the audience of the platform, the algorithmic de-indexing of video content, the number of moderation-related issues that have been reported, etc.
- d. In relation to the appropriateness of VSP providers' complaint handling mechanism, the regulatory assessment framework could specify a number of key performance indicators against which the

^{7 7} The following developments are without prejudice to the legal and policy options made by national parliaments and governments as part of the transposition of the Directive.

national regulator would carry out regular tests. These indicators could, inter alia, relate to: the timeframe under which the VSP provider is expected to handle the user's complaint; the availability of the complaint mechanism and its accessibility to disabled people; how complainants and content-posters have to be treated throughout the process; information about the availability of out of court redress mechanisms for 'dissatisfied' complainants; etc.

- e. Finally, the competent NRA may ultimately need to "step in", if the measures taken by VSPs themselves are found to be inappropriate or inadequate. This may lead the VSP provider to update its policies and/or to be sanctioned. In order to make informed decisions about the VSP provider's moderation policy, national regulators should be empowered with all relevant enforcement powers, such as the ability to run investigations (including access to internal decision-making procedures, on-site inspections, anonymous checks, etc.) and take sanctions when it is necessary to ensure compliance. In order to effect change in the VSP provider's policy and ensure it meets appropriate standards, NRAs should also be able to issue binding recommendations. The service provider could furthermore have a duty to cooperate with the regulator on implementing the recommendations.

2. Issues related to the settlement of disputes between VSP providers and users in cross-border situations⁸

N.B. Local NRA = the NRA in the country where the user is located; Competent NRA = the NRA in the country where the VSP provider is established in accordance with the rules defined in the Directive.

According to Article 28b, paragraph 7 of the revised AVMS Directive, the obligation is on all Member States – irrespective of whether there are VSP providers established on their territory – to ensure that 'out of court redress mechanisms' are available to any users. Yet, it may be the case that the complainant and the VSP provider are located in two different territories. This sort of situation will be referred to as 'cross-border cases' in the subsequent paragraphs.⁹

The revised AVMS Directive sets out a layered complaints handling process¹⁰ in which the competent NRA may only step in if the VSP provider and the user concerned could not reach an agreement in the first place. On a 'macro-level', it will be the task of the competent NRA to regularly review the measures put in place by the VSP provider pursuant to the provider's obligation to 'establishing and operating transparent, easy-to-use and effective procedures for the handling of users' complaints' (Article 28b (3), point (i)).

However, whenever a dispute arises after the first step of the complaint process has been exhausted and the complainant remains dissatisfied, the affected user(s) may more naturally turn up to its/their local NRA

⁸ This section and the developments hereafter builds on Proposal 26 of the 2018 'ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised AVMS Directive: 'ERGA members to exchange views on proposed approaches to complaints handling and to explore how the handling of complaints coming from several Member States can be facilitated through ERGA' [p.85].

⁹ It should be noted that these cases are discussed in the following section only in the scenario where the NRA is providing the redress mechanism itself: this might not always be the case and where another body is given the task by Member States they will also need to be involved.

¹⁰ Article 28b (3), point (i): a user complaint is being addressed to the VSP provider; Article 28b (7): if the user is unsatisfied with the outcome of the complaint process, he/she can seek remedy via out of court redress mechanism; Article 28b (8): the complainant may eventually decide to assert his/her rights before a court.

(which is not necessarily the competent NRA) in order to seek to obtain remedy from the VSP provider. It is therefore difficult— and not consistent with the legal requirement that ‘out of court redress mechanisms’ have to be available to users presumably in every Member State (see above) – to expect that the competent NRA would always be the first recipient of every individual request for dispute settlement coming from residents in other Member States.

Whereas the local NRA does not have jurisdiction over the VSP provider concerned and would not be legally empowered to adjudicate the persistent dispute, cooperation between the two concerned NRAs would nevertheless be highly desirable in such scenarios in order to effectively address such direct (potential) harms on individuals. The scope and scale of that cooperation is left up to the decision of the NRAs concerned but may range from a simple notification transfer to deeper forms of cooperation.

The following paragraphs only address such ‘cross-border situations’, i.e. where the VSP provider and the user(s) are located in a different Member State and have failed to reach an agreement in the first place¹¹. They aim to illustrate what forms this cross-border cooperation between NRAs could take.

2.1 Territorial and material jurisdiction issues before any notification transfer happens

Upon notification of the dispute by the affected user, the local NRA would first need to seek confirmation of the actual establishment of the service provider. The local NRA would therefore need to carry out some research, based on publicly available facts (including from the ‘publicly available database’ referred to in Article 2(5b) of the revised AVMS Directive), and then obtain confirmation from the allegedly competent NRA that the service provider belongs to its jurisdiction. The second preliminary step is to get confirmation from the competent NRA that the service concerned is defined as a VSP according to its national law and interpretation thereof.

Only if these two preliminary checks are confirmed should the local NRA inform the competent NRA about the matter of the dispute which was notified, and also advise the complainant of such developments.

2.2 Possible forms of cooperation between NRAs in cross-border cases

At this stage, there are two possible ways forward:

- The local NRA transfers the user notification to the competent NRA without further due (though the local NRA may find it necessary to request more information from the complainant at a later stage) or;
- The local NRA transfers the user notification together with a prior assessment of the situation which indicates whether the matter at stake seems to have anything to do with the application of Article 28b, paragraph 1 and 3 of the revised AVMS Directive.

¹¹ As a result, situations where the VSP provider and the user(s) are located on the same territory are beyond the scope of this Paper.

What information should go along with the transfer in any case? Where necessary, and in order to help for the settlement of the case, the local NRA could strive to obtain, at least, the following (factual) elements from the complainant:

- date on which the complaint was filed to the VSP provider;
- date of the VSP provider's first reply (if any);
- the purpose of the complaint (i.e. in relation to what type of measures and/or content was the complaint filed?);
- the decision taken by the VSP provider with respect to the matter complained about;
- screenshots of the effect(s) of the decision taken by the VSP provider with respect to the matter complained about;
- the remedy the complainant seeks to obtain through the redress procedure.

Along with the transfer of the original user's complaint, the local NRA could formulate questions (questions about e.g. how the contentious measure was applied by the VSP? What steps did the VSP provider take upon receipt of the user's complaint?) which it deems useful for the competent NRA to answer in order to meet the user's request for settlement. Going forward, there may also be a case for establishing a model list which ERGA members could use between them in cross-border cases.

What happens once the dispute notification has been transferred to the competent NRA? Article 30a of the revised Directive sets out for a general principle that NRAs should aim to provide each other with relevant information and mutual assistance. This may particularly relevant in order to check whether e.g. there is any difference between the information which was reported by the complainant and the facts which the VSP provider shared.

The competent NRA may therefore be reasonably expected to acknowledge receipt of the notification transfer and start its assessment of the situation without undue delay. Where appropriate, such an evaluation would cover both:

- how the VSP provider reacted upon receipt of the user's complaint (swift and reasoned processing of the complaint, transparency and efficiency of the VSP's complaints mechanism, etc.) and;
- how the contentious measure (i.e. which triggered the complaint) has been implemented by the VSP provider so far (e.g. was any flaw previously noticed by the competent NRA?)

In general terms, it would be desirable to ensure the highest possible degree of visibility to all the local NRAs concerned. For instance, the competent NRA may e.g. choose to share its draft assessment before responding to the user's request and the local NRA could be invited to provide its views on the draft assessment.

How should the proposed settlement of the dispute be communicated to the user? It may be desirable that the local NRA remains a contact point throughout the entire process.

How are disputes involving users and audiovisual media service providers regarding a programme which is provided on a VSP supposed to be settled? There may be cases where the VSP user's initial complaint relates to content which is provided through a service which the local NRA sees as an on-demand

audiovisual media service (e.g. YouTube channels). In that case, the dispute may involve one or more users, the VSP provider, and the editorially-responsible content provider. Several NRAs may accordingly be interested in achieving an impartial settlement of the dispute.

Provided that the NRAs concerned agree on the qualification of the service as an on-demand audiovisual media service, there is a question as to which of them has authority to settle the dispute. One possible way forward may be to make two separate assessments. While the NRA which has jurisdiction over the media service provider would be responsible to assess whether the content provided over the VSP is compatible with its national law, the NRA which is competent over the VSP provider would adjudicate on the appropriateness of the measures put in place in order to limit the accessibility of the content. The local NRA(s) – in the country (ies) where the user(s) is located – should be granted with appropriate visibility over both assessments.