



Subgroup 1

Strengthening the Digital Single Market by enforcing European rules and values in the online environment

Activity Report on the ERGA Workshop
“Regulation of Vloggers on Video-Sharing Platforms”

2020



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1. Background

Vloggers¹ are acquiring more relevance in the audiovisual market as the consumption of their services is increasing dramatically. In fact, for some specific segments of the audience such as children and teenagers, the consumption of vloggers' contents is higher than that of traditional audiovisual services.

According to the European Commission's 2020 *Digital Economy and Society Index (DESI) on the use of Internet services*², the Internet use continued to increase year-on-year with 85% of Europeans surfing the Internet at least once per week (up from 75% in 2014). Using the Internet for listening to music, playing games or watching videos is the most common activity (81% of individuals who used the Internet in the last 3 months).

With regard to the Internet use by children, the findings of the *EU Kids Online Report 2020*³ reveal a substantial increase in the amount of Internet use compared to 2010. The time that children spend online each day has almost doubled in many European countries – for example, from about one hour to three hours per day in Spain, and from about two to three and a half hours in Norway.

Watching videos is on top of the list of activities that children do on a daily basis. However, differences between countries are considerable. For instance, daily video consumption ranges between 43% of 9- to 16-year-olds in Slovakia and 82% in Lithuania. In most of the countries covered by the report, over half of all children use social networking sites at least weekly.

Vloggers are also acquiring more relevance in the advertisement market, as they capture part of the investment formerly addressed to the traditional audiovisual players. According to the Infoadex Study of Advertising Investment in Spain in 2019, investment in advertising through influencers reached 61.8 million euros, a share of 0.9% of the total unconventional estimated advertising media, representing a growth of over 65% in its investment figure⁴.

An example of the consolidation of this new advertising modality is the professionalization of the influencer-marketing sector, with vloggers evolving as professional players with advanced knowledge of communication techniques capable to adapt to the needs of today's advertising industry.

The definition and identification of audiovisual media services has been a controversial subject for a long time. In the past, it used to be relatively easy to identify an audiovisual media service, and in those cases, the type of audiovisual service: linear or non-linear. However, the

¹ The term "vlogger" is used in a wide sense as including all actors providing audiovisual media services on video-sharing platforms (VSPs).

² EC Digital Economy and Society Index (DESI) 2020: Use of Internet services. Available at <https://ec.europa.eu/digital-single-market/en/use-internet-and-online-activities>.

³ The EU Kids Online Report maps the risk and opportunities of the Internet for children in 19 European countries. Available at <https://www.lse.ac.uk/media-and-communications/assets/documents/research/eu-kids-online/reports/EU-Kids-Online-2020-10Feb2020.pdf>.

⁴ INFOADEX. Summary of the INFOADEX Study of Advertising Investment in Spain 2020. February 19, 2020. Available at: <https://www.infoadex.es/home/wp-content/uploads/2020/02/NP-Estudio-InfoAdex-de-la-Inversi%C3%B3n-Publicitaria-en-Espa%C3%B1a-2020.pdf>.



technological developments in recent years and new consumer habits have led to the emergence of new relevant players in the audiovisual sector, such as video-sharing platforms (VSPs). Similarly, new forms of audiovisual content emerge, the nature of which is not always easy to identify, mainly due to the difference in the business model, the format of the content and the behaviour of its providers compared to traditional audiovisual services.

The increasing role of these new online players poses new challenges to effectively protect the core values of audiovisual media regulation, such as the protection of viewers, but also in terms of ensuring legal certainty and a level playing field.

Taking into account these developments, the revised Audiovisual Media Services Directive (AVMS Directive)⁵ requires video-sharing platforms to take specific measures to ensure the protection of the public, and minors in particular, from illegal and harmful content and to respect commercial communications standards. This applies also to vloggers' content hosted on such platforms.⁶ However, in certain circumstances vloggers may qualify themselves as audiovisual media service providers. In this case, they are directly subject to the AVMS Directive content rules as well as other relevant obligations of the Directive. Whether vloggers qualify or not as audiovisual media services is a matter for the national regulators to decide.

As ERGA points out in its Statement of Purpose⁷, *“there is a need for NRAs to deepen their understanding of how some provisions of the AVMS Directive are being applied by regulators in their national jurisdiction”*. In line with this strategic priority, and with a view to assisting the regulators and fostering a consistent implementation of the new rules, the Terms of Reference of the ERGA Subgroup on “Strengthening the Digital Single Market by enforcing European rules and values in the online environment” (Subgroup 1 - SG1)⁸ included the organisation of a workshop about the challenges of vloggers' regulation as well as a report on the workshop.

2. Introduction

In September 2020, ERGA and the CNMC organized a one-day internal workshop on the “Regulation of vloggers on video-sharing-platforms”. The aim was to carry out a reflection on whether and under what conditions the services provided by vloggers may qualify as audiovisual media services under the revised AVMS Directive and about the key elements to

⁵ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

⁶ These rules include requirements to protect users from such content in their terms and conditions and put in place effective, transparent and user-friendly mechanisms allowing users to report it. Moreover, platforms will have to put in place systems to provide meaningful feedback to users on content that has been reported and procedures for the handling and resolution of users' complaints in this regard.

⁷ ERGA “Statement of Purpose”. Available at: https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-02_Statement-of-Purpose-adopted.pdf.

⁸ ERGA Subgroup 1 “Strengthening the Digital Single Market by enforcing European rules and values in the online environment” – 2020 Terms of Reference (ToR). Available at: https://erga-online.eu/wp-content/uploads/2020/03/ERGA_SG1_2020_ToR_Adopted_2-03-2020.pdf.



identify and address some of the potentially challenging issues around the regulation of these new players.

The workshop was divided in two parts: the first session focussed on the views of the industry, while the second session focused on the approaches of the regulators and was reserved to ERGA members.

Representatives from YouTube, Facebook, the European Advertising Standards Alliance (EASA), Autocontrol (the independent self-regulatory advertising organisation in Spain), the European Consumer Organization (BEUC) and a YouTuber from Norway participated in the first session, whereas in the second session intervened delegates from Austria (KommAustria), Belgium-Wallonia (CSA), Norway (NMA), Germany (MABB) and Ireland (BAI). The introductory speech was given by Anna Herold, Head of Unit for Audiovisual and Media Services Policy at the European Commission's Directorate-General for Communications Networks, Content and Technology, while Alejandra de Iturriaga Gandini, Director of Telecommunications and Audiovisual Sector of CNMC and Member of the Board of ERGA, was the moderator of the workshop.

This report brings together the main discussions and conclusions. The document is divided into the following topics addressed in the debate:

Stakeholders' views on the topic:

- General approach to the definition of a Vlogger as an audiovisual media service provider.
- Commercial communications on video-sharing platforms.
- The role of Alternative Dispute Resolution (ADR) organisations: self-regulation and co-regulation.

ERGA members' views on the topic:

- Identification of vloggers as AVMS providers.
- Best practices on how vloggers comply with legal requirements.
- "Soft touch" approach vs. statutory approach.

In the final section, the report provides a summary of the key conclusions generated during the debate.

3. Stakeholders' views on the topic

3.1. General approach to the definition of a vlogger as an audiovisual media service provider

Participants, including national regulatory authorities (NRAs), agreed that "short videos" produced by vloggers in broad terms could be qualified as audiovisual media services, provided that other conditions laid down in the relevant definition are fulfilled.



In this regard, panellists highlighted the need for a consistent approach of NRAs and in general the enforcement of the audiovisual media framework concerning vloggers. This consistency would be a necessary condition for establishing a level playing field in the European single market and to provide clarity and greater legal certainty to content creators.

Some participants expressed their concerns on the negative impact that a divergent transposition and enforcement of the revised AVMS Directive could have on the different players in the audiovisual ecosystem, including VSPs. Moreover, some participants highlighted the need to provide guidance to ensure a more consistent approach towards the application of the legal framework concerning vloggers.

In this context, the benefits of identifying a common set of criteria to assess whether or not a given vlogger is to be considered an AVMS provider were emphasised.

The representatives of VSPs did not express a particular position with regard to the legal classification of users uploading content on their platform (such as vloggers). They considered that the legal status of the users should be determined by the media regulator of the country in which the vlogger is established in line with its national law transposing the AVMS Directive.

Depending of the nature and the presentation of the offers, vloggers may be operating as an audiovisual media service provider. If they are considered AVM service providers, vloggers would themselves be directly responsible for complying with the AVMS Directive's obligations while the VSPs would remain responsible for the application of the general technical measures provided under Article 28b over the content of such services (e.g. reporting and flagging).

As for the enforcement of the regulatory framework, it was highlighted that the regulatory burden on these vloggers should be proportionate, so that the new framework does not undermine creators' services or users' experiences.

3.2. Commercial communications on VSPs

One of the aims of the revised 2018 Directive is to protect viewers and consumers, among others, by ensuring that commercial communications are easily recognisable as such.

Article 28b of the revised AVMS Directive obliges video-sharing platforms to put in place appropriate measures to protect users, particularly minors, from harmful or illegal content. With regard to commercial communications, VSPs have to respect certain qualitative obligations for the commercial communications they are responsible for and are required to be transparent about commercial communications they are not in control of, by providing specific tools allowing creators and users to declare or flag the presence of commercial communications. In this regard, it was stressed that the application of these new obligations would require a reinforced level of cooperation between VSPs and vloggers.

Some participants to the workshop welcomed the inclusion of VSPs in the scope of the revised 2018 Directive. Others mentioned that these commercial communication rules may have less impact on their services than other obligations of the AVMS Directive, but all agreed that these rules clearly differentiate between traditional media and VSPs services by taking into account



the different level of control that VSPs and traditional media have over content and commercial communications.

Participants to the workshop also discussed the enforcement of VSPs' Community Rules or Community Standards, which inter alia may require creators to identify commercial communications. In particular, participants discussed the application of these rules to pan-European services and in cross-border cases.

Furthermore, the session highlighted that VSPs are introducing systems in order to fulfil the obligations set out in the AVMS Directive regarding commercial communications and the protection of minors. VSPs explained some of their procedures to identify and remove harmful content, differentiating between content identified by themselves or flagged by users. Lastly, VSPs described some age verification mechanisms already implemented and others to be available soon.

Finally, it was argued that not all vloggers have the same size and resources to ensure compliance with the AVMS Directive. Taking this into account, some participants stated that it could be desirable to follow a forward-looking analysis or consider soft law approaches through self- or co-regulation.

3.3. The role of Alternative Dispute Resolution (ADR) organisations: self-regulation and co-regulation

Overall, it was stressed that ADR, based on self- and co-regulation, is an effective tool to solve disputes concerning compliance of vloggers' with their obligations. ADR entities may be well-positioned in this new ecosystem to contribute in the areas concerned, including the application of commercial communications standards and protecting European core values.

Some panellists stated that ADR may be particularly useful in vloggers' activities because their services are pan-European, meaning that cross-border cases are likely to be frequent or prevalent. In this sense, ADR holds a well-established EU-wide network where this type of cases may be handled quickly.

At the same time, it was mentioned that ADR offers a variety of tools that can help vloggers' advertising to comply with legal and ethical standards and is less intrusive than other measures (recommendations, prior-analysis, etc.). This entails that vloggers are more likely to adjust their commercial communications strategies to these procedures because they are less strict and easier to implement than traditional tools.

Some stakeholders stressed the need for a holistic approach, taking account of the different regulatory spheres: the AVMS Directive, the Electronic Commerce Directive and the Unfair Consumer Practices Directive.

There was a wide consensus on the need for collaboration among all the parties involved: VSPs, vloggers, ADR organisations and NRAs in order to ensure an adequate level of consumer protection.



4. ERGA Members' views on the topic

4.1. Identification of vloggers as AVMS providers

In this session, the focus was on the criteria that a service has to meet, according to the AVMS Directive, to qualify as an audiovisual media service (AVMS) provider. The basis for the discussion was a background paper based on NRAs' preparatory discussions, which raised some of the key aspects that NRAs should consider in assessing whether a vlogger qualifies as an AVMS provider and, if this is the case, how to ensure compliance with the AVMS Directive.

Short videos

In its judgement of 21 October 2015, case C-347/14, regarding the *New Media Online GmbH*, the Court of Justice of the European Union analysed the nature of a particular type of service. It noted that the concept of a programme - one of the essential requirements for the definition of an audiovisual media service - should be interpreted as encompassing the provision of short videos corresponding to short sequences extracted from local news, sports or entertainment, also if provided on a subdomain of a newspaper's web site.

This decision meant that some services providing audiovisual content which may not appear included in the legal scope of the audiovisual media sector at first glance, should be considered, under certain conditions, as audiovisual media services.

In fact, this extension of the scope of the Directive beyond what we may consider to be traditional audiovisual services has been expressly enshrined and generalised in the revised AVMS Directive. Most NRAs shared the view that the elimination of the "TV-like" criteria and the introduction of the "short video" concept by the *New Media Online GmbH* judgement of the Court of Justice of the European Union, now enshrined in the definition of a "programme" in Article 1(1) (b) of the revised AVMS Directive led to a possibility of vloggers being considered as AVMS providers (provided that the other conditions of the definition are fulfilled). However, they also recognised that there are still grey areas to differentiate "short videos" from "user-generated content" (UGC).

Some NRAs consider that not all kind of short videos available on the Internet can be qualified as audiovisual programmes. For example, short videos intended to share moments of the everyday life of a user should not qualify as an audiovisual programme.

Criteria to assess whether a service is an AVMS

According to Articles 1 and 2 of the revised 2018 Directive and Recitals 21 to 28 of the 2010 Directive⁹, a service has to meet a set of criteria to qualify as an AVMS, the most relevant for this discussion being:

1. The service provided involves an economic activity.

⁹ Directive 2010/13/EU on Audiovisual Media Services.



2. The content creator has editorial responsibility.
3. The service is intended for the general public.
4. The service is a mass media in its function of the service is to inform, entertain or educate.
5. The main objective of the service is the distribution of audiovisual content.
6. The service consists in audiovisual programmes.
7. The service is provided through electronic communications networks.

In carrying out this assessment, NRAs agreed that to be considered AVMS providers, vloggers should provide a service in terms of Articles 56 and 57 TFEU, i.e. carry out an economic activity.

Different approaches were identified in how to determine this economic activity. Some NRAs stated that they could consider the revenues generated by the commercial content and, for instance, whether the video creators are “professional vloggers” and/or the vlog constitutes a significant source of income or a fulltime job. Other NRAs indicated that as long as the legal framework does not require a specific consideration from an economical point of view, it should be understood that all vloggers carrying out an economic activity linked to commercial communications meet in principle this criterion, irrespective of the economic dimension thereof.

There was a debate on how to assess the “mass media” criterion. TV broadcasting or on-demand services, which are mass media, have a clear impact on a significant proportion of the public. In this regard, it was noted that some vloggers could be comparable in terms of audience with other audiovisual media service providers as certain vloggers can have eventually more subscribers or viewers than local television channels. The number of views could be another indicator for a vlogger’ service to be considered a mass media service, although this data is fluctuating.

To meet the editorial responsibility criterion, it was suggested that a vlogger has to own and manage a channel or a catalogue. It may also be relevant to analyse if a vlogger is using some advanced features from a VSP to structure their offer, such as creating playlists.

There was a consensus that once a service meets all legal criteria established in the AVMS Directive, it would be justified to qualify vloggers’ services as audiovisual media services.

Finally, participants were conscious of the need for an in-depth, case-by-case analysis that shall govern the qualification of any such services.

Thresholds

One of the main issues discussed was whether or not the current framework allows the establishment of thresholds or other indicators to qualify a vlogger as an AVMS provider.

In this context, some regulators stated that the consideration of thresholds or indicators could be a helpful tool to supervise vloggers as long as those indicators help NRAs to identify and distinguish a vloggers’ services as either AVMS or UGC. Such thresholds could refer to



viewers, subscribers or revenues. However, other indicators such as the volume of the content of a catalogue could also be considered. In this regard, some NRAs stated that these indicators should be taken into account all together in order to assess when a vlogger is really a “professional” AVMS and/or has a clear impact on an audience.

By contrast, other regulators considered the establishment of thresholds incompatible with the audiovisual regulation since thresholds are foreseen in the legal framework only to determine some types of obligations (i.e. exemptions from the European works rules) but are not expressly set to differentiate between service providers. However, these regulators did not object to the idea that some indicators should be taken into account when a vlogger meets, for example, the requirement of being a mass media service.

4.2. Best practices to enforce the legal framework on vloggers

Some NRAs have regulated vloggers only from the commercial communications point of view, whereas others have also enforced measures regarding the protection of minors and age rating.

In this regard, certain NRAs offer some flexibility to vloggers when it comes to complying with the rules, as long as the commercial communications are identified and content is properly age-rated.

The complications of identifying certain new types of advertisement (channel ambassadors, mentions, links, etc.) as commercial communications in the terms of the legal framework were raised. Nevertheless, it was stated that any type of commercial content should be readily recognisable as such in terms of visibility and size. In that sense, a label appearing on the screen for a reasonable period time identifying content as advertisement should be sufficient to clarify the commercial nature of the video.

There was an interesting discussion on the language used to label commercial communications, taking account that some videos are addressed to users from different countries. It was also noted that labelling could be inserted in the video by the vlogger or by means of a tool provided by the VSP.

In this sense, some NRAs stated that ADR could be a useful tool to consider with a view to solving disputes that arise on the compliance with the relevant standards, also considering the specific characteristics of the service at hand.

It is worth noting that most of the NRAs that have experience with addressing vloggers, have found a high degree of collaboration from their side. From this experience, the implementation of measures to comply with the AVMS Directive has generally not required sanctioning procedures.

4.3. Discussion on appropriate regulatory approaches

The general opinion was that once a service meets all legal criteria, it would be justified to require vloggers to comply with the AVMS Directive. However, most of the NRAs who have experience in this area have opted for a soft-touch approach, at least in the initial stages of



dealing with vloggers. In this sense, the traditional command and control approach seems to be an exception among regulators.

Regulators are aware of the benefit of a cooperative relationship with vloggers based on the information and transparency criteria. Therefore, they invest resources in information-sharing events and in providing and promoting offers with comprehensive information (e.g. FAQs and information on the classification of vlogger formats).

Most of the regulators prefer a 'soft-touch' approach regulation towards vloggers, such as issuing specific guidelines, fostering dialogue and training courses. They consider the vlogger industry to be very cooperative, as they have seen that informal communication sent by the regulator is usually enough to achieve compliance. In some countries, this soft-touch approach is based on co-regulation.

There was also an exchange of experiences regarding the need for vloggers to register, in the same way as other AVMS providers.

NRAs agreed on the difficulty that the monitoring and supervision of all of these services may entail, so collaboration with VSPs and vloggers is considered crucial. In the same line, and taking into account the country-of-origin principle, it was stressed that the collaboration with other NRAs to solve cross-country issues is vital. The potential problem of "forum shopping" also arose during the discussions.

Overall, it was highlighted that even though vloggers deliver their services over VSPs, the regulatory approach applicable to vloggers and VSPs should be varied, as the latter do not have editorial responsibility over vloggers' content.

5. Conclusions

During the course of the workshop, there were several interesting opinions and lively debates regarding vloggers' and VSPs' issues. Some of the topics discussed could entail further research or other possible follow-up actions. Overall, the following points were some of the main results and observations made during the event:

- There was a common understanding that not all vloggers would qualify as audiovisual media service providers. Thus, vloggers' content can be qualified as audiovisual media services if they meet the legal requirements under the AVMS Directive. In that case, the commercial communications obligations and age rating of videos as well as the other relevant rules set in the legal framework for AVMS providers are fully applicable to these services.
- The analysis must be carried out on a case-by-case basis. The use of thresholds may become a useful tool, for instance, to assess whether there is an economic service, although there is no consensus on their application. Furthermore, regarding the application of the other AVMS definition criteria, there is no complete clarity and consensus yet.



- There was a common view that consumers should be protected from undue commercial communications and harmful content disseminated on VSP services and on vloggers' 'channels'.
- Given the lack of clarity and lack of consensus about how the AVMS definition criteria are to be interpreted in the context of vloggers, as demonstrated by the current divergent national approaches based on either soft law or other regulation, there is a clear need for a more consistent approach in the EU regarding the application of the revised AVMS Directive to vloggers. This would increase legal certainty in the sector and may strengthen the single market. This could form the focus of further cooperation amongst ERGA members.

A reinforced cooperation framework is suggested in order to ensure the overall effectiveness of the enforcement of the revised AVMS Directive, in particular the new rules concerning commercial communications in Article 28b. Alternative Dispute Resolution entities, based on self- and co-regulation, may be an effective tool for solving disputes regarding vloggers' obligations in areas such as commercial communications.

- A 'soft-touch' approach is until now the preferred regulatory option for most of the regulators that already have experience with the regulatory supervision of vloggers. In some Member States, this approach is based on a co-regulatory system. Even though vloggers mainly provide their services through VSPs, the regulation of VSPs as such has to be clearly differentiated from the regulation of vloggers.