

ERGA scoping paper on material jurisdiction in a converged environment

1. Introduction

Recital 2 of the AVMS Directive recognises that audiovisual media services provided across national boundaries are one way in which the European Union's objectives can be achieved. Recital 4 recognised the impact of the spread of information and communication technologies on, among other things, audiovisual business models and the transmission of audiovisual media services (AVMS).

The Directive anticipated the future influence that technological innovation would have on the markets for AVMS. Accordingly, it sought to put in place a system of regulation to reflect those possible changes

We are now almost seven years on from the date when the Directive was laid before the European Parliament and Council. ERGA's 2014 Work Programme has proposed that there should be two work streams under the theme "adapting the EU regulatory instruments to a convergent audiovisual world":

- one looking at **protecting minors** in a converged environment; and
- the other (this paper) looking at **material jurisdiction** in a converging world.

The sub-groups set up to explore those themes have been asked to produce scoping papers that will form the basis of ERGA's 2015 work programme. ERGA may also explore other issues, for example territorial jurisdiction in a converging world, in 2015 and beyond.

This paper proposes that ERGA should undertake work in 2015 to examine whether developments since the AVMS Directive was introduced may justify a change of approach. This is underpinned by an ongoing desire to ensure that public policy goals continue to be delivered in a connected society. The scope of any change may centre on the desirability of modifying the material jurisdiction of the Directive in respect of:

- The types of services and service providers covered by the framework;
- The criteria defining those types of services and service providers and the distinctions made between them; and
- The roles and responsibilities that each type of provider might have

In broad terms this sub-group is examining the types of services and service providers the legal framework covers and the sub-group on protection of minors will look at the standards that apply to those services. Given the potential for the discussions in each group to complement each other the Chairs of both groups will maintain regular dialogue in 2015.

As agreed in its Terms of Reference (see Annex 1), this subgroup has produced this scoping paper. Its purpose is to outline what we consider to be the important themes that arise in the

context of material jurisdiction. In turn we set out a set of proposals for the more detailed work that we believe ERGA should undertake in 2015 so that we can address this issue.

2. Context

The past decade has seen the market for audiovisual content evolve rapidly, prompted by a combination of:

- the growing availability and take-up of fixed and mobile broadband connections;
- a growing range of digital devices capable of storing and displaying AV content and of content providers bringing innovative forms of AV content to market through them. This increased provision of and investment in online distribution models has led to increased levels of take-up and usage of services supported by these devices; and
- a resulting fragmentation of the traditional models of distribution and access.

This has brought benefits of access to an increasing array of content to the public for both consumption and creative use. It has led to a degree of fragmentation in the audience's consumption of AV content. Content is regulated differently depending on the distribution platform, and consumers may not be aware of the differences in regulatory approach.

Convergence, the theme that unites these trends, is a broadly understood term that is taken to mean in this context the "progressive merger of traditional broadcast services and the internet" as defined in the European Commission's Green Paper on "Preparing for a fully converged audiovisual world: Growth Creation and Values".

Under the current model audiovisual media services are treated as both economic and cultural goods. The public goals underpinning the specific regulation of audiovisual content - including (but not limited to) human dignity, diversity of opinion and more broadly of cultures, protection of minors and consumer protection - remain relevant in a digital environment. It could be argued that the multitude of offerings and information brought about by digital innovation makes it more important to ensure consumers can access reliable and trustworthy information with confidence. Conversely, it could be argued that digital innovation and the choice it provides in itself furnishes people with an abundance of information. Either way, there is a need to maintain the diversity of reliable information as the basis of democratic discourse. The power of moving images or their impact on the individual and on society persists regardless of the means of distribution.

This prompts a series of high-level questions around how the AVMS Directive might need to adapt in future to accommodate these trends:

1. Who are the key players (including intermediaries) and what are the forms of content provision and consumption in the audiovisual distribution chain?
2. Does the current distinction between linear and non-linear content providers continue to work in the context of the market developments set out above?
3. Do the current boundaries of the scope of the Directive, and the definitions of the services and service providers it covers remain appropriate in light of these developments?
4. How might the AVMS framework interact with other regulatory frameworks such as the Telecoms Framework and e-Commerce Directive?

5. What consequences may arise in terms of the efficacy of enforcement, competition, choice, quality, diversity, content funding and data privacy?
6. What roles and responsibilities might players need to secure public policy goals?

The remainder of this document suggests an approach to how ERGA might wish to develop its answers to these questions over the course of 2015. The scoping paper is accompanied by two annexes:

1. The Terms of Reference for this sub-group; and
2. Some supplementary questions and emerging hypotheses that sub-group members have put forward during the development of this scoping paper.

3. Key issues

3.1 The emergence of digital intermediaries and new forms of content provision and consumption in the audiovisual chain of distribution and their relationship to existing players in the distribution chain.

Objectives

The objective of this work stream will be to map the effects of technological and market developments in the audiovisual sector, in particular the key players which are now present in the market and their role and relationship to the existing chain of supply and distribution.

Context

The emergence of television distributed through broadband networks, and the use of online audiovisual services through connected networks has led to the emergence of new types of intermediary. These players link media service providers with their audiences, and many have been able to enter the audiovisual market with the benefit of low entry costs.

The traditional media value chain comprised content production, content aggregation (commissioning or acquisition), and distribution via a single technology (over the air; via satellite or cable, or broadband networks) to one kind of a viewing device. Today, the value chain is far more complex. Alongside those basic elements of the value chain are new activities such the provision of navigation tools like electronic programme guides; the operation of consumer publishing platforms (YouTube); the collection and analysis of customer data; new means of distribution, new viewing devices and the potential to publish to or access content from anywhere in the world.

It is important to consider as a starting point the existing frameworks for regulating content and e-Commerce. The AVMS Directive imposes public policy obligations on editorially responsible providers of audiovisual media services. The key terms are defined as follows:

- **Media service providers:** the natural or legal person or entity 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
- **Editorial responsibility:** For linear broadcasts this means the exercise of control over both (i) the selection of the programmes and (ii) their organisation. For

broadcast services the 'organisation' is in a chronological schedule; for video on demand (VoD) it is the organisation of the programmes available in the service.

Linear broadcast services are typically offered on a TV platform such as cable or satellite, with a clear regulatory distinction drawn between two types of activity: the linear channel provider chooses and schedules the programmes and is editorially responsible, while the platform merely aggregates the channels. The AVMS seeks to maintain this clear distinction for VoD, between an editorially responsible service provider (choosing programmes and organising them in the VoD service), and a platform operator which merely aggregates such individual VoD offerings. However, in practice the distinction may be less clear, as a VoD platform which aggregates five VoD services, each comprised of five programmes, may look very much like a single VoD service with twenty five programmes, but the two circumstances have different regulatory consequences.

The e-Commerce Directive defines two main types of intermediary for which it imposes a limited liability framework:

- **Mere conduits** which provide transmission and network access services only, (and may store information temporarily for this purpose);
- **Hosts** which store information provided by a recipient of the host service (so that it is accessible to others).

Providers acting as mere conduits are absolved from secondary liability for illegal content unless they initiate, modify, or select the receiver of, the contentious transmission. Hosting providers receive exemptions unless they have "actual knowledge" of the illegal activity.

When considering the relevance of the current material jurisdiction of the AVMS Directive, it is important to have a more complete understanding of the players that play a significant role in content distribution. It is also important to understand the different platforms and services through which people consume content and whether they have different expectations concerning the model (and level) of regulation that applies to each. We propose to undertake a mapping of the players (including digital intermediaries) that play a role in the provision of audiovisual content online, and the ways in which people are consuming content today.

Key Questions:

- What underlying factors have brought about changes in the distribution and presentation of audiovisual content?
- What new activities have emerged in the audiovisual distribution chain over the past decade and why?
- What is the nature of the new digital players (including intermediaries) who have emerged? Which roles do these players play in terms of access to audiovisual media?
- Can clear positions for each digital intermediary be established in the audiovisual distribution chain?
- How are citizens and consumers interacting with the various players in the audiovisual distribution chain? What implications might this have for their expectations of how the related content is regulated?

3.2 The current distinction between linear and non-linear on demand content provision currently in the scope of the AVMS directive, and how that might interact with market and public policy developments and consumer expectations

Objectives

This section aims to initiate an in-depth reflection on the questions posed in the analysis above but with a focus on two specific parts of the chain of distribution; the providers of linear and non-linear audiovisual media services as defined under the AVMS Directive. The work stream will go on to consider the criteria used to define these types of service and the different regulations to which they are subject.

Context

One of the principal aims of the AVMS Directive is to ensure that, in the digital age, specific rules apply to audiovisual media services independent of how they are distributed. This reflects the importance of AVMS supporting freedom of expression and diversity of opinion in democratic societies as well as promoting education and culture (recital 5). It also seeks to provide a level playing field for providers of linear TV and “TV like” on demand services.

The Directive therefore establishes a tier of coordinated rules that apply to all providers of audiovisual media services, making a distinction between linear (television broadcasts) and non-linear (on demand) services. The main rationale for this graduated regulation is the varying degree of choice and user control over the services (active lean forward or passive lean backward consumption) and their impact on society (Recital 42). For both services a cumulative set of criteria determine whether they qualify as an audiovisual media service.

- In this respect, a **linear service** is defined as *an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a program schedule* (Art. 1 e).
- An **audiovisual on-demand service** means *an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider* (Art. 1 g).
- A **programme** is defined as *a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and the content of which are comparable to the form and content of a television broadcasting*. The Directive states that *the concept of ‘programme’ should be interpreted in a dynamic way taking into account developments in television broadcasting* (Rec. 24) in order to give Member States flexibility in implementing this definition. Media services are **mass media**, i.e. are *intended for reception by and which have a clear impact on a significant proportion on the general public* (Rec.21) and their **principal purpose** must be the *provision of programmes*, so that the audiovisual content is not merely incidental (Rec. 22).

The criterion the AVMSD provides to determine whether an audiovisual media service qualifies for stricter or lighter regulation is in effect the extent to which the consumer

exercises control over the selection of an individual programme to view. Now is the time to reexamine whether a widely differing regulatory framework based on this distinction remains appropriate. For example, can we be sure that the AVMSD ensures the protection of minors must apply universally across linear and VoD services? Similarly, should a leading VoD service should be regulated less intrusively than a marginal teleshopping channel, which has limited viewership or impact on public opinion.

Key questions:

- In the light of the regulatory goals underpinning the AVMSD, consumers' expectations, and the significant impact on society and culture that on-demand services may have, is the current distinction between broadcast and on-demand services still the appropriate criteria for a graduated regulation in a converging media environment?
- Would it be appropriate to maintain graduated regulation of TV broadcast and on-demand services but identify and adapt rules that create a competitive disadvantage?
- Are there any new criteria which could in future determine the appropriate form of regulation which should apply to an on-demand or linear service. What might those criteria be?

3.3 The distinction between regulated non-linear audiovisual services and other unregulated services containing audiovisual content

Objective

This section aims to initiate an in-depth reflection on the appropriateness of the current material jurisdiction of the AVMS Directive in terms of the services that it covers, and the definitions used to quantify those services.

Context

As set out in preceding sections, a differential regulatory regime applies to linear and non-linear services. However, there is also a class of services including audiovisual content but which are not subject to any specific AV regulation.

In assessing whether an audiovisual offering is an AVMS, regulators must determine whether they satisfy the relevant criteria, in particular whether the providers have editorial responsibility. The issues raised in determining whether a service is a "TV-like mass media service" often relate to (but are not limited to):

- the importance that must be attached of the length of the audiovisual material, whether its form and presentation is comparable to a broadcast;
- whether it is offered on an open or closed platform;
- whether the services target the same audience as a television broadcast or whether the consumer would reasonably expect this service to be regulated.

Implementation of the AVMS criteria and regulatory practice varies among Member States. Whilst flexibility is a key requirement for any regulatory regime intended to apply to such a dynamic and innovative industry, it can have the effect of creating regulatory uncertainty which a simpler definition might not entail.

In certain cases, issues with the status of certain audiovisual digital services as AVMS might rest not on the possibly unclear notion of audiovisual media service, nor the notion of “editorial responsibility”, but rather provisions related to territorial jurisdiction.

Key Questions:

- Are the AVMS Directive’s criteria still appropriate given the increasing divergence of interpretation across the EU? Could it be improved or clarified? Or is flexibility desirable given the dynamic nature of the market?
- Are there audiovisual on-demand services currently out of scope that should in future be covered by the scope of the Directive to ensure fundamental values such as human dignity, protection of minors and plurality of opinion, are protected?
- What could be the criteria for defining the new services to be brought into scope?
- How could the requirement that non-linear media services must be “comparable to the form and content of television broadcasting” be interpreted in the future and is it still useful?
- To what extent can difficulties arise, in determining whether a service provider falls within the scope of the AVMS, from definitions related to territorial jurisdiction?
- What would be the economic impact on various players if the scope of the Directive were to be modified?

Supplementary questions in relation to this theme can be found in Annex 2.

3.4 The points of interaction between the AVMS framework and other regulatory frameworks, including the telecoms framework and the e-Commerce Directive

Objectives

This work stream will aim to conduct a concurrent, technology-neutral examination of the interactions between the three frameworks and assess the potential for them to overlap. We will also consider the appropriateness of these interactions in view of the developments identified in the work outlined in sections 3.1-3.3.

Context

There are three different frameworks which are relevant to the online distribution of audiovisual content. Audiovisual content whether it be linear or non-linear (regulated under the AVMS Directive) is delivered over a communications network (regulated under the Telecommunications Framework) and, in the case of content delivered online the distribution chain involves digital intermediaries (regulated under the e-Commerce Directive).

As a first step it is necessary to identify some specific key elements of each framework:

- **The AVMS Directive:** As stated in section 3.1, the AVMS Directive imposes public policy obligations on editorially responsible providers of audiovisual media services. It defines linear and non-linear on demand AVMS, AVMS providers and what constitutes editorial responsibility for an AVMS.
- **The e-Commerce Directive:** As mentioned in section 3.1 the e-Commerce Directive defines two main types of intermediary (hosts and mere conduits) for which it sets out a limited liability framework. It also defines information society services, and information society service providers.
- **The Telecommunications Framework:** The Framework defines electronic communications networks (ECNs) and electronic communications services (ECSs). It also introduces a range of obligations, for example in relation to the management of radio frequencies and numbering and addressing. It also includes “must carry” rules which require network providers to transmit specific television or radio services.

Although the general objectives of each framework may seem separate and independent, technological evolution has led to new ways of consuming content which have reduced the extent to which the frameworks operate independently of one another. NRAs’ recent experiences identify two strongly connected key issues: the identification of which regime services fall under and the definition of the territorial jurisdiction that services fall under.

It could be argued that the AVMS Directive and the e-Commerce Directive do not provide sufficient clarity across the full range of players that currently operate in the market. The responses to the European Commission’s Green Paper on Audiovisual Convergence suggest a common concern among NRAs in relation to asymmetric regulatory treatment of services that compete with each other but are subject to different frameworks.

Many services operating in competition with EU AVMS providers are established outside EU, but nonetheless targeting EU countries. The AVMS Directive only applies to providers under EU jurisdiction and is underpinned by the country of origin principle. The AVMS rules do not apply to providers delivering content online from outside of the EU Member States, but targeting the EU. However, there are provisions for linear services operated from outside the EU, but making use of using EU technical facilities such as satellites or uplink services.

The e-Commerce Directive also sets out a framework for establishing territorial jurisdiction. Under the country of origin or “internal market” clause, an operator is deemed to be established in the country where it actually pursues an economic activity through a fixed establishment. The e-Commerce Directive provides for exceptions to this principle, and it may be useful to examine these exceptions in more depth, in particular looking at extent to which similar exceptions could be applied in a future audiovisual regulatory framework.

Key Questions

- Is there a conflict between the AVMS principle of editorial responsibility and the liability exemptions in the e-Commerce Directive? Should we be considering protected intermediaries as candidates for audiovisual regulatory responsibilities, and would this create a conflict with the ECD?

- To what extent is it still appropriate to consider the three sectors under three different frameworks, given the interactions between the players and the services?
- What are the key differences between information society services and the AVMS service providers? To what extent is this distinction being challenged?
- To what extent can existing definitions under the e-Commerce framework be applied to new digital media services falling outside the scope of AVMS?

Supplementary questions in relation to this theme can be found at Annex 2.

3.5 The consequences of the developments identified under 3.1 - 3.4 for, amongst others, efficacy of enforcement, competition, choice, quality & diversity, content funding, and data privacy

Objectives

This work stream will aim to clarify the potential consequences for the audiovisual sector of the findings of the discussions proposed in sections 3.1 -3.4. Where appropriate we will also aim to identify solutions to any potential issues that are identified.

Context

As noted above, there has been a proliferation of players standing between users and content producers, and several new and emerging players which have gained a central position in the digital content ecosystem. Those intermediaries act at various points within the value chain, and often provide diverse services and have diverse geographical locations i.e. may be in countries which are not covered by EU law.

They are central in providing e-commerce services (e.g. search engines), often the catalysts for innovation (e.g. OS editors, app store managers) and have extended the range of opportunities that now exist to enable people to engage in social interactions (e.g. platforms for content sharing). Many intermediaries have developed far faster than traditional operators. In some cases, for a comparatively low initial investment some intermediaries have built scale and enjoy developed competitive market positions in many countries both inside and outside the EU. This, as well as their intermediate position in the value chain, may contrast with local stakeholders' (such as traditional broadcasters) market positions. Local players could increasingly find themselves competing for audiences with global players within their own geographical markets.

Some players are diversifying their activities into products that include browsers, operating systems, devices, etc. This growth can demand significant resources and may result in vertically integrated operators able to offer a broad range of products and services. Intermediaries (including distribution players, i.e. platforms) can be interdependent whilst at the same time compete with each other. This intermediate position could enable some intermediaries to strengthen their position by gathering knowledge of the relationships between both sides of the market (users and providers of digital audiovisual services), and gaining knowledge of viewers' consumption habits. There is a risk, arguably, of an emerging imbalance between platform providers and service providers if the latter become dependent unduly on a particular platform provider.

Key Questions

- As a result of current AVMS definitions of material jurisdiction, what influence could different players in the audiovisual value chain exert on the competitive dynamics in market now and in the future?
- What challenges might exist in ensuring that there is a level playing field for competition in the market for digital audiovisual content?
- What challenges could these developments pose in terms of the preservation of core values, including (but not limited to) a dynamic original content production sector, access to content, and plurality of expression and opinion and data privacy?
- Can and should AVMS distributors or platforms included as the objects of audiovisual media services regulation into a new Directive. What services and players could this cover, and why? What obligations would it be desirable of practicable to impose?
- What economic consequences might emerge as a result of any additional obligations?

Supplementary questions in relation to this theme can be found in Annex 2.

3.6 The future roles and responsibilities of all digital intermediaries in securing public policy goals (e.g. accessibility and discoverability, protection of minors, quality and diversity of programmes, content funding etc.), and the evolution of the editorial responsibility concept

Objective

The objective of this work stream is to explore and define the roles that new players in the audiovisual value chain could play in helping to fulfil public policy goals.

Context

Audiovisual content and services have historically been the focus of a number of specific public policy interventions. These measures have been taken because of the important impact that audiovisual content has on culture and the functioning of a democratic society.

However, whether or not the underlying policy goals have changed, the mechanisms by which they are achieved may have to change to adapt to an increasingly global converged audiovisual environment. It is necessary to consider how effectively these policy objectives are now being fulfilled, in view of the conclusions that will be reached in the analysis that is proposed above, and whether there are any policy objectives which become increasingly crucial in a more connected society (for example discoverability or media literacy).

Key Questions

- What are the public policy goals that have historically been associated with the delivery of audiovisual content?
- How effectively are they now being delivered under the current framework, taking account of market developments, consumption habits and the consequences identified?
- What self-regulatory and voluntary measures are digital intermediaries (e.g. payment providers, search engines) undertaking in order to achieve these goals?

- What do the above questions imply for which services and players should be responsible for delivering public policy goals? How can we ensure non-discriminatory treatment between players delivering similar services?
- How can the work above contribute to efficient and proportionate regulation of a dynamic and innovative industry?
- Should the policy objectives and subsequent interventions be considered at a national, European or even global level?

Supplementary questions in relation to this theme can be found in Annex 2.

4. Suggested milestones and deliverables for 2015

The ultimate deliverable of this sub-group in 2015 will be a report in which we will outline common lines of thinking on whether it would be desirable or appropriate to modify the material jurisdiction of the Directive (i.e. the services it covers) in respect of:

- The types of services and service providers covered by the framework;
- The criteria defining those types of services and service providers and the distinctions made between them; and
- The roles and responsibilities that each type of provider might have.

We envisage three phases of work in order to enable us to produce this report.

Phase 1: Context

Milestone	Key Themes	Methodology	Date
Analysis mapping the digital intermediaries and content providers who play a role in the provision of audiovisual content.	The Emergence of digital intermediaries, new players and new forms of content provision and consumption in the audiovisual chain of distribution	Report with one NRA leading the drafting and seeking input and comments from the sub-group.	End Q1 2015
Analysis of current lines of thinking among members about how the current material jurisdiction of the AVMS Directive is being tested.	<ul style="list-style-type: none"> • The current distinction between linear and non-linear on demand content providers currently in the scope of the AVMS Directive, and how that might interact with public policy goals and market developments. • The distinction between regulated non-linear audiovisual services and other unregulated services containing audiovisual content. 	Questionnaire among ERGA members.	End Q1 2015

	<ul style="list-style-type: none"> The points of interaction between the AVMS framework and other regulatory frameworks, including the telecoms framework and the e-Commerce Directive. 		
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Phase 2: Assessing the potential consequences

Milestone	Key Theme	Methodology	Date
Analysis of the potential consequences of the developments identified in phase 1	The consequences of this development for, amongst others, efficacy of enforcement, competition, choice, quality & diversity, content funding, and data privacy.	Report with one NRA leading the drafting and seeking input and comments from the sub-group.	End Q2 2015

Phase 3: Conclusions

Milestone	Key Themes	Methodology	Date
Collection of views from NRAs	The roles and responsibilities of digital intermediaries/new players in securing public policy goals (e.g. accessibility and discoverability, protection of minors, quality and diversity of programs, content funding etc.), and the evolution of the editorial responsibility concept.	Questionnaire among CN to gather views.	End Q3 2015
Refinement of conclusions in draft final report	<p>Would be desirable or appropriate to modify the material jurisdiction of the Directive (i.e. the services it covers) in respect of:</p> <ul style="list-style-type: none"> The types of services and service providers covered by the framework; The criteria defining those types of services and service providers and the distinctions made between them; and The roles and responsibilities that each type of provider 	<ol style="list-style-type: none"> Circulation of draft among sub-group to gather views. Meeting of sub-group to discuss and refine conclusions. Comments round among CN 	Q4 2015

	might have.		
Adoption of final report.	As above	Adoption at Plenary	End 2015