

**ERGA discussion paper on the protection of minors in a converged environment -  
October 21, 2014**

**Introduction**

The protection of minors is a cornerstone of the AVMSD, and is addressed in several other EU documents including Recommendations and Resolutions. Due to new technological developments, changing consumer behaviours and expectations, and convergence trends in general this topic is of particular relevance. Its importance was also echoed in many reactions from various stakeholders during the recent consultation on the Green Paper on Convergence of the European Commission. Furthermore, the members of ERGA share the opinion that the protection of minors from harmful content is one of the permanent priorities of audiovisual regulators.

In the ERGA Work Programme 2014, the protection of minors is one of the two ERGA workstreams proposed under the theme “Adapting the EU regulatory instruments to a convergent audiovisual world”. The subgroup ‘Protecting minors in a converged environment’ will focus on the issue of protection of minors, and the subgroup ‘Material jurisdiction in a convergent audiovisual world’ will have a particular focus on the issue of material jurisdiction. As such, the subgroup on material jurisdiction will examine questions around the type of services that the legal framework covers, and the subgroup on protection of minors explores the standards that could apply to those services. However, since questions of material jurisdiction are also important considerations in the discussion about the protection of minors in a converged world, the Chairs of the subgroups on protection of minors and material jurisdiction will maintain regular dialogue.

As agreed in the Terms of Reference, the subgroup on the protection of minors has the aim to produce a detailed discussion paper in October 2014, on the current regulatory framework at EU level on the topic of protection of minors, with a view to go more in depth next year. The discussion paper comprises the following elements:

- Context and problem definition
- Specific questions to be explored in 2015
- Planned milestones and outputs for in-depth analysis

**Context and problem definitions**

For non-linear audiovisual media services, article 12 AVMSD states the following with respect to the protection of minors: “Member states shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services”. With regard to linear services (i.e. television), article 27(1) AMVSD provides that “television broadcasts by broadcasters under [the member states’] jurisdiction [must] not include any programmes which might seriously impair the physical, mental or moral development of minors, in

particular programmes that involve pornography or gratuitous violence. The AVMSD imposes no condition on on-demand media services for content that is “likely” to impair development – in contrast to television broadcasts: Article 27(2) AVMSD provides that linear content that is likely to impair development is only made available “where it is ensured, by selecting time of broadcasts or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.” In addition, article 27(3) AVMSD states that “when such programmes are broadcast in unencoded form Member States shall ensure that they are preceded by an acoustic warning or are identified by the presence of a visual symbol throughout their duration.” Article 4(7) AVMSD encourages the use of self- and co-regulation to pursue the objectives set out by the Directive.

The subgroup on protection of minors has identified the following key themes that need to be addressed in order to achieve an adequate system for the protection of minors in a converged world, in the EU:

*1. The distinction between the standards that apply to linear and non-linear audiovisual media content*

The less strict regulation of on-demand media services in the AVMSD was motivated by the level of user control (presumably higher with on-demand) and impact (assumed to be smaller with on-demand) of these services. A question is raised as to whether these assumptions underpinning the principal distinction in regulation between linear and on-demand content enshrined in the current Directive are still valid in a converged environment.

Pre-roll advertisements prior to video clips shown in catch-up services and other VOD services can often not be avoided or interrupted as was previously the case when this phenomenon started and the first drafts of the current AVMSD were developed. This poses the question whether the degree of user control is much higher when using non-linear media services and whether it still would justify a lower level of protection. Furthermore the level of protection should not only depend on the degree of user control and freedom of choice. Also the risks of unexpected confrontation of minors with (presumed) harmful content need to be taken into account. For instance, is the impact lower when a minor repeatedly watches highly shocking and disturbing video content regarding current news events on video sharing sites compared to a linear news broadcast on television?

The protection of minors is also affected by the way young people access content. More and more, minors have access to all kinds of media content via a variety of different devices like mobile phones, tablets and their own televisions, usually without any adult supervision. This easy and multiple access may also lead to changing the way some content can be perceived by the public.

Furthermore, the distinction between the rules that apply to linear and non-linear services makes the use of protection tools to protect minors less consistent. The distinction may also confuse viewers as they increasingly expect that there is consistent regulation across these services, especially when they use devices like smart TVs, which enables both the television signal and other audiovisual services to be displayed and also permit access to internet services. Moreover, differences in the regulatory approach to different types of content on screen make it difficult for users to determine which authorities to complain to.

If the conclusion would be that the distinction between the standards that apply to these services cannot be longer justified, the follow up question would be whether there should be more consistent regulation to protect minors across linear and non-linear services.

## *2. The harmonisation of key definitions and concepts*

Member States have a considerable amount of discretion when it comes to defining key concepts such as minors, pornography, gratuitous violence, impairing and seriously impairing media content as the AVMSD neither defines these concepts nor provides any explanations. One could ask whether in order to ensure more adequate protection further harmonisation of definitions based on practical experience and working definitions in practice is desirable and feasible. In that regard we should also take into account the existence of national sensitivities and concerns over audiovisual media content in relation to the protection of minors.

## *3. Protection measures: new challenges due to numerous techniques and distribution platforms to offer audiovisual media content*

More than 15 years ago the discussions and debates about protection measures mainly focused on the pros and cons of the V-chip and internet filters. Back then, the media landscape was still rather simple and clear. TV sets were meant to watch TV and computers were mainly used to surf the internet and visit websites mainly existing of text and images.

The current presence and importance of video on the internet and the stage of convergence of media, platforms, devices and techniques poses new challenges for protection measures.

The potential number and variety of technical measures (like watersheds, filtering, pin codes, pay walls etc.) appears to be endless and depends highly on the distribution platform, technique and device used. In some cases a consumer can choose at the same time from several protection measures, one provided by the platform operator (i.e. cable operator), one built in a device (i.e. smart TV) and one offered by the service provider (i.e. broadcaster). This poses the question as to whether this abundance of possible options creates uncertainty for the consumer and even endangers the purpose of protection in the end of the day. The AVMSD does not provide for specific protection measures. So a key question is whether we can and should aim for more harmonisation of technical requirements, coordination, unification and certification of technical protection measures within the EU.

Highly relevant to the use of technical measures is the classification of audiovisual media content. Today audiovisual media services are accessible from almost all (Member) States. For that reason it is important that industry in each Member State is able to make a reliable translation to national ratings and content advice. This poses the question as to whether we need more coordination between existing labelling and classification systems or maybe even aim for one universal system within the EU. Also, greater standardization in the use of classification labels could provide parents,

users and children with added guidance on the basis of which they can make 'informed' decisions.

#### *4. Effective enforcement, shared responsibilities, self- and co-regulation*

As a key element, it is useful to consider what should be the role of the mechanisms of shared responsibility and self- and co-regulation in ensuring an adequate system for the protection of minors in a converged world. Which rules can be enforced by shared responsibilities and self- and co-regulation systems and which need an effective enforcement by national authorities?

In the Interinstitutional agreement on better law-making of 2003, the European Parliament, the Council of the European Union and the Commission of the European Communities recall the Community's obligation to legislate only where it is necessary. They recognize the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms. The current Directive encourages the use of self- and co-regulation systems.

In practice, regarding the protection of minors, in almost all Member States responsibilities are somehow being shared with industry, educational institutions, Civil Society Organizations (CSO's) and parents, mostly through systems of self- and co-regulation. For instance, many Member States have implemented a classification system that involves some shared responsibility between the media service provider and the media authority. Actions initiated by industry can also play an important role when it comes to providers and networks that fall out of the scope of the Directive, but who may well distribute content that is impairing to the development of minors. Some self-regulatory initiatives (e.g. the CEO Coalition<sup>1</sup> and You Rate it<sup>2</sup>) have already been taken by industry, not only involving parties qualifying as media service providers, but also (or especially) other providers and networks like intermediate parties, aggregators and providers of social network sites. To contribute to an environment whereby all relevant parties have incentives to provide consumers with appropriate tools to protect minors from harmful content one could ask the question whether it is desirable and feasible to attach greater significance to the mechanisms of shared responsibilities and self- and co-regulation in a future Directive. When we want to attribute more responsibilities to the industry we need to identify which specific parties we need to address. Questions that might occur here are: Who are the "new" responsible players/parties in a converged environment? How can they be included from the beginning on in the process of protecting minors? Which incentives can be given? We could build on the work of the Material Jurisdiction group in attempting to answer these questions.

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1 The CEO Coalition is one of the instruments of the European Strategy to create a Better Internet for Children and is composed of 31 leading companies across the value chain in order to develop, through a self-regulatory process, appropriate measures for inter alia reporting tools for users, age-appropriate privacy settings, wider use of content classification and a wider availability and use of parental control.

2 In response to an initiative of the CEO Coalition, the British Board of Film Classification (BBFC) and the Netherlands Institute for Classifying Audio-visual Media (NICAM) have developed a tool for rating user generated content across different territories and platforms.

An essential follow up question here would be how the aforementioned mechanisms should be balanced with an effective enforcement regime. One could ask whether the Directive should provide in a certain level of minimum harmonisation and if so, which rules need at least an effective enforcement by national authorities. A key note here would be that mechanisms of self- and co-regulation cannot be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. However this does not prevent Member States from delegating some responsibilities to the industry based on principles of self- or co-regulation. Yet, often in these cases the general framework will be enshrined in formal legislation and the legislator will be able to intervene in case of failure of the system of self- or co-regulation, and it will be useful for this group to consider examples of how and when such frameworks work in practice and the challenges involved.

#### *5. Media literacy*

Finally, the empowerment of users can be considered as a key element to the protection of minors. The current Directive mentions the promotion of media literacy as an important instrument to achieve this empowerment. Scaling up awareness and empowerment is one of the main goals of the European Strategy to create a Better Internet for Children. Besides that, in all countries there are initiatives to increase the awareness of audience and to empower media consumers. Although due to different national traditions and differences in financial sources there appear to be significant differences in the pace and scope of activities in various Member States. One of the key questions here would be whether we need further actions at EU level (such as a recommendation of the EC or Resolution of the EP) and/or more specific and explicit references in a future Directive (such as a requirement to allocate sufficient funds) to speed up developments and/or achieve more harmonisation within the EU.

#### *6. Territorial jurisdiction*

A theme we will not further discuss in this paper but which also touches the subject of protection of minors in a converged world, concerns the issue of territorial jurisdiction. Market parties established outside of the EU and falling out of the scope of the AVMSD are not bound by the EU requirements. Questions related to services and intermediaries that originate from third countries are ones that may be addressed by the subgroup on material jurisdiction.

## Questions to be explored in 2015

Considering the outlined context and problem definition, in 2015 the subgroup on protection of minors aims to explore the following main questions:

1. In a future Directive, should the current distinction between the standards that apply to linear and non-linear audiovisual media content be deleted or diminished?
2. Is it desirable and feasible to aim for common approaches or universal definitions of key concepts such as minors, pornography, gratuitous violence, impairing and seriously impairing media content?
3. Should we aim for more harmonisation of technical requirements, coordination, unification and certification of technical protection measures and labelling and classification systems within the EU?
4. What should be the role of mechanisms of shared responsibility and self- and co-regulation in the protection of minors and how could these be balanced with an effective enforcement regime?
5. What should be the role of media literacy vis-à-vis the protection of minors?

From these main questions the following milestones and related sub-questions can be derived.

Regarding question 1: In a future Directive, should the current distinction between the standards that apply to linear and non-linear audiovisual media content be deleted or diminished?

<i>Milestone</i>	<i>Sub-Questions</i>	<i>Methodology</i>	<i>Date</i>
Insight into obstacles and challenges, leading eventually to a common position	<p>1. Regarding the protection of minors, is the distinction between the standards that apply to linear and non-linear content still feasible and desirable in a converged environment?</p> <p>2. What are the pros and cons for imposing stricter rules for non-linear services (levelling up) and liberalising rules for linear services (levelling down)?</p>	<p>- Inventory of research/studies on this subjects, e.g. conducted by the European Audiovisual Observatory and The EU Kids Online network</p> <p>- Interviews with stakeholders and technological/research institutes/ university's</p> <p>- Questionnaire amongst members subgroup</p>	First half of 2015, with a possible extension to the second half of 2015

Regarding question 2: Is it desirable and feasible to aim for common approaches or universal definitions of key concepts such as minors, pornography, gratuitous violence, impairing and seriously impairing media content?

<i>Milestone</i>	<i>Sub-Questions</i>	<i>Methodology</i>	<i>Date</i>
Insight into obstacles and challenges, leading eventually to a common position	<p>1. Is the distinction between impairing vs seriously impairing content still justified?</p> <p>2. Is it realistic to aim for harmonisation of key concepts?</p> <p>3. If yes, how could this be achieved?</p>	<p>- Interviews with experts from the field of youth, media, law and ethics</p> <p>- Research and eventual update of information collected within the EPRA-network</p> <p>- A preference survey conducted within EGRA</p>	First half of 2015, with a possible extension to the second half of 2015

Regarding question 3: Should we aim for more harmonisation of technical requirements, coordination, unification and certification of technical protection measures and labelling and classification systems within the EU?

<i>Milestone</i>	<i>Sub-Questions</i>	<i>Methodology</i>	<i>Date</i>
Insight into obstacles and challenges, leading eventually to a common position	<p>1. Regarding technical protection measures, which are the technical options, depending on distribution platforms and techniques? Is it possible to apply more consistent standards across multiple types of media?</p> <p>2. Should a new Directive prescribe specific protection measures?</p> <p>3. If so, do we need a differentiation depending on the technique and/or platform used? Or is a solution for different techniques and/or</p>	<p>- Interviews with technological/research institutes/stakeholders /university's</p> <p>- Inventory of research/studies on this topic, e.g. conducted by the European Audiovisual Observatory and within EPRA</p> <p>- Questionnaire amongst members subgroup</p>	Second half of 2015

	<p>platforms feasible?</p> <p>4. Do we need more coordination between existing labelling and classification systems or maybe even aim for one universal system within the EU?</p> <p>5. If so, which systems can be considered as best practice models and can provide input?</p>		
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Regarding question 4: What should be the role of mechanisms of shared responsibilities and self- and co-regulation in the protection of minors and how could these be balanced with an effective enforcement regime?

<i>Milestone</i>	<i>Sub-Questions</i>	<i>Methodology</i>	<i>Date</i>
Insight into obstacles and challenges, leading eventually to a common position	<p>1. In a future Directive, should there be more room for mechanisms of shared responsibilities and self- and co-regulation in the protection of minors?</p> <p>2. If so, should these mechanisms play a complementary role or do they need to function as a main instrument for the protection?</p> <p>3. Should a future Directive provide in a certain level of minimum harmonisation and if so, regarding to what standards?</p> <p>4. What should be the role of industry, educational institutions, Civil</p>	<p>- Questionnaire amongst members subgroup</p> <p>- Inventory of research/studies on this topic</p>	Second half of 2015



	<p>Society Organizations (CSO's) and parents?</p> <p>5. Who are the "new" responsible players/parties in a converged environment? How can they be included from the beginning on in the process of protecting minors? Which incentives can be given?</p>		
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Regarding question 5: What should be the role of media literacy vis-à-vis the protection of minors?

<i>Milestone</i>	<i>Sub-Questions</i>	<i>Methodology</i>	<i>Date</i>
Insight into obstacles and challenges, leading eventually to a common position	<p>1. What can we do to increase awareness and to achieve a higher level of empowerment of users?</p> <p>2. What should be the role of industry, educational institutions, Civil Society Organizations (CSO's) and parents?</p> <p>3. Should a future Directive elaborate in more detail how media literacy can be encouraged, for instance by prescribing adequate financing of media literacy systems?</p>	<p>- Interviews with representatives active in the field of media literacy</p> <p>- Stakeholder consultation</p> <p>- Inventory of research/studies on this topic, e.g. conducted by the EU Kids Online network and within EPRA</p> <p>- Questionnaire amongst members subgroup</p>	Second half of 2015

In January 2015 the Chair of the subgroup on protection of minors will organise a meeting of the subgroup, in order to elaborate further on the schedule and the proposed activities, such as the surveys and research that needs to be conducted.